**UNIVERSAL SERVICE IN TELECOMMUNICATIONS
A CASE STUDY OF NEW ZEALAND AND VIETNAM
LEGAL AND INSTITUTIONAL FRAMEWORKS,
WITH PROPOSALS FOR REFORM
IN VIETNAM**

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ABSTRACT

This thesis examines models for the delivery of telecommunications universal services in Vietnam and New Zealand. The focus is on identifying obstacles to effective and economically efficient performance of services delivery in Vietnam, and proposing solutions for substantial improvements to legal frameworks and institutional structures. The central argument of the thesis is that the universal service scheme in Vietnam and the supporting laws and agencies responsible for implementation of the scheme need to be improved in order to contribute to the achievement of social targets.

The universal service funding mechanism in Vietnam, including the allocation of industry levies and subsidies, is not linked to real costs, nor is it efficient. The laws and legal instruments governing the universal service scheme are incomplete and in parts contradictory. Moreover, the institutional structures reflect diffuse and duplicated accountability among the authorities involved, lack of transparency, and insufficient external monitoring mechanisms. Performance information systems and involvement of the public and stakeholders are also insufficient.

The insufficiencies in the Vietnamese structure are illustrated in the thesis by comparing them to the key elements of a best practice model. They are also compared with elements of the New Zealand model that reflect features closer to the best practice: transparency, effective monitoring and performance accountability. These features serve as a basis for the principal proposals for improvements to the legal framework and institutional structures in Vietnam and for economically efficient and competitive funding arrangements.

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LIST OF ABBREVIATIONS

ADSL	Asymmetrical Digital Subscriber Line
AT & T	American Telephone & Telegraph
BMI	Business Monitor International (estimated growth rates)
BTA	Bilateral Trade Agreement
CDMA	Code division multiple access
CNVCs	Commercially Non-viable Customers
CPV	Communist Party of Vietnam
DGPT	Department General of Post and Telecommunications
DOT	Department of Telecommunications (India)
DSL	Digital Subscriber Line
ECPR	Efficient Component Pricing Rule
EOI	Expression of Interest
EU	European Union
EVN	Vietnam Electricity
GDP	Gross Domestic Product
GNI	Gross National Income
HF	High-Frequency
ICA	Inter-connection Agreement
ICT	Information and Communication Technology
ISPs	Internet Service Providers
ITU	International Telecommunications Union
Kbps	Kilobytes per second
KSO	Kiwi Share Obligations
LRIC	Long-run Incremental Cost
Mbps	Megabytes per second
MIC	Ministry of Information and Communications
MPI	Ministry of Planning and Investment
MPT	Ministry of Post and Telecommunications
NGNs	Next Generation Networks
NZD	New Zealand dollar

OECD	Organisation for Economic Co-operation and Development
PM	Prime Minister
PSTN	Public Switched Telephone Network
PTN	Public Telecommunications Network
RBI	Rural Broadband Initiative
RFP	Request for Proposals
ROL	Rule of Law
RSBI	Remote Schools Broadband Initiative
SMS	Short Message Service
SOE	State-owned Enterprise
SPT	Saigon Post and Telecommunications Joint Stock Corporation
TDL	Telecommunications Development Levy
TRS	Telecommunications Relay Service
TSO	Telecommunications Service Obligations
TSP	Telecommunications Service Provider
TUSMA	Telecommunications Universal Service Management Agency (Australia)
UA	Universal Access
UFB	Ultra-Fast Broadband
US	Universal Service
USO	Universal Service Obligations
Viettel	Military Electronics and Telecommunications Corporation
VND	Vietnam dong
VNPT	Vietnam Post and Telecommunications Corporation
VNTA	Vietnam Telecommunications Authority
VoIP	Voice over Internet Protocol
VTC	Vietnam Television Technology Investment and Development Company
VTF	Vietnam Public Utility Telecommunications Service Fund
WTO	World Trade Organisation

CHAPTER ONE

INTRODUCTION

I Overview

This thesis examines models for the delivery of telecommunications universal services in Vietnam and New Zealand. The focus is on identifying obstacles to effective and economically efficient performance and administration of services delivery in Vietnam, and proposing reforms to legal frameworks and institutional structures.

Universal service is a key policy and regulatory issue for major network industries such as telecommunications and electricity, and also a central building block of the concept of ‘service to the public’ in most countries.¹ The central idea of a universal service policy is that specific infrastructure services should be available to every person.²

In the telecommunications industry, universal service policy aims to ensure the provision, at affordable rates, of either a full range or a basic package of telecommunications services to everyone, especially those living in rural and isolated areas or with low incomes.³ While sector reform and liberalisation of telecommunication markets worldwide since the 1990s have led to greater efficiency in the sector, a phenomenal growth rate of service penetration, along with lower prices, and improved choice and quality of services, ensuring the provision of these services remains a challenge in an ever-changing market environment and amidst continuous technological developments.⁴

¹ Helmuth Cremer, Farid Gasmi, Andre Grimaud and Jean-Jacques Laffont “The Economics of Universal Service: Theory” (1998) World Bank, at 1 <info.worldbank.org/etools/docs/library/64602/theory.pdf>.

² Scott Wallsten “Using Competitive Bidding to Reform the Universal Service High Cost Fund” (2009) Technology Policy Institute, at 6 <www.techpolicyinstitute.org/files/using%20competitive%20bidding%20to%20reform%20the%20universal%20service%20high%20cost%20fund1.pdf>.

³ American Telecommunications Act 1996 § 254.

⁴ International Telecommunications Union “Recent Regulatory Trends from Around the Globe” (2010) ICT Regulatory News, at 9 <www.itu.int/ITU-D/treg/publications/ICT-Reg-News-e.pdf>.

Throughout the 20th century, telecommunications policies in most countries promoted ‘universal service’ for voice calling, using fixed-line telephony.⁵ The definition of universal services has however varied according to market conditions, public demand⁶ and changes in technology and services.⁷ Today, a call is no longer simply a signal sent over a fixed line to a receiver on another fixed-line.⁸

A widely available voice calling service is well established in most developed countries, with the provision of services to nearly all households.⁹ However, it has remained a long-term goal in most developing countries.¹⁰ In the least developed countries, more than 50% of the population is rural, but only 12% of the total fixed telephone lines serves these areas.¹¹ For example, voice service is still an issue for a considerable part of the population in African countries.¹²

At the same time, broadband Internet access has moved quickly from being an expensive service to being an essential service comparable to voice calling, and therefore is included within the scope of universal service policies.¹³ Developing countries lag well behind in their ability to access and use broadband services.¹⁴ Nearly three-quarters of the world’s population in 2010 did not have access to the Internet.¹⁵ In addition, there is a wide disparity of broadband penetration between developed and developing countries, and between various regions of the world.¹⁶ While 23.6% of inhabitants in developed countries were using fixed broadband services by the end of 2010, only 4.2% of

⁵ Mandlesino Msimang “Universal Access and Universal Service: An Overview” in John Alden (ed) *Trends in Telecommunication Reform 2003: Promoting Universal Access to ICTs, Practical Tools for Regulators* (ITU, Geneva, 2003) 29 at 29.

⁶ InfoDev Programme of the World Bank *Telecommunications Regulation Handbook* (Washington, 2000), at [6.2.2].

⁷ International Telecommunications Union, above n 4, at 9.

⁸ James Alleman, Paul Rappoport and Aniruddha Banerjee “Universal Service: A New Definition?” (2010) 34 *Telecommunications Policy* 86 at 86.

⁹ Stanford Levin “Issues and Policies for Universal Service and Net Neutrality in a Broadband Environment” (paper presented to the First Asia-Pacific ITS Regional Conference, Wellington, August 2010) at 1.

¹⁰ Msimang, above n 5, at 29.

¹¹ International Telecommunications Union World Telecommunications Indicators Database (Switzerland, 2004).

¹² Intelcom Research and Consultancy Limited “Universal Access and Service (UAS) and Broadband Development” (paper presented to the World Bank Workshop on Universal Access and Service (UAS) and Broadband Development, Washington, 2009) at 13.

¹³ Levin, above n 9, at 2.

¹⁴ Nancy Sundberg “Overview of Trends in the ICT Market and in ICT regulation” in Theresa Miedema (ed) *Trends in Telecommunication Reform 2010/2011: Enabling Tomorrow’s Digital World* (International Telecommunications Union, Geneva, 2011) 1 at 7.

¹⁵ John Alden “Postcards from the information society: living with always-on technology- the good, the bad, and the just plain baffling” in Theresa Miedema (ed) *Trends in Telecommunication Reform 2010/2011: Enabling Tomorrow’s Digital World* (International Telecommunications Union, Geneva, 2011) 311 at 312.

¹⁶ Sundberg, above n 14, at 7.

residents in developing countries were fixed broadband subscribers. In order to provide equal opportunities to all citizens to access and use telecommunications services, many countries have begun to re-examine their policies on universal service obligations.¹⁷

In Vietnam, a developing country with 87 million people¹⁸ and with about 73% of its population living in rural areas,¹⁹ the coverage of fixed telephone service does not reach all of the population. The fixed telephone density is lower²⁰ than that of developed economies and average world density, both for Internet access and fixed (wired) broadband subscriptions.²¹ There is a big gap in telecommunications penetration between urban and rural areas in terms of telephone density, especially in the number of fixed telephones. The situation is similar with the percentage of households with Internet access and the number of individuals using the Internet frequently.²² Most key indicators put Vietnam behind the average penetration rates of either developing countries generally or Asian-Pacific countries.²³

Existing research related to the Vietnamese universal service scheme focuses mostly on financial aspects, such as funding sources, administration of funds by the regulator, and financial aspects of universal service projects.²⁴ Most of these studies relate to the first period of the implementation of the 2006-2010 universal service programme.

Other studies focus on micro-/macro-financial and economic analysis with forecasting and budgeting models²⁵ or the development of universal Internet service in rural areas

¹⁷ Sundberg, above n 14, at 9.

¹⁸ General Statistics Office <www.gso.gov.vn/default_en.aspx?tabid=467&idmid=3&ItemID=11728>.

¹⁹ General Statistics Office <www.gso.gov.vn/default_en.aspx?tabid=467&idmid=3&ItemID=8647>.

²⁰ In Vietnam, there were low telephone densities both in fixed and mobile services in 2002. Recently mobile subscriptions increased sharply and reached around 175 per 100 inhabitants; however the majority of those are in urban areas and used by only 30 million out of total 87 million people. Moreover, there were only 32.8% of these users in rural areas. See the Report of the Ministry of Information and Communication on the nationwide survey of the current status of telephone, Internet and broadcasting services in 2010 (2011), at 3.

²¹ International Telecommunications Union “Key Global Telecom Indicators for the World Telecommunication Service Sector” (2012) <www.itu.int/ITU-D/ict/statistics/at_glance/KeyTelecom.html>.

²² Apart from income disparity between urban and remote areas, a common contributing factor is the problem of power supply in remote areas. Fixed lines do not work without power. The same applies to PCs. See MIC’s Document 28/BC-BTTTT reporting to the Prime Minister on the nationwide survey of the current status of telephone, Internet and broadcasting services in 2010 (2011).

²³ See Chapter Four III.C.1.(c).

²⁴ Nguyen Hoang Long “Telecommunications Development towards Universal Services” (Master, National Economic University, 2001) and Nhat Le Tran “Telecommunications Universality - Evaluation of Telecommunications Universality in Vietnam” (Master, Waseda University, 2004).

²⁵ See Bui Xuan Chung “Financial solutions for socialising the universal service delivery in Vietnam” (PhD, National Economic University, 2010).

only.²⁶ Other research reviews the current implementation of universal service delivery (with the main focus on the Vietnam Public Utility Telecommunications Service Fund)²⁷ and makes only general suggestions about universal service objectives, and the development of universal service within the international economic integration of the telecommunications market.²⁸

Overall, none of these studies provide a comprehensive examination of the universal service legal framework and institutional arrangements, or propose suggestions for regulatory and institutional reforms. Moreover, none of these studies give attention to identifying specific obstacles particularly to the economic efficiency and effectiveness of universal service policy/programmes in Vietnam, and to the legal framework and institutional structures. This thesis, thus, after an analysis of the legal framework and institutional arrangements, makes specific proposals about changing laws and regulations so as to promote efficient and effective universal service delivery.

II Thesis Questions and Hypothesis

Issues in relation to the provision of universal services and funding mechanisms are topics of never-ending political debate in most countries. In the light of technological innovations and increasing competition, it is necessary to re-evaluate institutional arrangements for the administration of universal service and the legal frameworks for allocating levies, selecting universal service providers and subsidies. Almost all countries, both industrialised and developing, face this challenge.

In Vietnam, during the fifteen years of economic reforms up to 2001, there was no specific determination or regulation of universal service, or any allocation of universal service levies amongst telecommunications operators. The Post and Telecommunications Ordinance 2002 was the first time the Government defined the provision of universal services and obligations of telecommunications operators to

²⁶ See Nguyen Viet Long “The Universality of Internet services in Rural Areas” (PhD, Korean National University, 2010).

²⁷ Vietnam Public Utility Telecommunications Service Fund is a separate department of the Ministry of Information and Communications having the main responsibility for the implementation of universal service programmes in Vietnam.

²⁸ See Tran Manh Dung “Development of universal services in Vietnam within the international economic integration” (PhD, Vietnam Institute of Commercial Research, 2011).

provide those services or pay levies.²⁹ There followed a range of subordinate legislation in order to complete the universal service legal framework and institutional arrangements in Vietnam.³⁰ In addition, numerous ministerial documents have been issued to provide instructions for the administration of the universal service scheme.

There have been many obstacles to the efficient delivery of universal services in Vietnam. Most have stemmed from the shortcomings of institutional structures and legal frameworks for funding mechanisms. My hypothesis is that the Vietnamese universal service legal framework and institutional arrangements can be improved by borrowing from funding arrangements and legal structures, and elements of best practice from other jurisdictions.

In order to propose reforms for the universal service legal framework and institutional arrangements in Vietnam, this thesis poses the following key research questions:

- (1) What is the best practice model for universal telecommunications services?
- (2) How could the delivery of such universal services be improved in Vietnam?
- (3) How has universal service developed elsewhere in a particular jurisdiction?
- (4) If the Vietnamese universal service model could be improved, what changes should be made in institutional structures, legal and regulatory structures, funding models, universal service provider criteria, and in systems for management of universal service financial resources, monitoring, and achievement of transparency and competitive neutrality?

In order to answer these questions, the thesis will look at the New Zealand and Vietnamese universal service structures, and the development of universal service delivery. The thesis takes the development of universal service in New Zealand as a principal case study. The New Zealand model of universal service delivery reflects practical experience closer to the best practice: transparency, effective monitoring and performance accountability. Its funding arrangements are aimed at economic efficiency,

²⁹ The Post and Telecommunications Ordinance 2002, arts 49-51.

³⁰ They include Decree 160/2004/ND-CP, Decision 191/2004/QĐ-TTg established the Vietnam Public Utility Telecommunications Service Fund, Decision 74/2006/QĐ-TTg promulgating the universal service programme 2006-2010, and Decision 1643/QĐ-TTg promulgating the universal service programme 2011-2015.

cost-effectiveness and competitive neutrality. In particular, universal service institutional arrangements and legal frameworks for universal service funding mechanisms in the two countries will be examined in order to identify:

- (1) How universal service develops within different political cultures;
- (2) Where the emphasis lies in the New Zealand universal service model - issues such as transparency, performance accountability, public and stakeholder involvement, performance information and reporting systems; and geographical features of universal service delivery;
- (3) Where the emphasis lies in the Vietnamese universal service model;
- (4) What factors in the New Zealand model could contribute to reform in the Vietnamese universal service model;
- (5) What practices from other jurisdictions would contribute to the Vietnamese universal service model.

The reasons for including improvement/reform in the title of this study are based on the current situation of the universal service legal framework in Vietnam, the current obstacles to efficiency and effectiveness in delivery, and things to be improved or amended if universal service is to be efficient and effective. There are three main options for the reform of the universal service scheme in Vietnam:

- (1) abandon the current universal service model and begin again;
- (2) import a model or structure from another jurisdiction; or
- (3) make significant changes and reforms within the current model.

For several reasons the option chosen here is for both improvements (short-term – amendments to subordinate documents) and reform (longer term – amendments to the Telecommunications Act), and for borrowing valuable experiences from other jurisdictions:

(1) the structure of the State, the Communist Party's dominant leadership, and the multi-level regulatory system mean that no radical or complete reform is possible in the short term;

(2) elementary universal service structures exist, although they do not yet function efficiently or effectively.

In order to propose reforms, this thesis presents proposals for creating and revising universal service policies where they either do not exist, or are poorly defined or unclear in their current form. In particular, concrete proposals are given for revising laws so as to produce better performance outcomes (precise proposals for new regulations are given throughout Chapter Five).

In addition, this thesis proposes new institutional structures and arrangements for monitoring of universal service performance, makes suggestions for improved coordination between government departments and agencies, and advocates effective public and stakeholder involvement, improved performance information and reporting systems of universal service delivery, and the establishment of clear and closely monitored funding processes.

It should be noted that there is currently a considerable range of challenges in the Vietnamese context for the implementation of the reforms outlined in Chapter Five. These challenges are concerned not only with the socialist political reality, but also with the willingness of the Government to propose and impose reforms, financial priorities and realities for the government in Vietnam, and restructuring and monitoring of legislation. The challenges should not be underestimated, but they are not subject of this thesis.

III Approaches to the Research

This thesis employs three main methods in its examination of the universal service legal framework and its institutional arrangements in Vietnam:

(1) legal analysis;

(2) comparing Vietnam universal service delivery with New Zealand TSO³¹ delivery; and

(3) interviews.

A Legal Analysis

The analysis of primary legal documents (legislation) in context, and especially in Vietnam case is the principal research method in this thesis. The Vietnamese legal framework for universal service delivery and institutional arrangements is presented exclusively in legislation. Thus, in order to improve the legal framework for efficient and effective universal service delivery in Vietnam, it is essential to examine the legislation that governs the performance of universal service delivery and its institutional arrangements, understand what it says, and how it works.

Secondary sources are also examined. Secondary sources most notably include: (1) reports by international organisations such as the World Trade Organisation (WTO), the International Telecommunications Union (ITU), and the World Bank; and (2) academic and scholarly research, articles and books.

B Comparing Vietnam Universal Service Delivery with New Zealand

Comparative law or cross-national legal comparisons are of great importance.³² They can be used as a legal research methodology and a tool for policy-makers to source legislation and law reforms in countries with either common law or civil law systems.³³ A wide knowledge of the possible range of solutions to legal problems is now available from other jurisdictions. In addition, comparing Vietnam universal service delivery with New Zealand TSO delivery helps to make clearer the functions and purposes of the rules originating or currently operating within different jurisdictions, and working within different socio-economic, political and cultural factors.

³¹ TSO is the terminology used in the New Zealand legislation for a telecommunications universal service obligation.

³² Mary Glendon, Paolo Carozza and Colin Picker *Comparative Legal Traditions in a Nutshell* (3rd ed, Thomson West Publishing Co, St. Paul, 2008) at 3.

³³ Peter De Cruz (ed) *Comparative Law in a Changing World* (3rd ed, Routledge-Cavendish, New York, 2007) at 19-20.

A comparative methodology is particularly appropriate for examining the legal framework of universal service delivery in Vietnam. It can contribute not only to proposals about the use of legal transplants from foreign jurisdictions, but also locates the legal framework in Vietnam for universal service delivery within the global legal and regulatory context.

This study compares the Vietnamese universal service legal framework with that of New Zealand. The universal service legal framework and institutional arrangements in New Zealand have operated since 1989 within a competitive environment and universal service levies since 2001. Moreover, universal service delivery in New Zealand exemplifies a focus on good governance (performance accountability, transparency and stakeholder involvement) and economic efficiency.

C Interviews

In order to arrive at answers to the research questions and propose solutions for reforms to the universal service legal framework and institutional arrangements in Vietnam, this research included interviews with a limited number of key government and industry representatives in Vietnam. Discussion with and responses from participants involved in the universal service scheme and legal professionals helped to identify shortcomings of the universal service legal framework and institutional arrangements. Interviews with telecommunications operators threw light on impacts on the telecommunications industry of the universal service scheme.

Interviews were based on a set of specific questions, followed by further ad hoc questions to individuals. Seventeen people in total were interviewed separately between December 2011 and January 2012: five from government departments and agencies, seven from telecommunications operators, and five from academia. These interviewees were selected through my own networking experience and direct contacts in the telecommunications industry in Vietnam. They are mostly involved directly in universal service delivery at a senior level either in government agencies or telecommunications operators. Some are academic professionals with law, economics or telecommunications backgrounds. Their responses were their own personal ideas based on their experiences and did not reflect opinions of, or speak in a representative capacity for, their

organisations.³⁴ Grouped responses are presented throughout the thesis, particularly in Chapter Four and Chapter Five, but participants are not identified by their name or office.

To increase participants' openness in sharing experiences and viewpoints, interviewees were assured of complete confidentiality and anonymity about reporting the results in this thesis. Interviews were recorded and relevant information for the thesis was then transcribed and translated into English. Interviews began with a brief introduction and then a conversation about the thesis, and moved towards the research questions.³⁵

Most interviews began by asking questions covering four key themes:

- (1) universal service institutional arrangements (questions 1-3);
- (2) the scope of universal service in Vietnam (questions 4-6);
- (3) universal service funding mechanisms (questions 7-10); and
- (4) competitive neutrality (questions 11-13).

Additional questions were then posed, based on the responses of the interviewees in order to capture their general perspectives. Responses to questions from interviewees varied. Some participants had some hesitation in speaking out, but most provided significantly similar evaluations, estimations and critiques about the current situation of universal service delivery in Vietnam. The responses of interviewees demonstrated high awareness of the strengths and weaknesses of the current institutional arrangements and structure of universal service, and of the need for more efficient, effective structures and funding mechanisms.

IV Structure of the Thesis

This thesis is organised into six chapters. In addition to this introduction, there will be five further chapters.

³⁴ A full list of the institutions concerned set out in Appendix One. No names of participants are listed, and details of roles that may make identification of interviewees possible are not given.

³⁵ Principal questions are set out in Appendix Two.

Chapter Two of the thesis deals with three principal issues. Part I provides a framework for analysis of universal service policies. Basic definitions of universal service and various universal service funding approaches are reviewed. They include (1) universal access and universal service approaches with their hallmarks of availability, affordability and accessibility; (2) rationales for universal service policy; and (3) universal service funding approaches, including allocation of levies and subsidies.

Part II reviews basic concepts of public management that are related to universal service institutional arrangements and funding administration, namely (a) performance accountability; (b) transparency; (c) performance information and public involvement; and (d) performance budgeting.

Part III outlines how all these fundamental factors are mirrored in a possible best-practice universal service model for efficient and effective universal service performance, which is drawn from International Telecommunications Union (ITU) recommendations and international practical experience.

Chapter Three provides a description of New Zealand TSO delivery during three periods: (1) the State monopoly period (up to 1987); (2) the light-handed regulation period (1987-2000); and (3) the industry-specific regulation period (since 2001). The chapter pays particular attention to the current legal framework and institutional arrangements of the New Zealand universal service model. It examines the institutional structures and funding mechanisms of universal service delivery, with particular regard to four important issues: (1) transparent performance information and reporting systems; (2) effective performance accountability; (3) public and stakeholder engagement; and (4) economic cost-effectiveness, and competitive and technological neutrality.

The key features in regard to the best practice model are also reviewed. The New Zealand universal service model reflects features close to the key best practice: transparency, effective monitoring with public and stakeholder involvement, and performance accountability. Moreover, universal service funding arrangements aim at achieving economic efficiency, cost-effectiveness and competitive neutrality.

Chapter Four examines the evolution of the legal frameworks and institutional arrangements for the delivery of universal services in Vietnam. Particular attention is given to the following issues: (1) the multi-level State legal apparatus: Acts, Government Decrees, Prime Minister's Decisions, and Ministerial Decisions; (2) the development of universal service in the last 20 years; (3) the key obstacles and underlying reasons to the effective and economically efficient performance and management of universal service delivery, and (4) the most significant defects or problems in the current universal service legal framework and institutional arrangements.

Chapter Five gives concrete proposals for improvements/reform of universal service institutional arrangements and the legal framework in Vietnam. Some could be improved immediately (short-term) by amending the Prime Minister's Decisions and Ministerial legislation. Other reforms require amending the Telecommunications Act (long-term). The proposals focus on two key areas:

(1) Institutional arrangements for effective and efficient universal service performance, in particular: (a) the setting up of suitably independent institutions, managing conflicts of interests, and improved performance accountability; (b) performance-based information-gathering and reporting systems; and (c) effective public and stakeholder involvement in universal service delivery.

(2) The establishment of effective and efficient funding mechanisms and formulae, in particular: (a) the estimation of necessary financial resources (universal service funds); (b) establishing structures for competitive neutrality including bidding models; (c) the determination of universal service levies on telecommunications operators; and (d) the subsidy of universal service funds to universal service providers and household/individual subscribers.

Chapter Six summarises the main issues and proposals presented in the thesis. In particular, the chapter points out key paths for Vietnam to improve universal service delivery both in the short-term and in the long-term. It also suggests key points of departure for the improved universal service which might be put into the next five-year universal service programme in Vietnam.

The cut-off date for laws, including subordinate legal documents, and other materials used in this thesis is 31 December 2012. Some references in regard to New Zealand, international experience and telecommunications statistics data are to materials from 2013.

CHAPTER TWO

A FRAMEWORK FOR THE ANALYSIS OF TELECOMMUNICATIONS UNIVERSAL SERVICE

I Overview

Universal service is a cornerstone of industrial and regulatory policies of most countries in their major network industries, including telecommunications.¹ While not every resident of a country can afford essential telecommunications services, subsidising the delivery of those services is a means of ensuring wide uptake and usage. This has direct social benefits both for subsidised and other users, and spill-over benefits for the economy.

Historically, the delivery of these services was provided by a state-owned operator as the sole provider of telecommunications services. Subsequent market liberalisation leading to a multi-operator environment has made this obsolete. Regulatory authorities now face the problem of organising the provision and financing of universal telecommunications service in a competitive environment.

Although there is a wide range of mechanisms for collecting and disbursing funds that support universal service delivery, most nations face a common set of goals. Challenges vary from country to country.² The emergence of increasingly competitive telecommunications service providers and multiple technologies requires amendments in universal service policies.³ The difference is sharpest between a single monopoly supplier, which is directed by the government to achieve universal service targets, and a multi-supplier and multi-technology environment, where all suppliers benefit from universal service policy and should contribute to the costs of the policy.⁴

¹ Cremer, Gasmi, Grimaud and Laffont, above ch 1, n 1, at 1.

² Federal Communications Commission (FCC) “Connecting the Globe: Regulator’s Guide to Building a Global Information Community” (1999), part VI <transition.fcc.gov/connectglobe/sec6.html>.

³ International Telecommunications Union “Trends in Universal Access and Services Policies: Changing Policies to Accommodate Competition and Convergence” (paper presented to the 9th Global Symposium for Regulators, Lebanon, November 2009), at 2.

⁴ Patrick Xavier “Rethinking universal service for a next generation network environment” (2006) OECD Telecommunications and Information Services Policy, at 4 <www.oecd.org/sti/broadbandandtelecom/36503873.pdf>.

Many governments are now challenged by the difficulties of ensuring social benefits and economically efficient delivery of universal services, while avoiding negative impacts on competition policy in competitive telecommunications markets.⁵ A major task of governments today is to ensure effective public policies/programmes in achieving a very complex range of political, economic and social objectives.⁶

Effective and efficient universal service delivery is dependent on several factors. Firstly, governments need to establish a clear long term statement of universal service objectives. The starting-point is to define the problem, identify a solution, and then set up adequate legal frameworks, establish effective institutional arrangements, and work out the financial resourcing and funding models that should effectively underpin these goals. Appropriate direction to the organisations which deliver universal services is a fundamental task of government. The management strategies and practice of those organisations are crucial to the effectiveness and efficiency of universal service policies.

This chapter will first outline a conceptual framework, focusing on the interaction between economic efficiency and social objectives, and on how to improve the design and implementation of universal service policies. There follows a review of universal service objectives, universal services and funding arrangements, including financial resources, administration and subsidy. This is followed by an outline of basic concepts of performance management related to universal service institutional arrangements and funding administration. The key factors for efficient and effective universal service delivery are (1) performance accountability; (2) transparency with regard to performance information and public involvement; and (c) performance budgeting. The chapter concludes with a schematic outline of these factors as they might be mirrored in a best-practice universal service model. This best practice model is drawn from ITU recommendations and international experience.

The conceptual framework outlined in this section will be used in Chapters Three and Four to analyse the Vietnamese and New Zealand universal service schemes.

⁵ Helnuth Cremer, Philippe Donder, Francois Boldron, Denis Joram and Bernard Roy "Social Costs and Benefits of the Universal Service Obligation in the Postal Market" (2008) Institut d'Economie Industrielle, at 2 <neeo.univ-tlse1.fr/671/>.

⁶ Nicholas Rose and Peter Miller *Governing the Present* (Polity Press, Cambridge, 2008) at 42.

II Universal Service Conceptual Framework

A The Concept of Universal Service

The concept of ‘universal service’ refers to the idea that infrastructural utility services, such as electricity, transportation or telecommunications, should be available to every citizen.⁷ These services should be provided at affordable rates regardless of region or location, socio-economic status, ethnicity, gender or disability.⁸

The modern concept of universal service originated in the United Kingdom in the nineteenth century with regard to the postal service.⁹ At its core was the concept of universal access to mail services.¹⁰ This concept appeared in telecommunications where it was first put forward by Theodore Newton Vail in 1908 with the slogan “One Policy, One System, Universal Service” - this was in an American Telephone & Telegraph (AT & T) advertisement.¹¹ In general, this phrase encapsulated an economic and legal concept referring to the provision of basic telephone services to every resident of the country at a reasonable or affordable price. It was eventually adopted as a national policy in the United States Communications Act 1934¹² and then further codified in the United States Telecommunications Act 1996. It was also adopted more widely in Europe, such as in the EU Postal Services Directive 97/67/EC and the Telecommunications Directive 2002/22/EC (2002).¹³ It is now used widely in the contexts of health care, primary schooling, electricity and energy supply, water and

⁷ Scott Wallsten “Using Competitive Bidding to Reform the Universal Service High Cost Fund” (2009) Technology Policy Institute, at 6 <www.techpolicyinstitute.org/files/using%20competitive%20bidding%20to%20reform%20the%20universal%20service%20high%20cost%20fund1.pdf>.

⁸ InfoDev Programme of the World Bank “ICT Regulation Toolkit: Module 4 Universal Access and Service” (2012) InfoDev and International Telecommunications Union, at 1 <www.ictregulationtoolkit.org/en/index.html>.

⁹ The hallmarks of early universal service originated from Rowland Hill’s proposals in 1837 for post office reforms with a reduction of postal rates to uniform affordable rates and irrespective of distance of transmission throughout England, which was reviewed and reported by the Government in 1839 then introduced in 1840. See A D Smith “The Development of Rates of Postage: A Historical and Analytical Study” (PhD, University of London, 1917), at 24.

¹⁰ Robert Cohen, Matthew Robinson, John Waller and Spyros Xenakis “The Cost of Universal Service in the U.S. and Its Impact on Competition” (paper presented to the Future of Universal Postal Service in the United States, The Brookings Institution, 18 June, 2002), at 1 <www.postalreporter.com/cost.htm>.

¹¹ History of AT & T “One Policy, One System, Universal Service” <www.corp.att.com/history/milestone_1908.html>.

¹² The United States Communications Act 1934 s 1 defined its purpose as “to make available, so far as possible, to all the people of the United States... with adequate facilities at reasonable charges”.

¹³ European Parliament and the Council’s Directive 2002/22/EC 2002 s 8 stated that “A fundamental requirement of universal service is to provide users on request with a connection to the public telephone network at a fixed location, at an affordable price”.

sanitation.¹⁴ By the end of 2009, some 132 of 193 countries worldwide had adopted universal service obligations in telecommunications.¹⁵

1 Universal service

Universal service policies in telecommunications target service delivery either at household or community level.¹⁶ In the latter case, the service is commonly described as ‘universal access’, which implies that use of the service is shared, such as at public payphones or telecentres. Universal access is seen as the precursor to universal service.¹⁷ While universal service is usually measured as the percentage of individual or household penetration, the focus of universal access is on the public points where everyone can access the service.¹⁸ Hence, assessment of universal access is often based on a percentage of geographical coverage, particularly in rural areas.¹⁹

While universal service may be a feasible policy objective in developed countries, a focus on universal access objectives seems more achievable and practical for developing countries.²⁰ The focus of universal service policy on universal access, with the use of universal services at shared levels, would mitigate subsidies to rural populations and minimise levies on telecommunications operators in developing countries, which typically challenge the limited financial resources and low density of telecommunications services, particularly in rural and isolated areas.

2 Availability, affordability and accessibility

Availability, affordability and accessibility are the hallmarks of universal service policies.²¹ These three criteria are important for and relevant to both approaches (universal service and universal access) but in different ways and to different degrees.

¹⁴ InfoDev Programme of the World Bank, above n 8, at [1].

¹⁵ International Telecommunications Union “Recent Regulatory Trends from Around the Globe” (ICT Regulatory News, 2010), at 9.

¹⁶ InfoDev Programme of the World Bank, above n 8, at [1.1.1].

¹⁷ Ibid, at [1].

¹⁸ Ibid, at [1.1.1].

¹⁹ Karine Perset “Leveraging Telecommunications Policies For Pro-Poor Growth Universal Access Funds With Minimum-Subsidy Auctions” (paper submitted to the POVNET Infrastructure for Poverty Reduction Task Team workshop, Berlin, 27-29 October 2004), at 5.

²⁰ Patrick Xavier “Universal Access to Telecommunications in a Competitive Environment” in Aaditya Mattoo, Julia Nielson and Hindegunn Kyvik Nordas (eds) *Liberalisation and Universal Access to Basic Services: Telecommunications, Water and Sanitation, Financial Services, and Electricity* (OECD and The International Bank for Reconstruction and Development, The World Bank, 2006) 25 at 27.

²¹ InfoDev Programme of the World Bank, above n 8, at [1].

Availability, which particularly emphasises the development of network coverage throughout a country²² so that residents can access universal services or use them on request if they find it affordable, is a typical focus of universal access policies.²³ On the other hand, universal service policies that focus more on the availability of service for private use by every individual or household may emphasise improved affordability by supporting those who are otherwise unable to use services even if they are available.²⁴

Availability means that services are available to residents through public, shared or individual devices.²⁵ Living in a high cost, rural or remote area ought not affect a person's ability to access communications services.²⁶ Mobile service has reached a greater level of penetration than fixed networks in many developing countries.²⁷ This change is now recognised as an opportunity for the much more rapid achievement of universal service policy than was thought possible even a decade ago.²⁸

Availability needs to be clearly distinguished from 'use' in universal service policies.²⁹ While availability refers to the percentage of households with access to services, the term "use" means the percentage of households that actually subscribe to the service.³⁰ This distinction, which can be blurred with regard to voice telephony, is very important for broadband service. The underlying reason is that there is normally a significant gap between the percentage of households with access to broadband service and the percentage of households actually using it.³¹ A significant number of residents at household level in rural areas may not be able to afford to use broadband services due to the requirement of expensive end-user equipment such as computers or smartphones.

Affordability and accessibility mean that everyone can afford services and no one is disadvantaged either by their level of income or level of physical and mental ability in

²² Intelcom Research and Consultancy Limited "Universal Access and Service (UAS) and Broadband Development" (paper presented to the World Bank's Workshop, Washington, 23 November 2009), at 6.

²³ Arturo Muent-Kunigami and Juan Navas-Sabater *Options to Increase Access to Telecommunications Services in Rural and Low-Income Areas* (World Bank, Washington, 2010) at 1-2.

²⁴ InfoDev Programme of the World Bank, above n 8, at [1.1.1].

²⁵ Ibid.

²⁶ Xavier, above n 4, at 10.

²⁷ InfoDev Programme of the World Bank, above n 8, at [1.2.1].

²⁸ Ibid.

²⁹ Stanford Levin "Universal Service and Targeted Support in a Competitive Telecommunications Environment" (2010) 34 (1-2) Telecommunications Policy 92 at 92.

³⁰ Ibid, at 93.

³¹ Ibid.

terms of access to and use of telecommunications services, particularly vulnerable, disadvantaged consumers.³² Service take-up by low-income users often depends on the removal of price and non-price barriers.³³ Residents in high-cost (such as rural and isolated) areas may not be able to afford these services without subsidies. Regulators and telecommunications operators, however, are aware that lower prices and few outgoing calls by residents in rural areas connected to essential services would increase commercial viability. In addition, their staying connected to services benefits other end-users' communications and operators' business in other services. Thus, the majority of operators provide service access at a reasonable price so as to enable subscribers to stay connected even if they make few outgoing calls.³⁴

As a key goal of universal service policies is to provide telephone services at affordable rates, it can be important for regulators and policy-makers to determine what these rates are.³⁵ Quantitative measurement of affordability involves estimating the percentage of income that households may be able or willing to spend on services, and hence the price of the service.³⁶ According to the ITU, the ICT (Information and Communication Technology) Price Basket is a benchmarking tool for measuring the cost of services and an indication of affordable services between countries over periods of time.³⁷

While end-users in developed countries pay under 1% of the average national monthly income for broadband connections, in many developing countries even a slow broadband connection costs many times the average monthly income. For example, the 2009 ITU ICT basket showed that people in developed countries spent relatively less of their income (1.5%) on ICT services compared to people in developing countries (17.5%).³⁸ In 2010, the ICT Basket indicated that high-income earners in the top ten economies enjoyed the cheapest relative broadband prices, and paid less than 1% of their income (average monthly GNI per capita), compared with those in 19 other developing countries where comparable broadband services cost more than 100% of average income. In some countries (Ethiopia, Zimbabwe, Guinea and Malawi), broadband prices are ten times the

³² Xavier, above n 4, at 9.

³³ InfoDev Programme of the World Bank, above n 8, at [1.2.2].

³⁴ Ibid.

³⁵ Msimang, above ch 1, n 5, at 35.

³⁶ Ibid.

³⁷ International Telecommunications Union "Measuring the Information Society 2012" (Geneva, 2012), at 65.

³⁸ Sundberg, above ch 1, n 14, at 8.

monthly average income.³⁹ This illustrates that they remain unaffordable for many citizens, and are obviously more affordable in developed economies and less so in developing countries.⁴⁰

B Universal Service Rationales/Objectives

Over the last two decades an increasing number of governments have established universal service policies.⁴¹ The reasons for pursuing these policies vary from country to country, as governments promote them in an attempt to achieve objectives that are often unique to each country.⁴² The principal objectives are:

- (1) The promotion of full participation in an information society;
- (2) The promotion of economic productivity and growth;
- (3) The promotion of economic, political and social cohesion;
- (4) The improvement of delivery of government services; and
- (5) The elimination of economic and social disparities.⁴³

Each of these five factors is examined more fully below.

1 The promotion of full participation in the information society and digital economy

Access to telecommunications services has been increasingly viewed by policy-makers as a basic right of all citizens, and essential to full membership in society.⁴⁴ Today, telecommunications and Internet access in particular are crucial for far more than personal and business communications. They have become essential for delivering all types of information, goods and services to the public.⁴⁵ Broadband services have become more important as an ever larger proportion of the population depends more and

³⁹ International Telecommunications Union “Measuring the Information Society 2011” (Geneva, 2011), at 71.

⁴⁰ International Telecommunications Union “The World in 2013: ICT Facts and Figures” (press release, 27 February 2013).

⁴¹ Msimang, above ch 1, n 5, at 29.

⁴² Ibid, at 30.

⁴³ See Msimang, above ch 1, n 5, at 30 and International Telecommunications Union “Trends in Telecommunication Reform 2008: Six Degrees of Sharing: Summary” (2008), at 14.

⁴⁴ InfoDev Program of the World Bank, above ch 1, n 6, at [6.1.2].

⁴⁵ Ibid.

more on them on a day-to-day basis.⁴⁶ Broadband is recognised as an essential tool for business, education, health care and participation in the digital economy.⁴⁷

An enormous growth in social media networks, blog sites and online shared user-generated content in the last few years also demonstrates the benefits and opportunities that broadband services bring to people on a daily basis.⁴⁸ Thus, without access to telecommunications, citizens risk becoming increasingly marginalised members of modern society.⁴⁹ There is a growing recognition throughout the world of the importance of broadband in the digital world.⁵⁰ In addition, the need for deployment of broadband services to meet the growing demands of the information society and to ensure that citizens are not left out of the digital economy is a concern for many regulators worldwide.⁵¹

2 The promotion of economic productivity and growth

The relationship between economic growth and telecommunications development is complex. An increasing amount of research suggests that deployment of telecommunications services, especially broadband services, leads to GDP growth. The extent to which this is true varies in different studies, due to the use of different data sets and measurement models.⁵² In particular, Qiang concludes that every 10% increase in broadband penetration has brought an additional 1.21% or 1.38% points of GDP growth in high-income or low and middle income economies respectively.⁵³ Other research in 22 OECD countries for the period 2002-2007 indicates that more broadband penetration could contribute to greater GDP growth rates. An increase of 1% in adoption of broadband can generate 0.008%, 0.014% or 0.023% of GDP growth rates in countries with low (under 20%), medium (between 20 and 30%) or higher (more than 30%)

⁴⁶ Levin, above ch 1, n 9, at 4.

⁴⁷ International Telecommunications Union “Trends in Telecommunication Reform 2008: Six Degrees of Sharing: Summary” (2008), at 14 <www.itu.int/ITU-D/treg/publications/Trends08_exec_A5-e.pdf>.

⁴⁸ Sundberg, above ch 1, n 14, at 8.

⁴⁹ InfoDev Programme of the World Bank, above ch 1, n 6, at [6.1.2].

⁵⁰ Sundberg, above ch 1, n 14, at 18.

⁵¹ Ibid.

⁵² Raul Katz “The Impact of Broadband on the Economy: Research to Date and Policy Issues” in Theresa Miedema (ed) *Trends in Telecommunications Reform 2010/2011: Enabling Tomorrow's Digital World* (International Telecommunications Union, Geneva, 2011) 23 at 30.

⁵³ Christine Qiang and Carlo Rossotto “Economic Impacts of Broadband” in Mohsen Khalil, Phillipe Dongier, Velerie D’Costa, Christine Qiang, Peter Smith, Randeep Sudan, Eric Swanson and Bjorn Wellius (eds) *Information and Communications for Development 2009: Extending Reach and Increasing Impact* (World Bank, Washington, 2009) 35 at 45.

broadband penetration rates respectively.⁵⁴ Thus, a key objective of many governments is the use of broadband to promote economic productivity and growth.⁵⁵

3 The promotion of economic, political and social cohesion

Access to telecommunications and Internet services ensures that citizens living in rural and remote communities or low-income people can participate in a nation's political, economic and social development regardless of their geographical limitations or isolation.⁵⁶ The ITU considers that filling the information gap between rural and urban areas, and between lower-income and higher-income citizens through universal service programmes, contributes to social, political, economic and financial cohesion for residents in rural areas.⁵⁷

4 The elimination of economic and social disparities between the 'information rich' and the 'information poor' in access to telecommunications and Internet services

The gap between people who have ready access to telecommunications and Internet services and those who do not can be measured in several ways. It can be a geographical disparity between rural and urban users, or an economic gap between lower-income and higher-income citizens. Narrowing or eliminating these gaps is often a core objective of universal service policies.⁵⁸ In the least developed countries, more than 50% of the population is rural, but only 12% of the telecommunications infrastructure serves these areas.⁵⁹

5 The improvement of delivery of government services

Access to telecommunications and Internet services enables government organisations to improve the efficiency and effectiveness of the delivery of services, such as health care

⁵⁴ Koutroumpis Pantelis "The Economic Impact of Broadband on Growth: a Simultaneous Approach" (2009) 33 Telecommunications Policy 471 at 483.

⁵⁵ International Telecommunications Union "Harmonisation of Policies Governing the ICT Market in the UEMOA-ECOWAS Space: Universal Access and Universal Service" (2005), at 18.

⁵⁶ Msimang, above ch 1, n 5, at 30.

⁵⁷ Yang Soon Lee, William Bratton and Wu Wei Shi "The Role of the Regulator in Broadband Development" in John Alden (ed) *Trends in Telecommunications Reform 2006: Regulating in the Broadband World* (International Telecommunications Union, 2006) 51 at 54.

⁵⁸ Msimang, above ch 1, n 5, at 30.

⁵⁹ ITU's World telecommunications indicators database (2004) <www.itu.int/ITU-D/ict/>.

and education.⁶⁰ The deployment of broadband networks also facilitates the evolution of new applications in providing various combinations of voice, data and multimedia services.⁶¹ In addition, broadband (fixed and wireless) networks allow customers to access Internet services at high-speed any time and anywhere, and with greater mobility.⁶² Accordingly, an ever larger proportion of the population depends on the Internet on a daily basis.⁶³

C Universal Broadband Access

Throughout the 20th century, telecommunications policies in most advanced economies promoted “universal service” for fixed line telephony.⁶⁴ In addition, services for disabled persons, or institutions (such as hospitals or schools), as well as directory enquiry or emergency services, and support services for Internet subscribers (such as help-lines, and training for educational institutions) are often included in universal service schemes.⁶⁵

The universal service definition, however, has never been static and has varied according to market conditions, public demand⁶⁶ and changes in technology and services.⁶⁷ Indeed, the definition needs to be expanded as voice calls can now be made through varied protocols, including mobile networks or wireless telephones, or VoIP calls via Internet.⁶⁸ The question of whether broadband services should be included in universal service schemes has become a highly controversial topic.⁶⁹

At the same time, competitive neutrality and non-discrimination between technology and services are important principles of universal service policies.⁷⁰ An increase in communications facilities and technological innovation, and networks being built with new kinds of technology has resulted in a range of possible definitions of universal

⁶⁰ Msimang, above ch 1, n 5, at 30.

⁶¹ International Telecommunications Union *Trends in Telecommunication Reform 2006: Regulating in the Broadband World* (Geneva, 2006) at 127.

⁶² Sundberg, above ch 1, n 14, at 2.

⁶³ Levin, above ch 1, n 9, at 4.

⁶⁴ InfoDev Programme of the World Bank, above n 8, at 3.

⁶⁵ Ibid, at [1.1.3].

⁶⁶ InfoDev Programme of the World Bank, above ch 1, n 6, at 6-9.

⁶⁷ International Telecommunications Union “ICT Regulatory Trends 2010” (ICT Regulatory News, 2010), at 9.

⁶⁸ Alleman, Rappoport and Banerjee, above ch 1, n 8, at 91.

⁶⁹ Scott Jordan “A layered United States Universal Service Fund for an everything-over-IP world” (2009) 33 Telecommunications Policy 111 at 113.

⁷⁰ World Trade Organisation’s Agreement on Basic Telecommunications, Reference Paper, at [3].

service compared to the traditional fixed telephone scope and definition.⁷¹ Subsidies for universal service delivery should not rely on one service or technology only.⁷² In addition, the definition of universal service should be based on customer demand.⁷³ The variety of services that consumers are able to choose from, rather than simply or solely ‘voice’, is the measure of universal service.⁷⁴ Broadband access should be included in universal service because broadband has become more important and essential for people, and policy-makers are accordingly increasingly taking action to include broadband access as part of universal service policies.⁷⁵

In practice, there is still a wide disparity in access to broadband services between developed and developing countries, and between regions of the world, despite the increase in broadband penetration worldwide during the last few years.⁷⁶ The situation also holds true in regard to the availability of mobile broadband services (See Figure 1).

Figure 1: Broadband subscription per hundred inhabitants (2007-2012)⁷⁷

Year	Active mobile broadband subscription (per 100 inhabitants)						Fixed (wired) broadband subscription (per 100 inhabitants)					
	2007	2008	2009	2010	2011	2012	2007	2008	2009	2010	2011	2012
Developed	18.5	27.4	36.6	42.9	55.1	63.3	18.0	20.5	22.0	23.6	24.7	25.9
Developing	0.8	1.6	3.0	4.4	8.2	13.3	2.3	2.9	3.5	4.2	4.9	5.5
Worldwide	4.0	6.3	9.0	11.3	16.6	22.1	5.2	6.1	6.9	7.6	8.4	9.1

The ITU Broadband Commission for Digital Development in its 2010 declaration emphasised to government leaders around the world that social and economic development depends on accessible and affordable broadband access as a civil right.⁷⁸ It

⁷¹ Xavier, above n 4, at 6.

⁷² Alleman, Rappoport and Banerjee, above ch 1, n 8, at 87.

⁷³ Sofie Maddens “Trends in Universal Access and Service Policies: Changing Policies to Accommodate Competition and Convergence” (2009), at 7 and 11 <www.itu.int/ITU-D/treg/Events/Seminars/GSR/GSR09/doc/USPolicy_ITUEC.pdf>.

⁷⁴ Krishna Jayakar and Harmeet Sawhney “Universal access in the information economy: Tracking policy innovation abroad” (2007) Technical Report, Benton Foundation, at 4 <www.benton.org/node/5598>.

⁷⁵ Levin, above ch 1, n 9, at 4.

⁷⁶ Telecommunication Development Bureau “The World in 2013: ICT Facts and Figures” (2013) International Telecommunications Union, at 4 <www.itu.int/ITU-D/ict/facts/material/ICTFactsFigures2013.pdf>.

⁷⁷ International Telecommunications Union “Key Global Telecom Indicators for the World Telecommunication Service Sector” (2013) <www.itu.int/ITU-D/ict/statistics/at_glance/keytelecom.html>.

⁷⁸ Broadband Commission “A 2010 Leadership Imperative: The Future Built on Broadband” (2010) International Telecommunications Union, at 15 <www.itu.int/dms_pub/.../S-POL-BROADBAND.01-2010-PDF-E.pdf>.

challenged governments globally to ensure that “more than half of the world’s people have access to broadband networks by 2015”.⁷⁹

A survey of customers in 26 countries, commissioned by the United Kingdom’s BBC World⁸⁰ in 2010, surveying 27,973 people (including 14,306 Internet users) showed that 87% of respondents who use the Internet said they believe that Internet access should be considered a ‘fundamental right of all people’. Moreover, 71 % of non-Internet users agreed with that statement.

In 2012 the ITU Report recorded that more than 130 governments had adopted a national policy to promote broadband.⁸¹ Some developed countries have done so as part of their economic recovery plans while others have done so as part of their broader strategy to develop an information society and to extend universal access to telecommunications and Internet services.⁸² In 2012, over 40 countries had included broadband in their universal service or access definitions.⁸³

In summary, it can be seen that broadband services have become recognized as essential for every citizen and are present in most activities of individuals, organisations, businesses and government agencies. However, they remain unavailable or unaffordable for the majority of the world’s population,⁸⁴ especially those living in developing countries and in rural areas. Consequently, there is growing recognition at the highest government levels throughout the world of the importance of broadband.⁸⁵ Many countries have begun to revise their policies on traditional universal service obligations⁸⁶ to include the deployment of accessible and affordable universal broadband technologies and services.

⁷⁹ International Telecommunications Union (press release, 19 September 2010) <www.itu.int/net/pressoffice/press_release/2010/33.aspx>.

⁸⁰ British Broadcasting Corporation “Four in Five Regard Internet Access as a Fundamental Right: Global Poll, 2010” *BBC World* (United Kingdom, 8 March 2010) <news.bbc.co.uk/2/shared/bsp/hi/pdfs/08_03_10_BBC_internet_poll.pdf>.

⁸¹ International Telecommunication Union “Trends in Telecommunication Reform 2012: Smart Regulation for a Broadband World - Summary (Telecommunications Development Bureau, Geneva, 2012), at 4.

⁸² Sundberg, above ch 1, n 14, at 18.

⁸³ Mandla Msimang “The More Things Change, The More They Stay the Same: Strategies for Financing Universal Broadband Access” in Telecommunication Development Bureau (ed) *Trends in Telecommunication Reform 2012: Smart Regulation for A Broadband World* (ITU, 2012) 79 at 81.

⁸⁴ International Telecommunications Union, above n 37, at 8.

⁸⁵ Ibid.

⁸⁶ International Telecommunications Union, above n 15, at 9.

D Universal Service Funding Approaches

There are five main mechanisms which are utilised to implement the funding of universal service policies: market-based reform, mandatory service obligations, cross-subsidies, access deficit charges, and the establishment of universal service funds.⁸⁷

Traditionally, most countries use, or have used, more than one of these mechanisms to finance their universal service programmes. While internal cross-subsidies for universal service delivery provided by an incumbent are argued to be impractical and anti-competitive,⁸⁸ the mechanism of access deficit charges⁸⁹ is also criticised for its inefficiency and potentially anti-competitive subsidies.⁹⁰ An increasing number of countries adopted the universal service fund as the best option,⁹¹ except those countries (such as New Zealand) with a model of ex post reimbursement. Presently 66 countries have established or adopted plans for setting up universal service funds.⁹² These funds allow more flexibility than mandating a particular operator to use a specific prescribed technology. They are also seen by some countries as more transparent, and able to be designed to be competitively and technologically neutral.⁹³

Some countries prefer other financing mechanisms, such as public-private partnerships and non-government organisations.⁹⁴ There are costs in administration of the funds and other possible problems. Given that Vietnam has a universal service fund, the following section will review sources of universal service funds and their administration with institutional arrangements, and subsidies.

⁸⁷ An extensive description of these mechanisms can be found in the InfoDev Programme of the World Bank, above n 8, at [6-2].

⁸⁸ InfoDev Programme of the World Bank, above ch 1, n 6, at [6.3.5].

⁸⁹ Access deficit is defined as the loss made by a telephone company on providing access lines if this is regarded as a stand-alone business. It is the difference between the fully allocated costs of providing access lines and the revenues attributed to providing access lines. The resulting access deficit charges (ADCs) have usually been added to interconnection charges for call origination or termination on the incumbent's network, in recognition of the benefits that the competitors receive from that network. See InfoDev Programme of the World Bank, above n 8, at [3.1.4].

⁹⁰ InfoDev Programme of the World Bank, above ch 1, n 6, at [6.3.6].

⁹¹ Intelcom Research and Consultancy Limited "Summary of a Country Survey on Universal Access & Service and Broadband" (2011), at 7.

⁹² Msimang, above n 83, at 90.

⁹³ Xavier, above n 4, at 17.

⁹⁴ InfoDev Programme of the World Bank, above n 8, at [5.4].

1 Institutional arrangements for universal service funds

In the majority of countries with universal service funds, the fund is managed directly by a regulator (either a government Ministry or a government-established regulator) or in some cases, by an advisory or management board specially created to represent the interests of rural stakeholders, the telecommunications industry and the regulator.⁹⁵ Some countries set up either separate banks or trusts to manage the funds (eg Nigeria and Peru), or create an independent agency or company (eg France and the United States).⁹⁶ An Intelcom survey of 67 countries in 2011 showed that a majority (64%) of universal service funds are managed by a regulator, while another 23% are overseen by a government department or agency. Only 13% are entrusted to a private company or some other body.⁹⁷

Regardless of the institutional location of universal service fund administration, the entity in charge of managing the Fund and its operations should have clearly defined rules, principles and guidelines.⁹⁸ Principles for good governance, among others,⁹⁹ are the cornerstone of the success of universal service fund administration.¹⁰⁰ Institutional arrangements for universal service fund administration should emphasise the importance of accountability, transparency and efficiency,¹⁰¹ and independence,¹⁰² which are fundamental for effective administration.

Transparency requires active and substantial participation of telecommunications operators and end-users (public and stakeholder involvement) in the process of formulating and monitoring the outcomes of universal service policies in relation to policy objectives. This relates particularly to ensuring appropriate estimations of financial resources required for universal service delivery. In addition, performance

⁹⁵ Intelcom Research and Consultancy Limited “Universal Access and Universal Service Funds: Insights and Experience of International Best Practice” (2005), at 12.

⁹⁶ In France, the universal service fund is managed and administered by an independent financial institution overseen by the Ministry of Economy, namely Caisse des Dépôts et Consignation.

⁹⁷ Intelcom Research and Consultancy Limited, above n 91, at 6.

⁹⁸ International Telecommunications Union “SADC Toolkit on Universal Access Funding and Universal Service Fund Implementation” (2011), at 29.

⁹⁹ According to the ITU, there are some key principles that make universal service funds successful in practice, such as the Output-Based Aid (OBA) principles, and decentralised and bottom-up planning. See International Telecommunications Union, above n 98, at 7.

¹⁰⁰ Telecommunications Regulatory Association of Southern Africa “Policy Guidelines on Universal Access/Service for Telecommunications Services in SADC” (2002), at 17.

¹⁰¹ Msimang, above n 92, at 102.

¹⁰² Munte-Kunigami and Navas-Sabater, above n 23, at 38.

measurement and monitoring requires the generation, collection, analysis, reporting and utilisation of basic information about the performance of universal service administrators and programmes.

Finally, determining the actual needs of citizens is essential for setting up appropriate universal service policies. Accordingly, their design should be one in which the government sets goals, and community representatives, telecommunications operators and citizens are actively involved in the implementation. This helps to align sufficient financial resources (including budget, human resources, political support and legal documents) with final goals (intended outputs and outcomes). The administration of universal service delivery should include a mechanism for coordinating, monitoring, evaluating and reporting that enables resources to be managed flexibly in terms of realistic outcomes.

(a) Accountability

Accountability for the management of universal service funds requires that the funds are accountable to all external stakeholders or interested parties for the way in which they conduct their operations over a given period.¹⁰³ In order to ensure the accountability of universal service funds' administrators, certain key tools have emerged from both global experience and good practice.¹⁰⁴

Firstly, a universal service fund must have separate accounting systems for its operations, including its own bank accounts and associated accounting procedures.¹⁰⁵ This distinct system should be exclusively used for the purpose of universal service, and should not be mixed with any other regulatory activities where the regulator is the fund administrator, or linked in any way with other institutions which may manage the day-to-day operations of the fund.¹⁰⁶ Transparent accounting of fund administration enables

¹⁰³ International Telecommunications Union, above n 98, at 29.

¹⁰⁴ See International Telecommunications Union, above n 98, at [2.4]; Msimang, above n 92, at [4.7.1] and [4.7.2]; Intelcom Research and Consultancy Limited, above n 95; InfoDev Programme of the World Bank, above n 8, at [4.3.2] and [5.3.2].

¹⁰⁵ International Telecommunications Union, above n 98, at 29.

¹⁰⁶ Intelcom Research and Consultancy Limited, above n 95, at 13.

effective monitoring and tracking of all funding practices,¹⁰⁷ and contributes to increased accountability of fund administrators.

Secondly, all fund administration operating procedures must be transparent. A manual of operating procedures should be developed and published.¹⁰⁸ It should include rules about operational issues such as procurement, project selection criteria, competitive tendering processes and procedures, subsidy procedures, and participation rules in the case of public-private partnership.¹⁰⁹

Thirdly, there must be a clear governance framework provided both in legislation and in the manual of operating procedures.¹¹⁰ The governance manual should include issues such as the general constitution, the role and function of the fund, the Board, Executive and staff, the management of finances, and reporting requirements.¹¹¹ This enhances the performance accountability of the authorities involved in the administration and measurement of service delivery and avoids diffuse or overlapping responsibilities.

Fourthly, well-crafted service agreements and contracts ensure increased accountability by shifting performance risk.¹¹² This contributes not only to effective monitoring and evaluation through the alignment of subsidies to agreed outputs by the universal service providers, but also to the performance accountability of universal service fund administrators.

Fifthly, annual reports should be published, accounting for monies spent and setting out details of activities, levies collected, subsidies and any other key issues that have affected the fund in the reporting year.¹¹³ This leads to the effective engagement of stakeholders and the public in monitoring the fund administration.

Sixthly, periodic reports should be provided to the relevant stakeholders and also available publicly, which could enhance the effective monitoring and evaluation of

¹⁰⁷ Msimang, above n 92, at 102.

¹⁰⁸ InfoDev Programme of the World Bank, above n 8, at [4.3.2] and [5.3.2].

¹⁰⁹ International Telecommunications Union, above n 98, at 29.

¹¹⁰ Ibid.

¹¹¹ InfoDev Programme of the World Bank, above n 8, at [5.3.2].

¹¹² Msimang, above n 92, at 102.

¹¹³ International Telecommunications Union, above n 98, at 29.

programmes and projects undertaken.¹¹⁴ Regular reports ensure both performance accountability of fund administrators and community awareness.

Finally, financial accounts must be independently audited annually, and the results made available publicly.¹¹⁵ Similarly, the recipient of universal service funding must regularly provide an audited report on its progress and performance of projects.

In summary, all these factors contribute to ensuring the transparency and performance accountability of universal service fund administrators and associated authorities for the benefit of both external stakeholders and the public.

(b) Efficiency

Careful administration as well as effective estimation of subsidies, and market-driven distribution mechanisms could ensure minimum required levies and avoid wasteful distribution.¹¹⁶

Inefficient administration of universal service funds is often seen in the slow implementation of projects, due to inappropriate, slow or expensive performance.¹¹⁷ Stern and Townsend in their report on universal access in Latin American countries concluded that a major problem with most of these funds was their inability to effectively subsidise money collected to finance universal service projects, where all or large portions of the resources which had been collected remained unspent.¹¹⁸ In 2011 an Intelcom survey came to the same conclusion. The percentage subsidisation of universal service funds in non-OECD countries is about 33%, compared with 99% subsidisation in high-income OECD countries.¹¹⁹ This reflects the poor performance of funding mechanisms in developing countries, compared with developed countries.

In addition, properly designed competitive tendering can generate incentives to contain costs, to innovate, and to reveal the true cost of delivering universal services, thus

¹¹⁴ International Telecommunications Union, above n 98, at 98.

¹¹⁵ *Ibid.*

¹¹⁶ InfoDev Programme of the World Bank, above n 8, at [5.3.3].

¹¹⁷ International Telecommunications Union, above n 98, at 31.

¹¹⁸ Peter Stern and David Townsend “New Models for Universal Access in Latin America” (Summary Report, Regulatel/World Bank PPIAF/ECLAC Project on Universal Access in Latin America, 2006), at 10-11.

¹¹⁹ Intelcom Research and Consultancy Limited, above n 95, at 7.

minimising the subsidy required¹²⁰ and the levies placed on telecommunications operators. This can be a significant advantage, since difficulties in estimating the net costs of providing universal services can make the designation of a universal service provider difficult.¹²¹

(c) Transparency

Transparency is an essential feature of accountability. Accordingly, the transparent administration of universal service funds is fundamental to the economic efficiency and effectiveness of universal service policies. Moreover, transparency is one of the key criteria for a pro-competitive universal service policy.¹²² In order to ensure transparency, along with those regulations included in the Manual of Operating Procedures, rules for recipients of financing, compliance, and reporting requirements are mandatory.¹²³

In addition, consultation processes and requests for input on major decisions such as auction design, request for proposals and contracts, and key policy issues (such as definition of under-served areas, eligible beneficiaries and eligible bidders) should be conducted publicly.¹²⁴ Any redefinition of the scope, delivery and funding of universal service should be conducted on the basis of a transparent systematic review, to clarify objectives and targets pertinent to the country.¹²⁵

2 Sources of universal service fund

Universal service funds collect revenue from a variety of sources. These include governments' general budget, industry levies, various other regulatory revenues such as licence fees and one-off contributions, loans or grants from donors.¹²⁶

¹²⁰ Patrick Xavier "What Rules for Universal Service in an IP-Enabled NGN Environment?" (paper presented to the ITU Workshop, Geneva, March 2006), at 14.

¹²¹ Ibid.

¹²² According to the WTO Regulation Reference Paper, which forms part of the WTO Agreement on Basic Telecommunications, a member of WTO has the right to define the universal service policy it wishes to maintain and the policy will not be regarded as anti-competitive if administered in a transparent, non-discriminatory and competitively neutral manner and so as not to be more burdensome than necessary for such universal services.

¹²³ International Telecommunications Union, above n 98, at 30.

¹²⁴ Ibid.

¹²⁵ Xavier, above n 4, at 53.

¹²⁶ InfoDev Programme of the World Bank, above n 8, at [5.2.1].

(a) Industry levies

Most of the literature relating to universal service funds is concerned with whether they should be financed from levies on the telecommunications industry itself or general taxation revenues. Some theorists, for example Atkinson-Stiglitz, argue that the best way to redistribute income may be directly, such as through the taxation of income.¹²⁷ These authors see indirect manipulation of the relative price of goods and services as inefficient. Laffont and Tirole (2000) argue that the logic behind the Atkinson-Stiglitz conclusion is too simple. While the government may want to redistribute assets and wealth from the rich to the poor, it should not decide what consumers want to consume.¹²⁸ Crandall and Waverman, however, argue that if telecommunications services, especially universal services, are currently considered to be so socially important as to require a re-distribution of income from some sections of the population to others, then this should be achieved from the government purse and the general taxation system.¹²⁹

In practice, in a general tax system, governments allocate a fixed percentage of the national budget to cover the costs of public service delivery.¹³⁰ This system is used to fund schemes to provide gas, electricity and water. While less frequent, a number of countries also rely on general taxation revenue to fund their universal service programmes. A universal service fund financed in part or wholly from general taxation revenues ensures a measure of security and consistency that permits long term planning for universal service programmes. It also guarantees that the burden of providing universal services is distributed across all sectors of the economy.

¹²⁷ Atkinson Anthony and Joseph Stiglitz "The Design of Tax Structure: Direct versus Indirect Taxation" (1976) 6 Journal of Public Economics 55 at 74.

¹²⁸ Jean-Jacques Laffont and Jean Tirole *Competition in Telecommunications* (Massachusetts Institute of Technology Press, Massachusetts, 2000) at 220-221.

¹²⁹ Robert Crandall and Leonard Waverman *Who Pays for Universal Service? When Telephone Subsidies Become Transparent* (Brookings Institute, Washington, 2000) at 21-22.

¹³⁰ Lisa Leidig "An Assessment of Universal Service Funding in Canada" (2000) Ovum Ltd, at 20 <[www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/ovum.pdf/\\$FILE/ovum.pdf](http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/ovum.pdf/$FILE/ovum.pdf)>.

(b) Industry levies - how to determine levy levels

Industry levies are the main source for universal service funding in most countries.¹³¹ Therefore, determining the level of industry levies (universal service levies) plays a vital role in the implementation of universal service policies.

After a country's universal service policy objectives and targets are designed, an estimated cost of meeting these goals can be determined.¹³² Total sector revenues are estimated from an analysis of operator revenues. The estimated cost of the universal service programme for the next year is estimated and then allocated to telecommunications operators as a percentage of annual gross or net revenue.¹³³ By contrast, a market-driven approach employs a public consultation process, utilising surveys or assessment of operators' and other stakeholders' views, as well as international benchmarks, so as to determine what level of levy should be placed on telecommunications operators.¹³⁴

The determination of industry levies should be cost effective.¹³⁵ This requires defining the net cost likely to be incurred for the delivery of universal services (inputs) and comparing it to outputs or even outcomes. Mandl indicates that there is no sense in measuring outputs or outcomes without the link with net costs being used for universal service delivery.¹³⁶ An inappropriate determination of industry levies can result in either under- or over-collection. Moreover, over-collection imposes a cost on the industry, which is inevitably passed through to consumers in higher prices.

The creation of so called 'retrospective funds' is an option to ensure cost effectiveness and avoid the subsidy problem. In this model the percentage contribution is determined in advance, but payments only become due once the fund administrator has estimated them within a given year. This solution may be of help in solving concerns relating to the risk of unused collected revenues, the pace of commercial development and the over-

¹³¹ InfoDev Programme of the World Bank, above n 8, at [5.2.1].

¹³² International Telecommunications Union, above n 98, at 36.

¹³³ InfoDev Programme of the World Bank, above n 8, at [5.2.3].

¹³⁴ Ibid.

¹³⁵ Xavier, above n 4, at 5.

¹³⁶ Ulrike Mandl, Adriaan Dierx and Fabienne Ilzkovitz "The Effectiveness and Efficiency of Public Spending" (2008) Economic Papers 301, European Communities, at 3 <ec.europa.eu/economy_finance/publications/publication11902_en.pdf>.

collection problem.¹³⁷ However, risks, such as operators not making the payments when required or funds being distributed to universal service projects too slowly, have to be managed.¹³⁸

(c) Regulatory sources

In addition to levies on industry revenues, other potential sources of funding are: payments made on the award of a licence; annual licensing fees (either operating or spectrum licences); and amounts realised from the sale by government of interests in a service provider.¹³⁹ For instance, in Australia, 5% of the proceeds from privatising the second tranche of Telstra's¹⁴⁰ shares¹⁴¹ were allocated to improving conditions in rural areas.¹⁴² Other examples of licence auction proceeds being allocated to a universal service fund are: Ghana, with USD 50 million for the 6th mobile licence and 3G in 2008, and Egypt, with USD 2.9 billion for the 3rd GSM licence and 3G frequencies in 2006.¹⁴³

3 Allocating universal service levies

Who should pay universal service levies and how to determine levels of universal service levies are controversial issues.¹⁴⁴ A competitive environment and an equilibrium market structure challenges regulators to make the allocation and subsidies of universal service funds, and also share social benefits and costs.¹⁴⁵ The determination should ensure technological and service neutrality and not discriminate between providers. In addition, universal service levies should be based on an economic analysis of a geographic area which takes into account the universal service requirements, and the number and nature of players in the market.¹⁴⁶

¹³⁷ International Telecommunications Union, above n 98, at 36.

¹³⁸ *Ibid.*

¹³⁹ Kathleen Abernathy "Preserving universal service in the age of IP" (2005) 3 *Journal on Telecommunications and High Technology Law* 409 at 411.

¹⁴⁰ Telstra is the primary universal service provider in Australia.

¹⁴¹ In the second tranche sale of Telstra shares in 1999, 16.6% of Telstra's issued shares were sold and the sale returned proceeds of AUD 16.0 billion with sale costs of AUD 169 billion. See Australian National Audit Office *Third Tranche Sale of Telstra Shares* (Audit Report 43 2007-08, 2008), at 9.

¹⁴² Xavier, above n 4, at 50.

¹⁴³ InfoDev Programme of the World Bank, above n 8, at [5.2.1].

¹⁴⁴ Philippe Chone, Laurent Flochel and Anne Perrot "Allocating and funding universal service obligations in a competitive market" (2002) 1 *International Journal of Industrial Organisation* 1247 at 1249.

¹⁴⁵ *Ibid.*

¹⁴⁶ International Telecommunications Union, above n 55, at 33.

(a) Who should pay universal service levies?

Network operators, both fixed and mobile, are generally liable to pay universal service levies. Levies should be imposed on all telecommunications and Internet service providers (ISPs) (including VoIP service providers).¹⁴⁷ Determination of which operators must pay levies should be neutral and non-discriminatory in terms of technology and services.

In order to ensure affordability to pay universal service levies and minimise the impact on small providers, a minimum size limit (to be set at annual revenues or market shares of companies) can be set above which a service provider is required to pay.¹⁴⁸ In Japan, telecommunications service providers who interconnect with universal service providers and earn over JPY 1 billion must contribute to the universal service obligation fund.¹⁴⁹ In New Zealand, the Telecommunications Amendment Act 2011 provides that the revenue threshold for becoming a person liable to pay universal service levies is NZD 10 million¹⁵⁰ (NZD 5 million for the period 2010-2011).¹⁵¹

(b) Levels of universal service levies

Most countries use the ‘eligible revenues’ approach as the basis for the determination of universal service levies. In practice, the estimation of telecommunications service revenues has been difficult, due to rapid changes and development in services and technology that affect the preferences and habits of customers using the services. The ITU recommends¹⁵² that revenue percentage contribution levels should not be set in law. Instead, levels of levies should be reviewed periodically so as to be aligned with policy objectives and market developments. In addition, allocation of levies should have a close link with the real costs for the delivery of universal services.

¹⁴⁷ InfoDev Programme of the World Bank, above n 8, at [5.2.2].

¹⁴⁸ Ibid.

¹⁴⁹ Mamoru Uda “Japanese USO System and Broadband Deployment (paper presented to the Seminar on Broadband and Universal Service Obligation, Bangkok, 2010), at 7.

¹⁵⁰ Commerce Commission “Notification of Potential Liability for the Telecommunications Development Levy 2012” (2012), at [4].

¹⁵¹ Commerce Commission “TDL Liable Allocation Determination for the period 1 July 2010 to 30 June 2011” (2011), at [9].

¹⁵² International Telecommunications Union, above n 98, at 38.

Recent research indicates that universal service levy rates of revenues range from 0.04% (Estonia) to 6% (Malaysia).¹⁵³ According to Intelcom Research and Consultancy's survey in 2011, about 40% of countries imposed a rate of 1.5% or less, and another 28% imposed a rate of less than 1%.¹⁵⁴ International experience also illustrates that no developing countries appear to have been able to subsidise more than 2% per year of sector revenues in their universal service programmes.¹⁵⁵ Nearly 60% of total funds collected to date have not been paid.¹⁵⁶ The average percentage of subsidised funds in 15 developing countries (including Vietnam) was about 26%.¹⁵⁷

Although a considerable number of countries apply gross revenues for determining universal service levies,¹⁵⁸ there are arguments in favour of collecting levies based on net (after-tax) revenues, or at least based on revenues minus required interconnection payments to other telecommunications operators.¹⁵⁹ Regardless of whether levies are calculated before or after tax, they should be tax deductible.¹⁶⁰ Deduction of some amounts from gross revenues avoids the potential for double levying of some operators and of imposing a heavy burden on new entrants, who are often levied more heavily than early-entry operators and typically face heavier net interconnection outflows than do well-established operators.¹⁶¹

4 Administration of universal service funds

Universal service fund subsidy plays an important part in the literature concerning universal service policies, and is a key focus of interest for many economists and policy-makers.¹⁶² The general question of how subsidies from universal service fund are made covers a number of more specific questions. Target subsidies are the most effective means of financing universal access and service.¹⁶³ The principal questions are: who

¹⁵³ Heather Hudson "Defining Universal Service Fund" (2010) 38 (1) *Intermedia* 16 at 17.

¹⁵⁴ Intelcom Research and Consultancy Limited, above n 91, at 6.

¹⁵⁵ InfoDev Programme of the World Bank, above n 8, at 101.

¹⁵⁶ Intelcom Research and Consultancy Limited, above n 91, at 1.

¹⁵⁷ Hudson, above n 153, at 20.

¹⁵⁸ Intelcom Research and Consultancy Ltd, above n 91, at 5.

¹⁵⁹ InfoDev Programme of the World Bank, above n 8, at [5.2.3].

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² Crandall Robert "Universal Service Policies and the Diffusion of Broadband" (paper presented to ITS Asia-Pacific Conference, Wellington, August 2010), at 2.

¹⁶³ International Telecommunications Union, above n 98, at 35.

should get subsidies, what form should they take, and how should universal service providers be selected?

(a) How service providers should be selected

In the past, supply-driven approaches, which were measured by infrastructure deployment on a national level, were typically adopted for large universal service projects. A single provider, usually the incumbent, was selected to provide universal services over a wide geographical area with a narrow set of technologies.¹⁶⁴ Lie argues that while top-down (supply-driven) approaches could still be used in some cases, where large-scale projects are undertaken, competitive methods of selecting universal service providers should be considered.¹⁶⁵

Contestable bidding has been identified as one possible method to identify the most efficient universal service provider and minimise subsidies. Contestable bidding for universal service often takes the benefits of in-market competition for granted.¹⁶⁶ This can mitigate the duplicate investments in telecommunications infrastructure in high-cost (rural and isolated) areas. It can also help to avoid overestimated requirements for subsidies by the bidders or escape the price constraint by lowering quality.¹⁶⁷ In addition, contestable bidding is a solution for dealing with asymmetric information factors between regulators and telecommunications operators in determining the net cost for the delivery of universal services. Accordingly, contestable bidding is probably the best way to arrive at the least actual subsidy for universal service delivery.¹⁶⁸

Some studies focus on the ‘reverse auction’ for universal service. Milgrom proposed the idea of ‘reverse auctions’ for universal service obligations more than a decade ago¹⁶⁹ and since then, Weller has developed a more specific proposal.¹⁷⁰ A reverse auction¹⁷¹ is a

¹⁶⁴ Eric Lie “Next Generation Networks and Universal Access: The Challenges Ahead” (paper presented to the ITU’s Global Symposium for Regulators (GSR), Dubai, 5-7 February 2007), at 21.

¹⁶⁵ Ibid.

¹⁶⁶ Laffont and Tirole, above n 128, at 251.

¹⁶⁷ Ibid.

¹⁶⁸ Edgardo Sepulveda and McCarthy Tetrault “Minimum-subsidy auctions for public telecommunications access in rural areas” in John Alden (ed) *Trends in Telecommunications Reform 2003: Promoting Universal Access to ICTs Practical Tools for Regulations* (ITU, 2003) 85 at 89.

¹⁶⁹ See Paul Milgrom “Procuring Universal Service: Putting Auction Theory to Work” (lecture presented to the Royal Swedish Academy of Sciences, 1996).

¹⁷⁰ See Dennis Weller “Auction for Universal Service Obligations” (1999) 23 Telecommunications Policy 645-674.

possible option for achieving lower universal service fund subsidies.¹⁷² It is one in which companies bid for subsidies, and the firm which proposes the lowest subsidy to provide universal service wins.¹⁷³

Some countries¹⁷⁴ have used this type of auction with some success. Experience from these countries demonstrates that this auction system can bring subsidies down substantially, and that expenditure is no greater than it would be without an auction. For instance,¹⁷⁵ in Chile between 1995 and 1999, the average winning subsidy was about half the maximum subsidy offered for projects. Similarly, in Peru, in 1999-2000, the average winning subsidy was just 25 percent of the subsidy ceiling. These results show that this method of distributing funds for the delivery of universal services is both feasible and effective.¹⁷⁶

(b) Type of the subsidies

Appropriate mechanisms for universal service subsidies, including types and levels, help in using fund resources efficiently and enhance technological development to benefit under-served and unserved residents, especially in rural areas.¹⁷⁷

Policies which focus on universal access target the availability of access to telecommunications and Internet services by providing subsidies for the development of telecommunications and Internet infrastructures in rural and isolated areas, and for the development of shared and communal access such as public service centres.¹⁷⁸ These subsidies can be either by non-refundable subsidies or loans with favourable conditions, or through minimum subsidy auctions for projects which enhance public service access in rural areas.

¹⁷¹ Different from the traditional auction, the bidding winner for the projects of universal service delivery is the bidder with the lowest requirements for subsidies.

¹⁷² Scott Wallsten "Reverse Auction and Universal Telecommunications Service: Lessons from Global Experience" (2008) Social Science Research Network, at 4 <papers.ssrn.com/sol3/papers.cfm?abstract_id=1136836>.

¹⁷³ *Ibid*, at 3.

¹⁷⁴ Some of these countries are Australia, Chile, Columbia, Dominican Republic, Guatemala, India, Nepal, Peru, Malaysia, Russia, Taiwan and Greece.

¹⁷⁵ Sepulveda and Tetrault, above n 168, at 89.

¹⁷⁶ Wallsten, above n 172, at 14.

¹⁷⁷ Maddens, above n 73, at 10.

¹⁷⁸ InfoDev Programme of the World Bank, above n 8, at [1.1.1].

On the other hand, a universal service policy whose target is universal service normally provides subsidies for enhancing the affordability of services for residents in rural and isolated areas. Types of subsidies for this policy include subsidies for end-user equipment, and monthly subscription fees or a fixed per minute calling cost.

An increasing number of countries have included both universal access and universal service targets within their universal service policies.¹⁷⁹ The key criteria for determining types and levels of subsidies from universal service funds should be cost-based and one-off subsidies for universal access, to encourage cost-effective delivery of universal service in non-viable economic areas, linked to optimal outputs/outcomes.¹⁸⁰ One-off subsidies would avoid too much dependence of operators on subsidies without a willingness to reduce costs. Various means of improving the cost-effective subsidies, for example competitive auctions, have been explored.¹⁸¹ One-off subsidy is a good option not only for selecting the most economically efficient universal service provider,¹⁸² but also for projects that develop telecommunications and Internet infrastructures and public service access centres in rural and isolated areas.¹⁸³

(c) Who should be subsidised

Universal service policies, whether with regard to availability or use, are targeted at unserved geographic areas and towards customers who cannot obtain a competitively provided service. Appropriate determination of priority target groups (beneficiaries) and geographical locations (universal service-qualified areas) enable governments to enhance the efficiency and effectiveness of universal service funds.¹⁸⁴ In addition, determining what should be subsidised from these funds also helps to determine exactly which funds are needed, and to allocate universal service levies. Clear and appropriate statements by target groups help to mitigate unnecessary burdens levied on telecommunications operators while meeting public demand and contributing to the

¹⁷⁹ Ibid, at [4.1.1].

¹⁸⁰ International Telecommunications Union, above n 98, at 83.

¹⁸¹ Xavier, above n 4, at 49.

¹⁸² See Chapter Two II.D.3.(a).

¹⁸³ Sepulveda and Tetrault, above n 168, at 85.

¹⁸⁴ David Townsend "Creation and Operation of Universal Service Funds" in John Alden (ed) *Trends in Telecommunications Reform 2003: Promoting Universal Access to ICTs Practical Tools for Regulators* (International Telecommunications Union, 2003) 67 at 78.

sustainable outcomes of universal service delivery. Interventions and distortions in otherwise competitive markets, thus, could be limited accordingly.¹⁸⁵

There are a number of approaches to defining target areas and target population groups.¹⁸⁶ Priority target groups and geographical locations (universal service-qualified areas) are those where it is uneconomic for private providers to offer services.¹⁸⁷ Telecommunications indicators, performance costs and demand estimates should be used in a comprehensive analysis of socio-economic conditions and demographic locations in order to determine universal service targeted groups and areas.¹⁸⁸ Residents in the most remote, rural or isolated geographic areas should receive priority. Infrastructure and geographical service gaps could be used in defining the most precise target areas.¹⁸⁹ This approach is adapted to the situation of NGNs (Next Generation Networks), whose deployment in many countries is still at an early stage.¹⁹⁰

In summary, there are a number of key requirements for efficient and effective performance of universal service delivery. They centre on two main concerns in public administration: institutional arrangements and funding administration. In order to ensure efficient and effective institutional arrangements, governments should ensure performance accountability and transparency. At the same time, funding administration should aim to achieve economic efficiency rather than create unnecessary financial burdens on operators, and to ensure competitive and technological neutrality, and non-discrimination between operators.

Part III of Chapter Two will review certain basic concepts of public administration that could serve as key factors for understanding and proposing the best possible practices of universal service institutional arrangements and funding administration.

III Basic Concepts of Public Administration Related to Universal Service

When universal service delivery is provided by a public monopoly or a regulated operator, governments have greater control over the activities and processes of the

¹⁸⁵ Levin, above n 29, at 97.

¹⁸⁶ International Telecommunications Union, above n 98, at 57.

¹⁸⁷ Townsend, above n 184, at 78.

¹⁸⁸ *Ibid.*

¹⁸⁹ International Telecommunications Union, above n 98, at 57.

¹⁹⁰ *Ibid.*, at 58.

provider. In a competitive universal service delivery market, where there can be a range of providers, governments as far as is possible need to ensure the best performance management practice.

This section examines three fundamental issues - accountability, transparency, and efficiency and effectiveness - in some detail because universal service policies (as public policies) are increasingly dependent on best management practices in both the public and corporate sectors. This section focuses on performance accountability and transparency in the public sector. Accountability and transparency are widely accepted as foundational principles of performance management in public administration.¹⁹¹ In this thesis, they are also key factors that underpin proposals about reform in the provision of telecommunications universal service in Vietnam.

A Performance Accountability

Accountability is a key principle underlying the processes whereby public sector organisations carry out their functions and are accountable for their decisions or actions.¹⁹² Without accountability, governments and bureaucracies face many issues, high amongst them being potential corruption.¹⁹³

1 Concept of accountability

Accountability can be defined in many ways. A common definition is the ‘obligation or responsibility’¹⁹⁴ of persons or institutions to ‘explain, answer, justify’¹⁹⁵ and ‘defend’¹⁹⁶ ‘their actions or what they have done and how well it has been done’.¹⁹⁷ They are required to ‘explain, answer (and) justify’ to another party who will ‘observe, evaluate,

¹⁹¹ Elia Armstrong “Integrity, Transparency and Accountability in Public Administration: Recent Trends, Regional and International Developments and Emerging Issues” (2005) The United Nations, at 2 <unpan1.un.org/intradoc/groups/public/documents/un/unpan020955.pdf>.

¹⁹² Owen Hughes *Public Management and Administration* (Palgrave Macmillan, New York, 2003) at 240.

¹⁹³ Mark Bovens *Analysing and Assessing Public Accountability: A Conceptual Framework* (European Governance Paper No. C-06-01, 2006) at 25.

¹⁹⁴ Patricia Day and Rudolf Klein *Accountability: five public services* (Tavistock Publications Ltd, London, 1987) at 5.

¹⁹⁵ Mark Bovens “Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism” (2010) 33(5) *West European Politics* 946 at 958.

¹⁹⁶ Carl Friedrich “Public Policy and the Nature of Administrative Responsibility” in Carl Friedrich and Edward Mason (ed) *Public Policy: A Yearbook of the Graduate School of Public Administration* (Harvard University Press, Cambridge, 1940) 3 at 20.

¹⁹⁷ Robert Behn *Rethinking Democratic Accountability* (Brookings Institution Press, Washington, 2001) at 10.

and scrutinise¹⁹⁸ their performance and can give feedback, including reward and penalties.¹⁹⁹

A formal performance accountability relationship consists of four key components: control, answerability, responsibility, and responsiveness.

Control: accountability aims to ensure that agents and subordinates respond in accordance with the expectations or directions of their superiors. Mulgan notes that the accountability of public officials and their superiors is based on essentially unequal relationships; officials take directions from their superiors and accept sanctions for unsatisfactory performance.²⁰⁰ Identifying who is responsible for political outcomes when different officials contribute to the decision and policy-making processes is a considerable challenge.²⁰¹

Answerability: involves both answering questions and apportioning blame.²⁰² Public organisations have obligations to provide reasons for their actions, and why they fail to meet performance objectives.²⁰³

Responsibility: accountability and responsibility are not exactly the same.²⁰⁴ Responsibility involves an obligation and a possibility of being called to account, while accountability implies a compulsory requirement to account for an obligation.²⁰⁵

Responsiveness:²⁰⁶ accountability places emphasis on governments meeting the preferences, and needs of people,²⁰⁷ or of key stakeholders.²⁰⁸ Responsiveness focuses

¹⁹⁸ Bovens, above n 195, at 958.

¹⁹⁹ Ibid, at 951.

²⁰⁰ Richard Mulgan "Accountability: An Ever-Expanding Concept" (2000) 78 (3) Public Administration 555 at 570.

²⁰¹ Mark Bovens *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (Cambridge University Press, Cambridge, 1998) at 46.

²⁰² Bovens, above n 195, at 951.

²⁰³ Ibid, at 952.

²⁰⁴ Amir Licht "Accountability and Corporate Governance" (2002) Social Science Research Network, at 9.

²⁰⁵ Ibid.

²⁰⁶ Bovens, above n 193, at 5.

²⁰⁷ Mulgan, above n 200, at 566.

²⁰⁸ Bovens, above n 195, at 958.

on making a government meet popular demands.²⁰⁹ Public agencies are expected to be responsive to other actors within the political system.²¹⁰

2 Types of accountability

Accountability is classified in many different ways. These include political, public, managerial, professional, personal and organisational accountability, and financial, fairness and performance.²¹¹ The section provides a brief review of the six main kinds of accountability.

(a) Hierarchical (also referred to as organisational) accountability relationships form what is traditionally known as accountability.²¹²

(b) Legal accountability relationships are consistent with hierarchical accountability relationships. They refer to the relationship between two autonomous agencies, and involve detailed external oversight of performance in accordance with performance obligations.²¹³

(c) Political accountability relationships enable managers to make choices in dealing with the concerns of key stakeholders and the general public.²¹⁴

(d) Financial accountability is based on law, regulation and agreement. Any public organisation is obliged to use public funds appropriately.²¹⁵

(e) Accountability for fairness requires public servants/organisations having responsibilities to treat all citizens fairly.²¹⁶ Fairness accountability also involves protection from abuse of power.²¹⁷

²⁰⁹ Mulgan, above n 200, at 566.

²¹⁰ Hector Arambula "Toward a Theoretical Framework of Accountability for Performance in Public Organisations: A Review and Research Agenda" (paper presented to the EGPA Conference, Rotterdam, 1-2 September, 2008), at 4.

²¹¹ Behn, above n 197, at 6.

²¹² Barbara Romzek "Dynamics of Public Sector Accountability in an Era of Reform" (2000) 66 (1) *International Review of Administrative Sciences* 21 at 24.

²¹³ *Ibid.*, at 25.

²¹⁴ Barbara Romzek "Where the Buck Stops: Accountability in Reformed Public Organisations" in Patricia Ingraham, James Thompson and Ronald Sanders (ed) *Transforming Government: Lessons from the Reinvention Laboratories* (San Francisco, 1998) 197 at 198.

²¹⁵ Behn, above n 197, at 8.

²¹⁶ *Ibid.*

²¹⁷ Hughes, above n 192, at 246.

(f) Performance accountability involves fulfilling expectations of citizens in a satisfactory manner and being accountable to all citizens. In order to hold a public agency accountable, a clear benchmarking of performance (such as objectives or targets) must be established for the outcomes the agency will achieve, the consequences it will create, and how well it has done compared with the expectations that have been set for it.²¹⁸

3 Accountability: the shift to improved performance accountability

The traditional public administration paradigm focuses mainly on efficiency, hierarchical authority (through law), procedure, process and professional accountability in both financial and legal senses.²¹⁹ Certain problems arise in this model. One is related to the relationship between politics and administration. The politician can “be accountable in the system, whereas the administrator is neutral and anonymous and not associated with particular policies”.²²⁰ This means that administrators can avoid accountability if policy and implementation plans go wrong or fail. Their excuse can be that political leaders ordered them to implement such a policy or plan.²²¹ Accountability, therefore, is always potentially problematic in the traditional model because of the political and bureaucratic interface.²²²

The improvement of performance accountability is crucial for better public administration. It is essential to have an effective separation between politics and administration.²²³ Public organisations should also make roles, responsibilities, objectives, and citizens’ requirements absolutely clear.²²⁴ This includes the delegation of responsibility to lower public levels²²⁵ and the encouragement of public involvement in policy, planning and designing, and implementation.²²⁶ Policy makers and administrators should ideally be open to examination, and to public comments and critique.²²⁷ Public

²¹⁸ Behn, above n 197, at 10.

²¹⁹ Ibid, at 30.

²²⁰ Hughes, above n 192, at 245.

²²¹ Ibid.

²²² Ibid.

²²³ Ibid, at 254

²²⁴ Mark Harrison Moore *Creating public value: Strategic management in the government* (Harvard University Press, Cambridge, 1995) at 278.

²²⁵ Behn, above n 197, at 64.

²²⁶ János Bertók (ed) *Public Sector Transparency and Accountability: Making It Happen* (OECD, Paris, 2002) at 203-204.

²²⁷ Hughes, above n 192, at 240.

organisations should produce documents such as statements of functions and responsibility, organisational strategies, and codes of conduct. Plans are also important for accountability. Public agencies should also provide their performance information on outputs/outcomes through reports to external, independent organisations, and to the public.²²⁸

However, there are still some accountability concerns in the new public management paradigm. Firstly, changes often occur in setting performance standards for individuals and agencies in the context of public sector reform.²²⁹ Therefore, to make public agencies accountable for performance, it is essential to establish “expectations for the outcomes that agencies will achieve, the consequences that they will create, and the impact that they will have”.²³⁰ Secondly, because it is challenging to identify organisational objectives and long-term outcomes, as well as citizens’ demands, the new model is structured so as to improve relationships with citizens. Agencies are expected to improve the quality of public goods and services through disclosing details of administration to the public, and encouraging public participation in decision-making.²³¹ Public organisations must be accountable for financial expenditure and financial performance.²³² Thirdly, as the focus of individual organisations is directly on their own objectives, priorities and budget management, their accountability to government policy and objectives can often be ignored.²³³

A system of accountability helps clarify the key relationship between the administration of government and political systems.²³⁴ The overlap of public organisations’ responsibilities and incomplete or unclear legal specifications are common issues for governments. These include the obligation of public organisations to be suitably responsive to the public in terms of provision of performance information and to encourage the public to be more involved in designing and monitoring policies.

²²⁸ Guy Peters “Performance-Based Accountability” in Anwar Shah (ed) *Performance Accountability and Combating Corruption* (The World Bank, Washington, 2007) 15 at 16.

²²⁹ Hughes, above n 192, at 242.

²³⁰ Behn, above n 197, at 10.

²³¹ OECD “Serving the Economy Better, Occasional Papers on Public Management” (1991), at 7.

²³² International Bank for Reconstruction and Development *Public Expenditure Management Handbook* (World Bank, Washington, 1998) at 24.

²³³ Hughes, above n 192, at 254.

²³⁴ *Ibid.*

The accountability methods of the New Public Management²³⁵ eliminate the politics/administration dichotomy and other issues of the old model. Public servants have adequate power and resources to conduct their mission. They are accountable for managing outputs and outcomes. However, there are still considerable gaps in the measurement of managerial accountability and performance. Furthermore, the requirement of effective accountability for ‘managing for outcomes’ is different from that based on outputs and outcomes.

B Transparency

Transparency is an important feature of performance accountability.²³⁶ It helps assess the efficiency and effectiveness of government policies and programmes, and public organisations.²³⁷ Transparency, and openness and access to government-held information are broadly considered as remedies for the potential shortcomings in the operations of government in a democracy.²³⁸

1 The concept of transparency

Transparency can be understood as “the availability and accessibility of reliable, relevant and timely performance information”.²³⁹ It is also a measure of the freedom of both internal and external parties to examine, evaluate,²⁴⁰ and give feedback or comment²⁴¹ on “government’s rules, regulation and decisions”,²⁴² and on “policy intention, formulation and implementation”.²⁴³

²³⁵ New Public Management is a generic term for an overall movement for the modernisation of public institutions and reforms of public administration for outcomes. See Kuno Schedler and Isabella Proeller *Outcome-Oriented Public Management: A Responsibility-Based Approach to the New Public Management* (Information Age Publishing Inc, Charlotte, 2010) at 5.

²³⁶ Pat Barrett “Some Current Issues in Accountability” (2001) Australian National Audit Office, at 10 <www.anao.gov.au/uploads/documents/PAPER.doc>.

²³⁷ Ibid.

²³⁸ Jeremy Pope “Dimensions of Transparency in Governance” (paper presented to the 6th Forum on Reinventing Government Towards Participatory and Transparent Governance, Seoul, 24-27 May 2005), at 13.

²³⁹ Seiichi Kondo “Fostering Dialogue to Strengthen Good Governance” in János Bertók (ed) *Public Sector Transparency and Accountability: Making It Happened* (OECD, Paris, 2002) 7 at 7.

²⁴⁰ Seiichi Kondo “Opening Remarks for OECD/OAS forum on Ensuring Accountability and Transparency in the Public Sector” (OECD, Brazil, 5-6 December 2001), at 6.

²⁴¹ Moore, above n 224, at 299.

²⁴² Christopher Hood “Transparency in Historical Perspective” in Christopher Hood and David Heald (ed) *Transparency: the key to better governance* (Oxford University Press, 2006) at 4.

²⁴³ Kondo, above n 239, at 4.

A public organisation's transparency can be assessed by the extent of accessibility to performance information about its processes which it makes available,²⁴⁴ and its willingness not only to respond to citizens,²⁴⁵ but also to encourage them to participate in and monitor its policy-making and performance.²⁴⁶

The production of performance information has received considerable attention in public sector performance measurement and management. It contributes to systematic and in-depth evaluation of public policies and programmes.²⁴⁷ Performance information and reporting of public programmes and how taxpayers' money is spent helps to demonstrate the performance accountability of government officers to the public, and builds public trust in government institutions.²⁴⁸ Performance information is significantly neglected by some governments. However, there is increasing evidence that using performance information leads to greater effectiveness.²⁴⁹

Transparency can also enhance public support by creating more opportunities for public involvement, and encouraging public trust in the legitimacy of government actions.²⁵⁰ In the long term, it makes policy-making and implementation processes more equitable, efficient and effective,²⁵¹ and reduces the need for duplication. Transparency helps lower the risk of both financial crisis²⁵² and corruption. It calls both individuals and public organisations to a greater degree of performance accountability.²⁵³ The establishment of independent (auditing) agencies is one method of sponsoring greater answerability and

²⁴⁴ Mark Bovens "Public Accountability" in Ewan Ferlie, Laurence Lynn and Christopher Pollitt (ed) *The Oxford Handbook of Public Management* (Oxford University Press, 2007) 946 at 959.

²⁴⁵ Eric Welch and Charles Hinnant "Internet Use, Transparency and Interactivity Effects in Trust in Government" (paper presented to the 36th Hawaii International Conference on System Science, Hawaii, 2003), at 2.

²⁴⁶ Deirdre Curtin and Albert Jacob Meijer "Does Transparency Strengthen Legitimacy?" (2006) 11 (2) *Information Polity* 109 at 111.

²⁴⁷ Paul Thomas *Performance Measurement, Reporting, Obstacles and Accountability: Recent Trends and Future Directions* (ANU E Press, Australian National University, Canberra, 2006) at 41.

²⁴⁸ Alfred Tat-Kei Ho "Reporting Public Performance Information: the Promise and Challenges of Citizen Involvement" in Wouter Van Dooren and Steven Van De Walle (ed) *Performance Information in the Public Sector: How It Is Used* (Palgrave MacMillan, New York, 2008) 192 at 194.

²⁴⁹ Alexander Kroll "Performance leadership: towards an individualist approach to explain performance information use" (paper presented to the annual Conference of the European Group for Public Administration Seminar for Doctoral Students and Junior Researchers, Malta, 1 September 2009), at 4.

²⁵⁰ Jenille Fairbanks, Kenneth Plowman and Brad Rawlins "Transparency in government communication" (2007) 7 (1) *Journal of Public Affairs* 23 at 28-29.

²⁵¹ Suresh Shende and Tony Bennett "Concept paper 2: Transparency and Accountability in Public Financial Administration" (2004) The United Nations, at 14 <unpan1.un.org/intradoc/groups/public/documents/un/unpan020955.pdf>.

²⁵² International Monetary Fund "Fiscal Transparency, Accountability, and Risk" (2012) International Monetary Fund, at 4 <www.imf.org/external/np/pp/eng/2012/080712.pdf>.

²⁵³ Fairbanks, Plowman and Rawlins, above n 250, at 29-30.

transparency.²⁵⁴ Independent agencies are free to scrutinise information and analyse financial issues, and thus can make crucial contributions to transparency.²⁵⁵ Democratic structures which private-public partnerships demand are also considered as successful transparency strategies.²⁵⁶ Democratic cultures and societies by their very nature improve transparency.²⁵⁷

In order to obtain reliable, relevant and timely information about the performance of public organisations, it is essential to establish suitable measurements for their performance. These measurements should not simply be about accounting for finance or answering for performance, but also the quality of effective decision-making.²⁵⁸ This leads to the need for a system for acquiring different types of performance information, such as annual reports.²⁵⁹

Performance information allows public managers to create logical flow and to link performance monitoring, performance evaluation and performance management.²⁶⁰ This helps performance information to be used effectively, such as for guiding programme planning and improving future performance.²⁶¹

As public organisations use public resources, they should be ready to explain where and how public money has been used. They should provide all essential financial documentation.²⁶² This includes financial reports such as: financial statements and auditor's reports, statement of the aims and objectives of their organisation, a statement

²⁵⁴ Derick Brinkerhoff "Taking Account of Accountability: A conceptual Overview and Strategic Options" (2001) U.S. Agency for International Development, at 24 <www1.usaid.gov/our_work/democracy_and.../ipc/wp-14.pdf>.

²⁵⁵ Fred Schenkelaars and Imram Ahmad "Concept paper 4: Access to Information, Transparency and Accountability" (2004) The United Nations, at 7.

²⁵⁶ Ibid.

²⁵⁷ Bryan Rosendorff, James Hollyer and James Vreeland "Democracy and Transparency" (2011) 73 (4) The Journal of Politics 1191 at 1202.

²⁵⁸ Karen Baehler "Managing for Outcomes: Accountability and Thrust" (2003) 62 (4) Australian Journal of Public Administration 23 at 25.

²⁵⁹ Australian National Audit Office "Better Practice Guide: Better Practice in Annual Performance Reporting" (2004), at 7-8 <www.anao.gov.au/uploads/documents/Better_Practice_in_Annual_Performance_Reporting.pdf>.

²⁶⁰ Bill Ryan "Learning Managing for Outcomes - the Queensland case study" (Institute of Public Administration Australia, Sydney, 2004), at 6.

²⁶¹ Ibid, at 3.

²⁶² Hughes, above n 192, at 240.

on how the board or committee is appointed, its term of appointment and remuneration, performance standards, and any other commitments and liabilities.²⁶³

2 Transparency: its problems in traditional and managerial models

Insufficient transparency in public organisations is a problem in both traditional and new managerial models. The traditional management model is based mainly on hierarchical relationships.²⁶⁴ This is its main drawback.

By contrast, in new managerial models, there is sometimes too much concentration on transparency which can negatively affect the performance of an organisation. An over-concentration on transparency can create a reduction of decision making and promote rule-obsession in public organisations.²⁶⁵

In the traditional management model there was a clear lack of transparency. This involved many factors: inappropriate law and regulation on information availability, lack of accessibility to performance information, and inadequate systems or methods for collecting evidence, monitoring, evaluating, forecasting and reviewing.

By contrast, the New Public Management model, with support from politicians, has promoted decentralisation and deregulation, and has devolved much better budget management. However, it has not always succeeded in establishing perfect collaboration, nor coordination of systems and measurement techniques for strategic implementation. This has led to difficulties in collecting data needed to achieve the overall goals and outcomes.

C Performance Budgeting: Efficiency and Effectiveness

The third principal issue to be examined is financial efficiency and effectiveness (performance budgeting). Performance budgeting aims at enhancing expenditure by

²⁶³ International Federation of Accounts “Governance in the Public Sector: A Governing Body Perspective” (2001) International Federation of Accounts, at [298] <www.ifac.org/sites/default/files/publications/files/study-13-governance-in-th.pdf>.

²⁶⁴ Hughes, above n 192, at 241.

²⁶⁵ Mark Bovens “Public Accountability” in Ewan Ferlie, Laurence Lynn and Christopher Pollitt (ed) *The Oxford Handbook of Public Management* (Oxford University Press, New York, 2007) 182 at 194.

linking funding to the results of public policies and programmes.²⁶⁶ Performance budgeting focuses directly on the objectives of appropriate prioritisation of expenditures, and service efficiency and effectiveness.²⁶⁷ Appropriate prioritisation of expenditure refers to the allocation of funds to public programmes or policies which are most effective in meeting social needs.²⁶⁸ Efficiency refers to the delivery of services at the lowest possible cost without sacrificing quality.²⁶⁹ By contrast, effectiveness refers to the extent to which services deliver the benefits which it is supposed to deliver to society,²⁷⁰ and whether stated objectives/targets are achieved.²⁷¹ This indicates the relationships between the intended and actual effect of an activity.²⁷² It requires both clear organisational objectives and measurement results, including long-term outcomes.²⁷³

Effectiveness and efficiency concern the relationship between basic concepts of inputs, outputs and outcomes in the public funding/budgeting process.²⁷⁴ Efficiency is widely accepted by scholars as the output-input ratio.²⁷⁵ Effectiveness, on the other hand, relates to inputs or outputs with regard to the desired final objectives (eg public policies).²⁷⁶

1 Basic concept

Input is the first requirement for the measurement of efficiency and effectiveness. It is generally defined as all resources to be deployed in the production of an output and the eventual achievement of outcomes.²⁷⁷ This may include either monetary or non-monetary resources.²⁷⁸

²⁶⁶ Marc Robinson and Duncan Last “A Basic Model of Performance-Based Budgeting” (International Monetary Fund, 2009), at 2.

²⁶⁷ Marc Robinson “Performance-Based Budgeting” (2007) Regional Centers for Learning on Evaluation and Results, at 9 <www.theclearinitiative.org/PDFs/CLEAR_PB_Manual.pdf>.

²⁶⁸ *Ibid.*

²⁶⁹ Robinson, above n 267, at 10.

²⁷⁰ *Ibid.*, at 9.

²⁷¹ Report of the House of Representatives Standing Committee on Finance and Public Administration in Not Dollars Alone: Review of Financial Improvement Management Programme (Australian Government, Canberra, 1990), at 74.

²⁷² Ryan, above n 260, at 7.

²⁷³ Ryan, above n 260, at 5-6.

²⁷⁴ Mandl, Dierx and Ilzkovitz, above n 136, at 2.

²⁷⁵ See Cristiano Codagnone and Trond Arne Undheim “Benchmarking e-Government: Tools, Theory, and Practice” in Cristiano Codagnone (ed) *Efficiency and Effectiveness* (European Journal of e-Practice, 2008).

²⁷⁶ Mandl, Dierx and Ilzkovitz, above n 136, at 3.

²⁷⁷ Cristiano Codagnone and Trond Arne Undheim “Benchmarking e-Government: Tools, Theory, and Practice” in Cristiano Codagnone (ed) *Efficiency and Effectiveness* (European Journal of e-Practice, 2008) 4 at 10.

²⁷⁸ Mandl, Dierx and Ilzkovitz, above n 136, at 3.

Output is assumed to be less influenced by external variables and more under the control of the performing organisation or institution.²⁷⁹ The lower the input for a given output or the greater the output for a given input, the more economically efficient the performance is.²⁸⁰

Outcome, the last core concept, which is often blurred with output and sometimes used interchangeably,²⁸¹ is defined as the achievement of the underlying objectives of (public) policies.²⁸² Although similar to output, outcome may be influenced by multiple external factors, including regulatory frameworks, institutional arrangements, socio-economic background/situation, and country-specific features.²⁸³

2 Measurement and improvement of efficiency and effectiveness

Measurement and improvement of efficiency and effectiveness in public sector performance plays a key role in the political agenda of most countries.²⁸⁴ Assessments of efficiency involve measuring observed outputs over and against the utilised inputs in terms of maximum gains.²⁸⁵ The related information reflects efficiency by combining inputs and outputs, while the information collected, by comparing outputs and results, indicates gains. If the relevant component factors cannot be compared, neither inputs, outputs or results can provide true indicators of efficiency and effectiveness.²⁸⁶ Different methods have been developed to assess them,²⁸⁷ including the evaluation of indexes or performance indicators and efficiency frontiers.

One way of evaluating efficiency and effectiveness is by using indexes and performance indicators of other or similar countries, such as public sector performance indexes and public sector efficiency indicators.²⁸⁸ This method is often criticised as being incapable

²⁷⁹ Ibid.

²⁸⁰ Mandl, Dierx and Ilzkovitz, above n 136, at 3.

²⁸¹ Afonso Antonio, Schuknecht Ledger and Vito Tanzi "Public Sector Efficiency: An International Comparison" (2005) 123 Public Choice 321 at 321.

²⁸² Mandl, Dierx and Ilzkovitz, above n 136, at 7.

²⁸³ Ibid, at 3 and 15.

²⁸⁴ Ibid, at 1.

²⁸⁵ Santiago Herrera and Gaobo Pang "Efficiency of Public Spending in Developing Countries: An Efficiency Frontier Approach" (World Bank Policy Research Working Paper 3645, 2005), at 3.

²⁸⁶ Hundman N S and Anderson R "The Use of Performance Information in External Reporting: An Empirical Study of UK Executive Agencies" (1995) 11 (11) Financial Accountability and Management 1 at 9.

²⁸⁷ Mandl, Dierx and Ilzkovitz, above n 136, at 7.

²⁸⁸ Afonso, Ledger and Tanzi, above n 281, at 321-322.

of including information on the maximum possible achievements.²⁸⁹ Inter-country evaluations are regarded as a very useful way to compare a country's public performance with that of others, although they can give false readings about the functioning of a country's own economy.²⁹⁰

An alternative method, reflected in much of the literature, is based on the concept of efficiency frontiers.²⁹¹ This option demonstrates that efficiency can be improved either by increasing the level of output while keeping the input unchanged (output efficiency), or by maintaining a fixed level of output but reducing the amount of input incurred (input efficiency).²⁹²

In summary, the evaluation of the efficiency and effectiveness levels of public policies is vital for policy makers. It should be noted that no one approach is strictly preferable to any other regardless of the selection of performance indicators or efficiency frontiers - parametric or non-parametric methods, or a combination of these methods - to measure efficiency and effectiveness levels. In the final analysis the method chosen depends on the preference of policy-makers. With regard to the performance and measurement of universal service delivery, the evaluation of the efficiency and effectiveness mostly involves funding arrangements, including allocation of levies and subsidies. Universal service levies should be kept to a minimum and subsidies should not be squandered.²⁹³ In particular, allocation of levies should have a clear link with the actual costs of service delivery and should mitigate financial burdens on operators. On the other hand, subsidies should be cost-based effective and use the principles of Output-Based Aid (OBA)²⁹⁴ so as to ensure well-spent money, best benefits to appropriately identified beneficiaries and to link subsidies to the delivery of specific services, outcomes or outputs.²⁹⁵

²⁸⁹ Mandl, Dierx and Ilzkovitz, above n 136, at 8.

²⁹⁰ Mandl, Dierx and Ilzkovitz, above n 136, at 14.

²⁹¹ Luis Murillo-Zamorano "Economic Efficiency and Frontier Techniques" (2005) 18 (1) Journal of Economic Surveys 33 at 33.

²⁹² Codagnone and Undheim, above n 277, at 10.

²⁹³ InfoDev Programme of the World Bank, above n 8, at [5.3.3].

²⁹⁴ OBA is a results-based financing mechanism under which a basic service provision (such as water supply, power and telecommunications universal services) is contracted to a private sector operator, and subsidies are paid to the provider after the delivery of specific outputs. See general World Bank "A Review of the Use of Output-Based Aid Approaches" (2009) <www.worldbank.org/ida/papers/IDA15_Replenishment/Mid_Term/OBA_IDA15MTR.pdf>; InforDev Programme of the World Bank "ICT Regulation Toolkit: Output-Based Aid (OBA) explained (2012) <www.ictregulationtoolkit.org/en/PracticeNote.3159.html>.

²⁹⁵ Msimang, above n 101, at 90.

IV A Possible Best Practice Model for Universal Service Policy

The previous parts of this chapter have provided an overview of basic concepts relating to public administration and performance management, including foundational principles and approaches, which are parts of the core theoretical foundation for an analysis of universal service policies, and the management and funding mechanisms of universal service funds. These include major principles such as accountability, transparency and performance budgeting, which are key factors and vital requirements in ensuring and enhancing the success of public policies in terms of effectiveness and economic efficiency, while at the same time pursuing and balancing social policy objectives.

An optimum universal service policy should include: (1) precise definition of the scope of these services in line with technological advancements and the needs of customers; and (2) models of universal service funding, revenue sources and governance structure of universal service funds.

All these structures would need to have the following significant characteristics: (a) constant improvement of economic efficiency and effectiveness, (b) a focus on outcomes and outputs of universal service policies, (c) clear pursuit of social policy objectives, and (d) a focus on ensuring principles of accountability and transparency as precursory requirements of institutional arrangements for universal service fund administration. Finding the best blend of structures, regulatory frameworks, and funding models is an on-going process for most countries, although a best practice model must contain the key characteristics described above.

These characteristics will be used in Chapter Five to analyse the universal service policy in Vietnam so as to propose an improvement of the universal service legal framework and institutional arrangements in that country, and a practical implementation in line with the optimum model of economic efficiency and effectiveness.

Below is a schematic outline of the key elements and processes which constitute the basis of universal service policies in a potential best practice or most economically efficient and effective model:²⁹⁶

A Scope of Universal Services

1) Traditional voice (fixed) telephone should continue to be included in universal service policies. However, policies should also take into account alternative voice services, either wired or wireless, dependent on specific geographical conditions, the needs of citizens, and costs.

2) Broadband services should be included in universal service policies. However the definition should be specified according to the needs of customers in terms of required minimum speeds and applications of multiple/convergent services.

B Institutional Arrangements for Universal Service Fund Administration

1) The administrator of the universal service fund should be an independent agent/agency with a full-time administrator/CEO and a Board of Trustees or Board of Directors, which should consist of public sector representatives and external stakeholders (eg representing regulator and industry).

2) The administrator should have separate accounting structures and systems for the operation of the universal service policies, and not be involved with any other regulatory activities, nor be linked with other institutions that may manage the daily operation of universal service funds. The accounts of universal service funds should be independently audited on an annual basis and the results made public.

3) There should be specific and feasible rules for procurement, accounting standards, criteria for selection of universal service projects, competitive bidding processes and procedures, specified subsidy procedures, and rules about participation in cases of public-private partnership.

4) There should be a clear governance framework for universal service funds provided in

²⁹⁶ See general International Telecommunications Union, above n 98; InfoDev Programme of the World Bank, above n 8; InfoDev Programme of the World Bank, above ch 1, n 6; International Telecommunications Union, above n 146.

a legal framework and guidelines, including a description of the role of the Board, the roles of the executive and staff, and financial management and reporting mechanisms.

5) There should be public periodic reports on the collection and subsidy of levies and other inflows, and on other key issues affecting the fund in a given year.

6) Audited reports on the progress and performance of universal service projects should be provided regularly to responsible authorities, and made available to the public and stakeholders.

7) All information related to the implementation of universal service policies should be available to stakeholders and to the public.

8) Minimum administrative costs should be established or a ceiling set for the percentage of administrative costs in comparison to the resources of the universal service fund.

C Sources of Universal Service Fund

1) The determination of universal service fund revenue sources should follow principles of economic efficiency and avoidance of market distortion.

2) There should be competitive neutrality and non-discrimination in determining telecommunications operators to contribute to universal service funds.

3) Technology neutrality - there should be no discrimination by technology or by service.

4) Transparency - there should be the opportunity for all stakeholders/interested parties to have access to information, to the maximum extent possible.

5) The determination of universal service fund levies must ensure specific, predictable and sustainable arrangements, have a clear link with the costs of universal service delivery and be evidence-based.

6) Determination of levy contributions should be arrived at by consultation with all stakeholders, and by a public process. Publication of final decisions, and any binding

regulations or rules should be available publicly.

7) The actual percentage contribution should not be fixed in law so as to avoid the risk of under-collection or over-collection of levies.

8) Levels of industry levies should be reviewed periodically (annually) to ensure alignment with policy objectives and market developments.

9) Collection of industry levies should be delayed until projects or subsidies are clearly defined so as to avoid the risk of unused collected funds.

10) Cost-based effectiveness should be used for determining the source and level of contributions from telecommunications operators.

11) Industry levies should be allocated on the basis of net rather than gross revenues of telecommunications operators.

D Expenditure

1) Determination of subsidy levels for universal service policies should follow cost-based effectiveness or competitive bidding (reverse auction) processes depending on specific conditions.

2) Target groups should be determined on the basis of appropriate geographical areas.

3) Determination of targeted geographical areas: countries should be divided into different geographic target areas based on the existing broadband infrastructure which becomes the determinant of eligibility for subsidies (eg white areas for those without broadband infrastructure, grey areas for those with only one broadband provider and black areas where at least two or more broadband providers and broadband services are provided under competitive conditions).

4) There should be use of reverse auctions as a means of determining subsidy from universal service funds with the lowest cost subsidy. Some key criteria need to be designed for reverse auctions: the process must be transparent, competitively and technologically neutral, reduce the reliance on detailed cost information, encourage cost

savings and market growth, and be used only to supplement the results of a subsidy.

V Conclusion

This Chapter has provided a framework of basic concepts concerning universal service policies and relevant approaches of public administration. It has shown that efficiency and effectiveness of public policies, including telecommunications universal services, involve improvement of institutional structures and the legal framework for budgeting arrangements.

(1) Significant reforms in the telecommunications sector, particularly liberalisation and privatisation with the advent of multiple services through different technologies, have necessitated improvements for efficient and effective universal service delivery. These improvements have included the definition of services (universal broadband access) and funding arrangements (establishment of universal service funds and industry levies).

(2) Customer demands for voice services have varied with different technologies. In addition, broadband access, which has become essential for people on a daily basis, should be included in the universal service definition. This requires an extension of the universal service definition, which in turn impacts on amendments to funding arrangements and administration.

(3) The situation where a public monopoly operator for universal service delivery and an asymmetric obligation placed on a dominant service provider in a competitive market with internal cross-subsidised costs, presents significant obstacles to efficiency and effectiveness. The legal framework for institutional and funding arrangements needs to be improved in increasingly competitive markets.

(4) The basic concepts of performance-based administration/management (management for outputs or outcomes), which particularly concern improvement of universal service institutional and funding arrangements, are performance accountability, transparency, performance information and public involvement, and performance budgeting.

(5) Obstacles to institutional arrangements mostly concern the centralised model for public service delivery, including universal service policy. Too much power is retained at the centre instead of being delegated to lower levels of government organisations. The

centralised model also involves unclear and overlapping responsibilities among public administrators and organisations, insufficient accountability and lack of transparency without sufficient involvement of the stakeholder/public, and a general ineffectiveness and inefficiency of public policies, including universal service policy and implementation.

(6) Performance accountability and transparency help focus a public organisation's strategic management, and deal with complex issues of efficiency and effectiveness of public policies. Foremost amongst these are the establishment of appropriate regulations and procedures for performance, evaluation and monitoring. In addition, there is a need for appropriate performance information and a reporting system for measuring results and managing outcomes. Other matters include providing adequate guidance, incentives and penalties, and promoting appropriate communication and a collaborative culture. Nevertheless, all this can, at times lead to conflict, unclear vision, unrealistic proposed outcomes, and onerous demands on public organisations.

(7) Modern performance budgeting focuses on funding arrangements and processes that strengthen the link between funding and results (outputs and outcomes) through the systematic use of performance information with the objective of improving efficient public programmes.²⁹⁷ Funding arrangements for universal service delivery, including allocation of levies and subsidies, should also emphasise cost-effectiveness and have a clear link with the real costs of service delivery (cost-based funding arrangements). Contestable bidding should be used as the best option for mitigating expenditures.

(8) Amendments to funding arrangements with the establishment of universal service funds and financial resources, mostly from industry levies paid by telecommunications operators, relate to allocation of levies and subsidies. These arrangements should ensure not only general principles of performance-based public budgeting but also competitive neutrality, non-discrimination and mitigation of levies without unnecessary financial burdens on telecommunications operators.

The fundamental elements of a possible best practice model for universal service delivery and administration, which were outlined from international experience, will be

²⁹⁷ Mark Robinson (ed) *Performance Budgeting: Linking Funding and Results* (Palgrave Macmillan, Washington, 2007), at xxvi.

used for reviewing the universal service model in New Zealand so as to identify the best practical features (Chapter Three). These characteristics and elements will be used to examine the model in Vietnam (Chapter Four) so as to propose a set of recommendations to institutional structures and the legal framework for funding arrangements (Chapter Five).

CHAPTER THREE

TELECOMMUNICATIONS UNIVERSAL SERVICE

IN NEW ZEALAND

1 Introduction

This chapter will review the development of universal service delivery in New Zealand during three principal periods: (1) the State monopoly period before 1987; (2) the period of light-handed regulation between 1987 and 2000; and (3) the industry-specific regulation period since 2001. The Chapter examines the legal framework and institutional arrangements for the New Zealand universal service model. The main focus is on the establishment of key institutional arrangements, and the funding mechanisms for universal service delivery with particular regard to:

- (1) transparent performance information and reporting systems;
- (2) effective performance accountability;
- (3) public and stakeholder engagement in the performance of universal service delivery; and
- (4) cost-effectiveness, competitive and technological neutrality in funding arrangements.

The key features in the political context which favour or work against a best practice model theory are also reviewed. The current New Zealand universal service model has features close to the key best practice: transparency, effective monitoring with public and stakeholder involvement, performance accountability and publicly available performance information, and the on-going adjudication of commercial interests and funding arrangements by an independent judicial system. In addition, universal service funding arrangements (including the determination of universal service net cost and the allocation of universal service levies) reflect clear principles of cost-based effectiveness and competitive neutrality. The New Zealand model is still criticised for some issues

such as political interference or influence on the independence of the industry regulator¹ and inconsistent principles of broadband access regulation.² This chapter concentrates mainly on identifying positive features in the New Zealand model, which could contribute to improvement in Vietnam, rather than emphasising or criticising the shortcomings of its institutional and regulatory arrangements.

II New Zealand Profile

A Socio-Political Profile

New Zealand is an independent country and governed by an executive system, a one chamber parliament passes laws, with elections every three years.³ An independent judiciary is organised in a tiered court system. At the top is the Supreme Court. Below it, in descending order, are the Court of Appeal, the High Court and the District Courts. New Zealand has a diverse multicultural population of about 4.4 million people.⁴ The rural population decreased slightly between 2002 and 2010, and currently is about 576,000, approximately 13.2% of the total population.⁵ Population density (people per square kilometre) ranges from less than five in remote areas to over 500 in main urban areas.⁶

B Economic Background

New Zealand has a free-market economy based largely on tourist and primary industries such as agricultural and related manufacturing industries. The economy depends heavily on international trade, mainly with Australia, China, the United States, and Japan.⁷ Economic free-market reforms in the country since the 1980s have removed many barriers to foreign investment.

¹ Ross Patteson "Government interference doomed" *Stuff* (New Zealand, 10 December 2012).

² Bronwyn Howell "Fit for Purpose? Examining the Current State of Broadband Regulation in New Zealand" (paper presented to the New Zealand Institute for the Study of Competition and Regulation's Seminar, Wellington, 6 March 2013), at 24.

³ Technically elections must be held within three years. They can be held earlier.

⁴ Statistics New Zealand <www.tradingeconomics.com/new-zealand/gdp-growth-annual>.

⁵ Statistics New Zealand <www.tradingeconomics.com/new-zealand/rural-population-percent-of-total-population-wb-data.html>.

⁶ Ibid.

⁷ Statistics New Zealand "New Zealand in Profile 2012" <www.stats.govt.nz>.

III TSO Legal Framework and Institutional Arrangements in New Zealand

A State Monopoly Period before 1987

The first communication system set up in New Zealand (1840) was postal one, which ensured the movement by sea or land of hand-written communications.⁸ Communications services were formalised in the passage of the New Zealand Post Office Act in 1858. In 1862, New Zealand witnessed the construction of the first telegraph line in South Island.⁹ In 1865 the Government placed the country's growing telegraph networks under centralised control¹⁰ by setting up the Electric Telegraph Department.¹¹ In 1881, the Government merged the Electric Telegraph Department into the National Post Office, creating the New Zealand Post and Telegraph Department, which became the New Zealand Post Office. The New Zealand Post Office extended its network throughout the country, and opened a series of bureau stations which from 1881 combined telegraphic services with public telephones.¹²

During the 20th century (until 1987), telecommunications in New Zealand was a state monopoly (New Zealand Post Office). The New Zealand Post Office provided a wide range of public services and had a distinct social role.¹³ The Telecommunications Act 1912 enabled people in rural areas to build their own telephone networks and link into the public network.¹⁴ The legal framework for telecommunications during this period was regularly revised and amended, including the Post and Telegraph Act 1908, the Post and Telegraph Act 1928 and the Post Office Act 1959.¹⁵ The latter Act, which was enacted during the period of economic expansion and general well-being from the end of

⁸ Wilson A C *Wire & Wireless: A History of Telecommunications in New Zealand 1890 – 1987* (Dunmore Press Limited, Palmerston North, 1994) at 20.

⁹ The first official trial of a telephone link took place in 1877 in Blenheim. See Eli Noam, Seisuke Komatsuzaki and Douglas Conn *Telecommunications in the Pacific Basin: An Evolutionary Approach* (Oxford University Press, New York, 1994) at 395.

¹⁰ Wilson, above n 8, at 28.

¹¹ Electric Telegraph Act 1865 s IV.

¹² Wilson, above n 8, at 28.

¹³ Herbert Dordick “New Zealand: Testing the Limits of Nonregulation” in Eli Noam, Seisuke Komatsuzaki and Douglas Conn (ed) *Telecommunications in the Pacific Basin: An Evolutionary Approach* (Oxford University Press, New York, 1994) 420 at 420.

¹⁴ The Country Telephones-lines Act 1912 s 2.

¹⁵ Patrick McCabe “New Zealand: The Unique Experiment in Deregulation” in Eli Noam, Seisuke Komatsuzaki and Douglas Conn (ed) *Telecommunications in the Pacific Basin: An Evolutionary Approach* (Oxford University Press, New York, 1994) 393 at 396.

World War II to the early 1970s,¹⁶ provided the legislative basis for the monopoly in public switched telecommunications services enjoyed by the Post Office until mid-1987.¹⁷ This period is regarded as having had ‘a dominant influence on social attitudes and on politics alike’.¹⁸ The country became a ‘welfare state’ with a wide range of welfare benefits provided by the Government.¹⁹

There followed a period of economic decline from the early 1970s to the mid-1980s²⁰ with poor productivity and growth performance in New Zealand.²¹ The economic situation of the country was relatively stagnant due to an increasingly ad hoc and restrictive set of regulatory interventions by government.²² The Labour Government, which came to power in 1972, aimed to move New Zealand towards becoming a social, democratic, egalitarian nation.²³ The Government was focused on consumer interests, along with developing the efficiency of the economy.²⁴ There was ample evidence that the performance of government trading activities was far from satisfactory in a wide range of ways - in fact so unsatisfactory as to make it worthwhile for the government to examine other options about its ownership role,²⁵ which was argued as a mistake and unsuccessful.²⁶ The National Government elected in 1975 was unable to reduce trade deficits, inflation or unemployment in the country over the next nine years. Economic reforms commenced more vigorously with the re-election of the Labour Party in 1984.²⁷

With regards to telecommunications, an approach close to the universal service in New Zealand had its historical origins in 1856 when there was the establishment of regulated

¹⁶ Schechter P B “Telecommunications in New Zealand: Competition, Contestability and Interconnection” (1995) University of Colorado, at 2 <pb.freeshell.org/nz.pdf>.

¹⁷ McCabe, above n 15, at 396.

¹⁸ Keith Sinclair *A History of New Zealand* (Penguin Book, Harmondsworth, 1959) at 288.

¹⁹ Dordick, above n 13, at 425.

²⁰ Schechter, above n 16, at 3.

²¹ Ian Duncan and Alan Bollard *Corporatisation and Privatisation: Lessons from New Zealand* (Oxford University Press, London, 1992) at 5.

²² Ibid.

²³ Dordick, above n 13, at 425.

²⁴ The Commerce Act 1975 s 2 provided that:

“An Act to promote the interest of consumers and the effective and efficient development of industry and commerce through the encouragement of competition...”

²⁵ Duncan and Bollard, above n 21, at 9.

²⁶ Jack Nagel "Social Choice in a Pluralitarian Democracy: The Politics of Market Liberalisation in New Zealand" (1998) 28 (2) British Journal of Political Science 223 at 230.

²⁷ Schechter, above n 16, at 4.

postal tariffs at a single and uniform national rate in New Zealand.²⁸ This was then applied to telegraph services in 1864. The social policy objective of this approach was to facilitate the provision of telegraph services to a rapidly increasing population nationwide with the development of an export-orientated, agriculture-based, ex-colonial economy.²⁹ During this period, the Government had the monopoly of provision of all telephone services in the country.³⁰ “Free local calling” was introduced in New Zealand in 1880 so as to avoid charging for calls between telephone end-users connected to the same exchange. This approach referred to the practice of charging customers a fixed monthly rental, with free unlimited calls within a specified local region.³¹ The Post Office retained this ‘free local calling’ service for telephone end-users. It was funded by internal cross-subsidies set up under the Post Office’s tariff structure. These subsidies were part of the government social and political objectives.³² The internal cross-subsidies regime remained largely unchanged during the monopoly period, and continued through the light-handed regulation period.

B The Light-Handed Regulation Period between 1987 and 2000

1 Overview

There was a government monopoly in the telecommunications sector in New Zealand until the late 1980s.³³ In 1988 Touche Ross Report³⁴ demonstrated that the performance of the telecommunications system during the state monopolistic period was costly and highly inefficient by international standards.³⁵ The telecommunications sector was not market driven and its management was not markedly efficient.³⁶ The absence of asset data for a comprehensive fixed asset register reflected a very low emphasis on good management and financial and marketing skills.³⁷ Bollard refers to a Treasury report

²⁸ Wilson, above n 8, at 22.

²⁹ Ibid.

³⁰ The Electric Telegraph Act 1865, at [II].

³¹ Graham Wagner “The Deregulation and Privatisation of New Zealand Telecommunications: An Economic, Political and Ideological Analysis” (PhD, University Microfilms International, 1992), at 91.

³² Duncan and Bollard, above n 21, at 154.

³³ Ministry of Economic Development “New Zealand Telecommunications 1987-2001” (2001), at 3.

³⁴ Touche Ross Management Consultants was hired by the Government (1987) to study Telecom and the desirability of competition in telecommunications markets.

³⁵ Touche Ross Management Consultants *Competition in Telecommunications Networks* (Department of Trade and Industry, Wellington, 1988) at 115.

³⁶ Schechter, above n 16, at 8.

³⁷ Duncan and Bollard, above n 21, at 149-150.

which noted how the telecommunications sector demonstrated a lack of harmony in its various commercial and social objectives, was subject to political interference, and lacked a competitive environment.³⁸

By the mid-1980s, the New Zealand growth rates were lower than the OECD average.³⁹ Treasury reports found that annual economic growth rates in New Zealand were low with high inflation, compared with the average situation of OECD countries for the decade.⁴⁰ GDP per capita dropped to 27% below the OECD average in the mid-1980s.⁴¹ In the telecommunications sector, state monopolies and under-pricing of state-supplied services were poorly performing policy interventions.⁴² In view of all this, a light-handed regulatory regime was introduced which, it was hoped, would lead to a much more vigorously competitive telecommunications market. It was seen as an effective means of achieving consumer benefits and efficient economic outcomes.⁴³

In 1987, New Zealand was one of four⁴⁴ countries at the forefront of innovative telecommunications deregulation in the world,⁴⁵ and adopted 'light-handed' telecommunications regulation.⁴⁶ This government policy was in pursuit of economic efficiency⁴⁷ and aimed at "a competitive environment in which markets can operate relatively free from subsequent government involvement".⁴⁸ The 'light-handed' telecommunications regulation in New Zealand did not create an industry-specific

³⁸ Alan Bollard "Utility Regulation in New Zealand" (speech to ACCC/PURC Training Programme on Utility Regulation, Melbourne Business School, Melbourne, 10-14 November 1997), at 3.

³⁹ State Service Commission "New Zealand's State Sector Reform: A Decade of Change" (1998) <www.ssc.govt.nz/decade-of-change>.

⁴⁰ McCabe, above n 15, at 398.

⁴¹ Bollard A and Pickford M "New Zealand's Light-Handed Approach to Utility Regulation" (1995) 2 (4) Agenda 411-422.

⁴² McCabe, above n 15, at 398.

⁴³ Ministry of Finance "New Zealand Telecommunications 1987-1998 (1998), at 5.

⁴⁴ Three other countries are Australia, Chile and Guatemala. See Pablo Spiller and Carlo Cardilli "The Frontier of Telecommunications Deregulation: Small Countries Leading the Pack" in Tom Bell and Solveig Singleton (eds) *Regulators' Revenge: The Future of Telecommunications Deregulation* (Cato Institute, Washington, 1998).

⁴⁵ Pablo Spiller and Carlo Cardilli "The Frontier of Telecommunications Deregulation: Small Countries Leading the Pack" in Tom Bell and Solveig Singleton (eds) *Regulators' Revenge: The Future of Telecommunications Deregulation* (Cato Institute, Washington, 1998) 39 at 39.

⁴⁶ Bronwyn Howell "From Competition to Regulation: New Zealand Telecommunications Sector Performance 1987-2007" (paper presented to the International Telecommunications Society European Region Conference, Rome, 2008), at 3.

⁴⁷ Bronwyn Howell "The End of the Means? The Pursuit of Competition in Regulated Telecommunications Markets" (paper presented to the International Telecommunications Society, Montreal, June 2008), at 10.

⁴⁸ Lewis Evans, Arthur Grimes, Bryce Wilkinson and David Teece "Economic Reforms in New Zealand 1984-1995: the pursuit of efficiency" (1996) 34 Journal of Economic Literature 1856 at 1863.

regulatory authority or enact comprehensive legislation to regulate competition within telecommunications market.⁴⁹ Key elements of the light-handed framework were:⁵⁰

- (a) The Commerce Act 1986 - generic competition legislation in New Zealand;
- (b) The Telecommunications (Disclosure) Regulations 1990 - imposing certain information disclosure obligations on the dominant telecommunications provider;
- (c) Private litigation: The Commerce Commission encouraged Telecom's competitors to take court actions against Telecom; and
- (d) Threat of Government intervention – the Government would introduce heavier regulation if the light-handed regulation was perceived as unsuccessful.

The light-handed regulatory environment began with the privatisation of the incumbent provider (Telecom) and the entry of competition in the telecommunications industry. The aim of these reforms was to improve the economic performance and increase consumer benefits through a competitive and open entry telecommunications market, supported by generic competition law.⁵¹

The competitive practices of the telecommunications industry were subjected to the Commerce Act 1986.⁵² In the following year, the Telecommunications Act 1987 ended a hundred years of state sector ownership and political control of telecommunications in the country.⁵³ These reforms resulted in the removal of regulatory restrictions on the supply of telecommunications equipment, the removal of statutory monopoly provisions, along with the creation of a stand-alone telecommunications state-owned enterprise, the

⁴⁹ Malcolm Webb and Martyn Taylor "Light-handed Regulation of Telecommunications in New Zealand: Is Generic Competition Law Sufficient?" (1999) 2 International Journal of Communications Law and Policy 1 at 2.

⁵⁰ See Ross Patterson "Light Handed Regulation in New Zealand Ten Years On" (1998) 6 Competition and Consumer Law Journal 134 at 139; Alan Bollard "Utility Regulation in New Zealand" (speech to ACCC/PURC Training Programme on Utility Regulation, Melbourne, 10-14 November 1997), at 3; Malcolm Webb and Martyn Taylor "Light-handed Regulation of Telecommunications in New Zealand: Is Generic Competition Law Sufficient?" (1999) 2 International Journal of Communications Law and Policy 1 at 2-3; Tristan Gilbertson "Beginning of the End of "Light Handed" Telecommunications Regulation in New Zealand" (2001) 7(1) Computer and Telecommunications Law Review, at 5.

⁵¹ Ministry of Economic Development, above n 33, at 3.

⁵² Commerce Act 1986.

⁵³ Bronwyn Howell "Strategic Interaction under Asymmetric Regulation: the 'Kiwi Share' in New Zealand Telecommunications" (paper presented to the International Telecommunications Society European Region Conference, Rome, September 2008), at 29.

Telecom Corporation of New Zealand Limited.⁵⁴ There followed the opening up of a limited competitive market and the establishment of the ‘Kiwi Share’ Obligations (the ‘Kiwi Share’), a special ‘golden’ share in Telecom held by the Government. The ‘Kiwi Share’ imposed on Telecom certain social obligations in relation to domestic telephone services.⁵⁵ All these changes can be summarised into the following three stages.

2 1987-1991: Corporatisation of the incumbent operator

During the 1980s and early 1990s, New Zealand underwent fundamental economic changes, which determined shifts in almost all aspects of economic policy.⁵⁶ There were a number of factors contributing to the decision to implement these structural economic reforms, such as low productivity, poor growth and economic performance, and restrictive government regulations.⁵⁷

In the telecommunications sector, the administration of telecommunications and its operation moved from being a government department to a state-owned enterprise, then to an unlisted company, and eventually to being a publicly listed company.⁵⁸ The Post Office Review in 1986⁵⁹ suggested the inadequacies of this state-owned organisational entity and recommended that it should be re-organised into specific business units.⁶⁰

The Government started the deregulation of the telecommunications sector with the passage of the Telecommunications Act 1987⁶¹ with the premise that economic efficiency was an essential aim to reform the sector.⁶² The Post Office was restructured into three autonomous state corporations.⁶³ The telecommunications section was first spun off and incorporated as a separate limited liability company (Telecom Corporation of New Zealand), pursuant to the State Owned Enterprises Act 1986.⁶⁴ It was given the

⁵⁴ Louise Hill “Litigation Versus Regulation: How Successful is Light-Handed Regulation” (1996) 8 Auckland University Law Review 1119 at 1126.

⁵⁵ Webb and Taylor, above n 49, at 3.

⁵⁶ Duncan and Bollard, above n 21, at 3.

⁵⁷ Ibid, at 5.

⁵⁸ Duncan and Bollard, above n 21, at 147.

⁵⁹ Mason N and Morris S *Post Office Review* (Government Printer, Wellington, 1986).

⁶⁰ Ministry of Economic Development, above n 33, at 4.

⁶¹ Carl Blanchard “Telecommunications Regulation in New Zealand: How Effective is ‘Light-Handed’ Regulation?” (1994) 18(2) Telecommunications Policy 154 at 154.

⁶² Hill, above n 54, at 1126.

⁶³ Duncan and Bollard, above n 21, at 145.

⁶⁴ Maurice McTigue “Alternative to Regulation: a Study of Reform in New Zealand” (1998) 21(1) Regulation 34 at 35.

status of a ‘state-owned enterprise’ (SOE).⁶⁵ Telecom then began the next stage of its transition, that of becoming a fully privatised company in 1989.

Some main themes of the Telecommunications Act 1987 expressed the government’s aims of removing restrictions on the supply of all telecommunications equipment by mid-1988⁶⁶ and maintaining an efficient telecommunications industry.⁶⁷ The final statutory barriers to market entry were removed,⁶⁸ including network service in April 1989, as provided in the Telecommunications Amendment Act 1989.⁶⁹

The Telecommunications Amendment Act 1989 removed the monopoly protection clauses in the Telecommunications Act 1987.⁷⁰ The first competitor of Telecom, which set up business in New Zealand in 1990 to compete in the long-distance and later local calling markets, was Alternative Telephone Company.⁷¹ There were other investments in the telecommunications market by Global One, Team Talk, Telstra NZ and Vodafone (formerly BellSouth NZ).⁷² The deregulation and opening of the market to competition resulted in substantial price reductions, improvement of service availability, and sizeable investment from other telecommunications operators and development of competition in a wide range of telecommunications services.⁷³

⁶⁵ The State Owned Enterprises Act 1986 s 4(1) provides that:

- (1) ... every State enterprise shall be to operate as a successful business and... be -
 - (a) As profitable and efficient as comparable businesses that are not owned by the Crown; and...
 - (c) An organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so.

⁶⁶ Lewis Evans and David Boles de Boer “The Economic Efficiency of Telecommunications in a Deregulated Market: the Case of New Zealand” (working paper 8/95, Victoria University of Wellington, 1995), at 7.

⁶⁷ Hill, above n 54, at 1120.

⁶⁸ Ibid.

⁶⁹ Max Saunders “Telecommunications Regulation in New Zealand” (1994) 18(6) Telecommunications Policy 495 at 496.

⁷⁰ Carl Blanchard “Telecommunications regulation in New Zealand: light-handed regulation and the Privy Council’s Judgment” (1995) 19 (6) Telecommunications Policy 465 at 465.

⁷¹ Alternative Telephone Company later became Clear Communications.

⁷² Bell South began to provide mobile services, but later sold its New Zealand assets to Vodafone.

⁷³ Ministry of Economic Development, above n 33, at 3.

3 Stage 1991-1997: The competitive era, litigation and the introduction of KSO

The telecommunications market entered on a further stage of development in the 1990s marked by the opening of a highly competitive era⁷⁴ and the privatisation of Telecom. The period 1991-1994 witnessed competition in fixed-line infrastructure and service markets, and the establishment and growth of the mobile market competition.⁷⁵ This period also witnessed the establishment of 'Kiwi Share' Obligations (KSO) with three explicit obligations laid on the newly-privatised incumbent telecommunications provider (Telecom).⁷⁶

An agreement⁷⁷ between Telecom and the Government was entered into on 12 September, 1990. Telecom was recognised as having a dominant position in the telecommunications market in New Zealand.⁷⁸ The KSO was recorded in Telecom's Articles of Association with the following main requirements:⁷⁹

- (1) To maintain a local free-calling option for local residential telephone service for all residential customers;
- (2) To ensure the rate of increase in the residential telephone line rental, which includes the cost of all local calls, does not result in the rental increasing in real terms above rate of NZD 27.80 per month (excluding GST as of November 1, 1989), unless this unreasonably impaired Telecom's profits;

⁷⁴ The first competitor to Telecom entered into the New Zealand telecommunications market in November 1990 - Clear Communications Limited. There followed other investments in the market, from Global One, Team Talk, Telstra NZ and Vodafone (formerly BellSouth NZ). See Ian Duncan and Alan Bollard *Corporatisation and Privatisation: Lessons from New Zealand* (Oxford University Press, 1992), and Ministry of Economic Development (*New Zealand Telecommunications 1987-2001* (2001).

⁷⁵ Ministry of Economic Development, above n 33, at 6.

⁷⁶ See Telecom Corporation of New Zealand Limited "Articles of Association of Telecom Corporation of New Zealand Limited" (1990).

⁷⁷ The State Owned Enterprises Act 1986 s4(1) provided that "...every State enterprise shall operate as a successful business and also exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so". With regard to non-commercial activities, s7 notes 'where the Crown wishes a State enterprise to provide goods or services to any persons, the Crown and the State enterprise shall enter into an agreement under which the State enterprise will provide the goods or services in return for the payment by the Crown of the whole or part of the price thereof. It should be noted that the State-owned Telecom was privatised in September 1990. The State Owned Enterprise Act ceased to apply to Telecom once it was privatised.

⁷⁸ As of September 2000, Telecom's public switched telephone network lines were 1,800,000 while those of two other telecommunications companies in the market, Clear and Telstra Saturn, were 10,000 and 22,500 respectively. See Ministry of Economic Development "Ministerial Inquiry into Telecommunications" (2000), at 60.

⁷⁹ Telecom Corporation of New Zealand Limited, above n 76, at [11.4.2].

(3) To ensure that the line rental for residential users in rural areas is no higher than the standard residential line rental and make ordinary residential telephone services as widely available as it is at 11 September 1990.

The introduction of KSO⁸⁰ in the 1990s had included three obligations of ‘universal service’, ‘free local calling’ and a ‘price cap’.⁸¹ KSO remained relevant as long as Telecom remained the sole provider of residential telephone service in many areas. In a competitive market, this became increasingly incongruous as it was an asymmetric allocation of a universal service obligation on the prices of only one telecommunications provider.⁸²

With regard to the funding mechanism during this period, Telecom, as the dominant player, took the responsibility of providing KSO service and implementing the recovery of its costs through ‘internal cross-subsidies’ within its retail pricing,⁸³ a cross-subsidy from urban, business and tolls to rural users, and at the same time a premium on the price Telecom charged its competitors to interconnect with its network.⁸⁴

The entry of other telecommunications companies⁸⁵ with the introduction of new services and alternative access technologies in the following years demonstrated that Telecom was no longer the sole significant player in the New Zealand telecommunications industry.⁸⁶ There arose questions as to who should contribute to the costs of the KSO⁸⁷ and whether Telecom or any other provider should be compensated by other telecommunications companies for the costs of providing KSO.⁸⁸

⁸⁰ Before privatisation, tariff equalisation and free local calling was a government policy. However, once Telecom ceased to be state-owned, it was necessary to create explicit obligations that could be enforced, if need be. At the time of privatisation, therefore, the policy was entrenched through the Kiwi Share mechanism.

⁸¹ Howell, above n 53, at [1.1] and [1.3].

⁸² Joseph Farrel “Creating Local Competition” (1996) 49 (1) Federal Communications Law Journal 201 at 214.

⁸³ Clear Communications Limited “Submission to the Commerce Select Committee on the Telecommunications Bill 2001” at 60.

⁸⁴ Ministry of Economic Development “Submission to the Commerce Select Committee on the Telecommunication Bill 2001” at [11].

⁸⁵ Twelve registered network operators and twenty eight registered international operators as of 2001. Annexes I and II of New Zealand Telecommunications 1987-2001 (MOED, 2001), at 31-32.

⁸⁶ Telecom New Zealand Limited “Submission to the Commerce Select Committee on the Telecommunications Bill 2001” at [105].

⁸⁷ Carl Blanchard “Telecommunications regulation in New Zealand: The Court of Appeal’s Decision in Clear Communications v Telecom Corporation” (1994) 18 (9) Telecommunications Policy 725 at 732.

⁸⁸ Charles River Associates “Submission the Commerce Select Committee on the Telecommunications Bill 2001” at 8.

These concerns became much more significant after three judicial decisions with regard to disputes between Clear and Telecom in 1991-1994.⁸⁹ Clear initiated proceedings under the Commerce Act in 1991, after failing to negotiate terms and conditions for access to Telecom's local loop.⁹⁰ Although Clear had succeeded in capturing approximately 20% of the long-distance call market⁹¹ after a year in the telecommunications market, the company's entry to the local call market was more complicated⁹² because Clear and Telecom could not agree on interconnection terms.⁹³

After the removal of legal restrictions on entry into the telecommunications market, all other providers of fixed or mobile telecommunications services had demanded access to the Public Switched Telephone Network (PSTN) of Telecom,⁹⁴ via interconnection agreements (ICA). An important issue in the ICA was the payment of termination charges: when a customer of one service provider made a call to another provider's network, the network of origin had to pay a per-minute-charge to the other network on which the call 'terminated'. However, the per-minute-charge payable by Clear to Telecom would be higher than that payable by Telecom to Clear.⁹⁵

The central issue of the dispute was the interconnection price, and whether Telecom could lawfully charge a price based on the Efficient Component Pricing Rule (ECPR).⁹⁶ The ECPR allows the telecommunications dominant incumbent to charge new entrants access prices equal to the opportunity costs on the competitive segment,⁹⁷ together with a contribution to common costs and profits, including any monopoly profit of the dominant incumbent from any business lost to the new entrants.⁹⁸ Telecom used the ECPR in its local calling ICA to set inter-connection prices with Clear so as to recover costs, thereby enabling continuing cross-subsidy of unprofitable residential services that

⁸⁹ *Clear Communications v Telecom Corporation of New Zealand Limited* [1992] 5 TCLR 166 (HC), [1992] 3 NZLR 249 (HC), [1993] 5 NZLR 25/93 (CA), [1993] 5 TCLR 166 (HC), [1993] 4 NZBLC 99-321 (CA), [1993] 5 TCLR 413 (CA), 6 TCLR 682 (CA), [1995] 1 NZLR 385.

⁹⁰ *Ibid.*, at 386.

⁹¹ Michael Carter and Julian Wright "Bargaining over Interconnection: The Clear-Telecom Dispute" (1998) Social Science Research Network, at 1 <papers.ssrn.com/sol3/papers.cfm?abstract_id=41223>.

⁹² Entry was not possible until there was an interconnection agreement. Notwithstanding lengthy negotiations, the parties were unable to agree on interconnection pricing, in large part because of the access deficit issue.

⁹³ Annemieke Karel "The Development and Implications of free ISPs in New Zealand" (2003) New Zealand Institute for the Study of Competition and Regulation, at 10 <www.iscr.org.nz/f209,4313/Free_ISPs_220903.pdf>.

⁹⁴ Ministry of Economic Development "Ministerial Inquiry into Telecommunications" (2000), at 60.

⁹⁵ *Clear Communications v Telecom Corporation of New Zealand Limited*, above n 89, at 386.

⁹⁶ *Ibid.*, at 385.

⁹⁷ Laffont and Tirole, above ch 2, n 128, at 166.

⁹⁸ *Ibid.*, at 23.

it was obliged to provide under the KSO.⁹⁹ Clear claimed that Telecom alone should bear the KSO costs and any charge levied by Telecom above its service delivery cost (excluding any component to recover KSO costs) constituted an exercise of market power, and was illegal under s 36 of the Commerce Act.¹⁰⁰

When starting legal proceeding against Telecom in 1991, Clear argued that the ECPR constituted ‘use’ of a ‘dominant position’ for the purposes of restricting or preventing competition in the telecommunications market.¹⁰¹ The High Court found that Telecom was dominant in the retail but not in the wholesale market.¹⁰² The Court also noted the existence of an element of cross-subsidy of residential calls by Telecom’s other services as a result of the KSO. However, the Court accepted that Clear had to contribute to the common cost of Telecom’s network in which any cross-subsidy would be included in the common cost.¹⁰³ The ECPR was also found not to be in violation of Section 36.¹⁰⁴ This indicated that monopoly pricing to recover KSO costs did not itself constitute the restriction, prevention or elimination of competition.¹⁰⁵

Clear then appealed against the finding of the High Court arguing that the ECPR was a breach of s 36 of the Commerce Act 1986, in that it constituted a use of a dominant position in order to constrain competition. The Court of Appeal concluded that the incorporation of a monopoly profit component in an interconnection charge was anti-competitive as a contribution to the cross-subsidy of Telecom’s revenue from residential services.¹⁰⁶ While Telecom could impose a charge reflecting the direct benefits of interconnection with residential subscribers, any access levy beyond that specifically to cross-subsidise Telecom’s revenue from its residential business would be in breach of section 36.¹⁰⁷

⁹⁹ Bronwyn Howell “A Pendulous Progression: New Zealand’s Telecommunications Regulation 1987-2007” (2007) New Zealand Institute for the Study of Competition and Regulation, at 18 <www.iscr.org.nz/n378.html>.

¹⁰⁰ *Clear Communications v Telecom Corporation* [1993] 5 TCLR 25/93 (CA), at 42-43.

¹⁰¹ *Telecom Corporation of New Zealand Limited v Clear Communications* [1992] 3 NZLR 247 at 249.

¹⁰² *Clear Communications v Telecom Corporation*, above n 100, at 2.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ Howell, above n 99, at 18.

¹⁰⁶ *Clear Communications v Telecom Corporation*, above n 100, at 47-48.

¹⁰⁷ *Ibid.*

Telecom appealed to the Privy Council.¹⁰⁸ The Privy Council concluded that Telecom had set its interconnection prices for Clear on the basis of opportunity cost, and it was behaving exactly as would any firm in a competitive market.¹⁰⁹ The Privy Council also found that Clear had not demonstrated that Telecom's prices included monopoly rents above that necessary to meet the costs of the KSO.¹¹⁰

Clear and Telecom subsequently negotiated an interconnection arrangement (ICA) that recognised the KSO and a contribution towards the fixed and common costs of the Telecom local network through the interconnection charge. The Government in turn reaffirmed its expectation that interconnection would be provided based on terms that would promote efficiency and deliver the benefits of competition to consumers.¹¹¹ This assumed that there would be no changes to the arrangements existing at that point.¹¹²

The '1995 Review' of telecommunications interconnection negotiations in New Zealand indicated that the Government would "continue, for the time being, with the present regulatory regime based upon the Commerce Act",¹¹³ particularly through s 27¹¹⁴ and s 36.¹¹⁵ The Government's endorsement of the continuation of a light-handed regime, plus the greater certainty following the interconnection agreement between Clear and Telecom in March 1996 brought an increasing number of new entrants into the

¹⁰⁸ Privy Council, a judicial body based in London, was the former final court of appeal for New Zealand. Since 2003 the Supreme Court is the final court of appeal for New Zealand, similar to the Supreme Court in Vietnam.

¹⁰⁹ *Telecom Corporation of New Zealand Ltd v Clear Communication Ltd* [1995] 1 NZLR 385 (PC), at [406].

¹¹⁰ *Ibid*, at [407].

¹¹¹ Damien Gérardin, Michel Kerf *Controlling Market Power in Telecommunications: Antitrust Vs. Sector-specific Regulation* (Oxford University Press, Oxford, 2003) at 123.

¹¹² Howell, above n 99, at 23.

¹¹³ Bollard, above n 38, at 11.

¹¹⁴ The Commerce Act 1986 s 27 (1) states:

- 1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market;

¹¹⁵ The Commerce Act 1986 s 36 (1) states:

- 1) No person who has a dominant position in a market shall use that position for the purpose:
 - (a) restricting the entry of a person into that or any other market; or
 - (b) preventing or deterring a person from engaging in competitive conduct in that or any other market; or
 - (c) eliminating a person from that or any other market.

telecommunications market.¹¹⁶ By the end of 1997, there were seven registered network operators and fourteen international service operators.¹¹⁷

Following the 1995 Review, Clear rejected an offer by Telecom, which included a separately-identified contribution to KSO costs, which would have enabled cost-based pricing of interconnection.¹¹⁸ Clear claimed that pricing of interconnection did not recognise network reciprocity nor take differences in call volumes into account. It counter-offered with a proposal equalising the per minute charge between the networks.¹¹⁹ However, a settlement agreement, with the express intention of settling all disputes, claims, arbitration and litigation between Clear and Telecom was finally signed in March 1996.¹²⁰ This agreement recognised the KSO, and a contribution from Clear and any other providers towards the fixed and common costs of the Telecom local network.¹²¹ There followed agreements between Telecom and Telstra (1996), Saturn (1997) and Compass (1998).¹²²

Shortly after signing the ICA, Clear requested changes in the capped-price provisions because of the structure of Telecom's capped-price retail long distance calls. However, Telecom declined this request on the basis that these capped-price offers, which were becoming common in the market, offering unlimited national calls for a fixed price in a given time,¹²³ had been trialled by Telecom before the ICA. Moreover, it claimed that Clear should have known about the use of capped-price calls before signing the ICA¹²⁴ and have been aware of both industry trends and the risks associated with the contract.¹²⁵

Despite Telecom's refusal, Clear tested the limits of its contractual obligations by withholding a proportion (approximately 15%) of interconnection revenues owed to Telecom.¹²⁶ Telecom then started legal proceedings to recover the debt. Clear's response

¹¹⁶ Howell, above n 99, at 23.

¹¹⁷ Ministry of Commerce, above n 43, at 27-28.

¹¹⁸ Blanchard, above n 61, at 160.

¹¹⁹ *Ibid.*

¹²⁰ Howell, above n 99, at 23.

¹²¹ Karel, above n 93, at 11.

¹²² *Ibid.*

¹²³ Howell, above n 99, at 24.

¹²⁴ Damery R "Section 46 of the Trade Practices Act: the Need for Prospective Certainty" (1999) 6 Competition and Consumer Law Journal.

¹²⁵ Evans Lewis and Quigley Neil "Contracting, Incentives for Breach and the Impact of Competition Law" (2000) 23 (2) World Competition, at 9.

¹²⁶ Karel, above n 93, at 11.

was that Telecom's retail long-distance call offers were in breach of s 27 and s 36 of the Commerce Act 1986. Both the High Court¹²⁷ and the Court of Appeal¹²⁸ found that Clear could legally withhold payments of interconnection charges until judgment was delivered. These 1997 court decisions injected a degree of uncertainty into the telecommunications market. This impacted on Telecom's incentives to invest in new infrastructures and services, and threatened the pursuit of monopoly profits.¹²⁹

4 1997-2000: 'free local calling' obligation in KSO and consequences of ICA

The period between 1997 and 2000 witnessed an increasing number of new telecommunications service providers: 11 registered network operators and 26 registered international operators by the end of 2000.¹³⁰ This period also witnessed the early emergence and rapid growth in uptake of 'dial-up' Internet service in New Zealand¹³¹ with more than 30 ISPs in the market as of 1996.¹³² This development was greatly facilitated by the residential 'free-local calling' obligation in the Kiwi Share and a flat-rate regime in the telecommunication sector.¹³³

The emergence of the Internet dramatically changed calling patterns.¹³⁴ The traffic generated on Telecom's PSTN grew exponentially as a result of the free local calling obligation under the KSO. Moreover, the majority of this traffic originated from Telecom's network because the majority of Internet users were Telecom's fixed line customers. This resulted in a financial burden on Telecom¹³⁵ due to the free local calling obligation that prevented Telecom from charging its customers for data traffic carried by the local access network.¹³⁶

In February 2000, Compass Communications introduced a 'free-internet-access' retail offering. This service was provided at no joining fee, a package of 10 free hours per

¹²⁷ *Telecom New Zealand Limited v Clear Communications Limited*, above n 101, at 256.

¹²⁸ *Telecom New Zealand Limited v Clear Communications Limited* [1995] 6 TCLR 682 (CA), at 14.

¹²⁹ Howell, above n 99, at 24-25.

¹³⁰ Ministry of Economic Development, above n 33, at 31-32.

¹³¹ Howell, above n 99, at 24-25.

¹³² Ministry of Economic Development, above n 33, at 26.

¹³³ Karel, above n 93, at 16.

¹³⁴ Howell, above n 46, at 11.

¹³⁵ Howell above n 53, at 17.

¹³⁶ *Ibid*, at 18.

¹³⁶ These Internet calls were terminated by the ISP, Telecom was obliged to pay the ISP a termination charge since the call was originated by a Telecom customer. Thus, an ISP would generate substantial volumes of terminating traffic from Telecom customers.

month and charged at NZD 1.50 per hour after those 10 free hours, or at a flat-rate of NZD 19.95 for 300 hours per month. This offer brought Compass about 10,000 new customers who signed up in the first four weeks.¹³⁷ Another free Internet access service, utilising Clear's network i4free, was launched in April 2000. It offered 'unlimited free internet access' and very soon there were about 33,000 customers using this service.¹³⁸

Business commentators noted that one customer of this service, if online continuously for more than 700 hours in a month, would cost Telecom more than NZD 840 in interconnection charges per line.¹³⁹ While the market share of ISPs signed up to Telecom's competitors grew to slightly over 50%,¹⁴⁰ more than 50% of the Internet traffic was terminated on Telecom's competitors' networks.¹⁴¹ As noted above, this was due to Telecom's obligation to provide the local component of dial-up Internet calls at no charge. Thus, Internet calls quickly came to exceed voice calls on the network.¹⁴²

The net result was to tilt the balance of financial advantage under the interconnection agreement from Telecom to Clear.¹⁴³ ISPs on Clear's network could keep their retail charges low or even free because Clear and the ISPs agreed to share the termination charges paid by Telecom.¹⁴⁴ This made Telecom's situation disadvantageous because some customers were encouraged to stay on the Internet longer.¹⁴⁵ Another problem for Telecom was that, under the KSO, the company was required to provide residential subscribers with free and unlimited local calls for a fixed monthly fee, which could not be increased by more than the rate of the Consumer Price Index.¹⁴⁶

Telecom responded with two initiatives - the one commercial and the other political. The commercial response was the introduction of a technological bypass of the dial-up PSTN

¹³⁷ Karel, above n 93, at 18.

¹³⁸ Ibid.

¹³⁹ Rod Oram and Richard Braddell "0867 Scheme Protection from Traffic" *The New Zealand Herald* (New Zealand, 8 April 2000) <www.nzherald.co.nz/technology/news/article.cfm?c_id=5&objectid=131204>.

¹⁴⁰ Christina Enright *Strategic Behaviour of Internet Service Provider in New Zealand and the Performance of this Market* (New Zealand Institute for the Study of Competition and Regulation, 2000), at 39 <www.iscr.org.nz/f240,4833/4833_enright_210600.pdf>.

¹⁴¹ Howell, above n 46.

¹⁴² Howell, above n 99, at 26.

¹⁴³ *Commerce Commission v Telecom Corporation of New Zealand Limited* [2010] NZSC 111 (SC) at [7].

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ See above n 79.

with a new, unregulated Asymmetrical Digital Subscriber Line (ADSL)¹⁴⁷ broadband service.¹⁴⁸ Wider availability of high speed ADSL and lower prices were targeted, in order to induce rapid substitution by the heavy users from costly, un-chargeable dial-up Internet access to relatively less costly, chargeable and unregulated ADSL.¹⁴⁹ However, there was no sudden customer change-over due to the high value of the ‘connection gift’ which bundled dial-up Internet access with voice telephony and the comparatively low valuation of the Internet usage of most consumers.¹⁵⁰

Due to its inability to significantly increase revenue through these technological means, Telecom sought to re-negotiate the terms of the ‘Kiwi Share’ so as to be able to recover the costs imposed by escalating Internet use and strategic arbitrage on the ICA.¹⁵¹ The company proposed a revision of the prices charged under the ‘Kiwi Share’ agreement,¹⁵² thereby charging residential consumers 2 cents per minute for calls in excess of 10 hours per month per account made to ISPs not connected to a separate Telecom dial-up Internet PSTN network.¹⁵³

This Telecom solution, referred as the ‘0867’ package, was proposed from the point of view that use of the ‘0867’ prefix enabled separation of Internet traffic from voice traffic. As a result, it enabled the company to maintain voice service quality levels as agreed under the ‘Kiwi Share’ terms.¹⁵⁴ Telecom argued that 0867 calls were outside the KSO and ICAs, thus not incurring termination charges. This package aimed at encouraging residential end-users and ISPs based on Clear’s network to terminate to Telecom and encourage Clear to adopt the 0867 prefix for ISPs on its network.¹⁵⁵ As a result, the termination costs payable by Telecom could be reduced.¹⁵⁶

¹⁴⁷ Asymmetrical Digital Subscriber Line (ADSL), the most widespread DSL technology using one frequency band for a low-speed upstream channel (25 KHz – 138 KHz) and another for a high-speed downstream channel (139 KHz – 1.1 MHz), is used primarily by residential customers.

¹⁴⁸ Howell, above n 53, at 18.

¹⁴⁹ Karel, above n 93, at 41.

¹⁵⁰ Howell, above n 53, at 20.

¹⁵¹ New Zealand Telecom Limited “Telecom moves to protect phone customers” (press release, 3 April 2000).

¹⁵² Commerce Commission “Commerce Commission considers Court of Appeal 0867 decision” (press release, 4 August 2009).

¹⁵³ Karel, above n 93, at 41.

¹⁵⁴ Rod Oram and Richard Braddell “0867 scheme protection from traffic” *The New Zealand Herald* (New Zealand, 8 April 2000).

¹⁵⁵ *Commerce Commission v Telecom Corporation of New Zealand Limited* [2008] 8 NZBLC (HC), [2008] 12 TCLR 168 (HC), [2009] NZCA 338, [2009] 12 TCLR 457, [2009] SC76, [2010] NZSC 111, [2011] 1 NZLR 577, at [8].

¹⁵⁶ *Ibid*, at 578.

In September 1999, the Government announced that as of 1 November 1999, Telecom would be permitted to introduce a 2c a minute charge for dial-up Internet access for residential customers after 10 hours of free use each month.¹⁵⁷ By contrast, the Commerce Commission processed litigation against Telecom under s 36 (1) (b) of the Commerce Act 1986, alleging that, by the introduction of the ‘0867’ package, Telecom attempted to prevent competitive conduct by other telecommunications network operators and ISPs.¹⁵⁸ The Commerce Commission’s contention was rejected first by the High Court in 2008¹⁵⁹ and then by the Court of Appeal in 2009.¹⁶⁰ In September 2010, the Commerce Commission’s appeal to the Supreme Court was dismissed because it could not prove that Telecom used its dominant position in the relevant markets when introducing the 0867 code in 1999.¹⁶¹ The case was finally ended after a decade of arguments.

In summary, free local calling for fixed lined telephone services in the KSO scheme was onerous to the universal service provider (Telecom) due to asymmetrical obligations and the need for internal cross-subsidies. Solutions to recover costs of providing universal services (fixed line telephone services) in the form of the ‘0867’ package led to litigation between Telecom and other operators. The courts came to the conclusion that Telecom, through the 0867 dial-up Internet package, did not contravene s 36 or use its dominance to limit competition.¹⁶² Thus, the Telecom 0867 dial-up Internet package was inconsistent with competitive neutrality between operators. At the same time, the calculation of universal service costs would become more complicated with the determination of separate components between local residential voice telephones and dial-up Internet access through the same residential line so as to avoid double-dipping compensation.

5 Summary

¹⁵⁷ Karel, above n 153.

¹⁵⁸ Commerce Commission “Commerce Commission considers Court of Appeal 0867 decision” (press release, 4 August 2009).

¹⁵⁹ *Commerce Commission v Telecom Corporation of New Zealand Limited* [2008] 8 NZBLC (HC), [2008] 12 TCLR 168 (HC).

¹⁶⁰ *Commerce Commission v Telecom Corporation of New Zealand Limited* [2009] NZCA 338, [2009] 12 TCLR 457.

¹⁶¹ *Commerce Commission v Telecom Corporation of New Zealand Limited*, above n 155, at [49].

¹⁶² See above nn 159, 160, 161.

The period 1987-2000 was characterised by privatisation of the dominant telecommunications operator, and regulated by generic competition law.¹⁶³ There were no fundamental changes in the telecommunications legal framework and the Government continued to pursue the public policy of universal service through the KSO.

C Legal Framework and Institutional Arrangements for TSO Delivery from 2001

The light-handed regulatory period in telecommunications was replaced by industry-specific regulation with the passage of the 2001 Telecommunications Act.¹⁶⁴ This was partly a response to entrants' dissatisfaction with the three judicial decisions of 1991-1994.¹⁶⁵ It was also an outcome of the general reaction to the failure of the previous light-handed regulatory structures which had resulted in only limited reductions in Telecom's market share and degree of market dominance. The Government, with the purpose of tightening controls on companies with a dominant position, stated its objective of ensuring that the regulatory environment for cost-efficient, timely and innovative telecommunications service on an on-going, fair and equitable basis to all existing and potential users.¹⁶⁶

A distinct shift was made in the report of the Ministerial Inquiry on Telecommunications released in 2000. The report focused on processes within the industry and the nature of the interaction between industry participants. It also focused on the Government's objectives, rather than on an assessment of the light-handed regime's performance against its original policy objectives. It considered alternative means of establishing interconnection terms and conditions, and the pricing principles and processes applying to interconnection negotiations and Kiwi Share Obligations.¹⁶⁷ As a result of the report, the Telecommunications Act 2001 was enacted, providing for the establishment of an industry-specific regulator in the telecommunications sector, the removal of the cost burden of the Kiwi Share Obligation from Telecom alone, and the replacement of the KSO with a telecommunications service obligation (TSO).¹⁶⁸ In addition, a mechanism

¹⁶³ Sean Mosby and Jerome Purre "Toward Universal Broadband Access in New Zealand" (2010) Mikan Consulting Limited and Ministry of Economic Development, at 15.

¹⁶⁴ The Telecommunications Act 2001 was amended in 2006 and 2011.

¹⁶⁵ Howell, above n 99, at [1.4.1].

¹⁶⁶ Ministry of Economic Development, above n 94, at 11.

¹⁶⁷ Ibid, at 37.

¹⁶⁸ The Telecommunications Act 2001 Part 3.

for funding the TSO was provided in Part 3 of the Act, which aimed to facilitate the supply of certain telecommunications services to end-users to whom those services might not be otherwise supplied on a commercial basis at a price affordable to those end-users.¹⁶⁹

1 Ministerial Inquiry into Telecommunications 2000

One of the main concerns of the Ministerial Inquiry into Telecommunications was the tension between efficiency and equity. ‘Cost-efficient’ within the new approach implied that services would be provided at the lowest cost and delivered to consumers at the lowest sustainable price.¹⁷⁰ Moreover, the efficiency should be ‘dynamic’,¹⁷¹ without any impediment to the implementation and uptake of innovative services. On the other hand, equity-based approaches aim at ensuring that every existing and potential user has affordable access to a minimum level and standard of services.¹⁷² However, statistical surveys of telecommunications use in rural areas suggested that some residential customers were not receiving from Telecom even standard ‘ordinary residential telephone service’.¹⁷³

Tendering out the universal service delivery obligations so as to seek low-cost options was another recommendation in the Inquiry report. The proposal of a tendering process was aimed at supporting a more competitive environment in the sector. However, the report also referred to some potential problems related to this tendering option, such as no acceptable bids being forthcoming at the expiry of a contract with a new provider, what guarantees Telecom should be obliged to give about resuming the service, or customers being reluctant to switch to a new provider that did not have an established, long-standing service delivery record. The report did note that the tendering option could

¹⁶⁹ Ibid, at [70 (1)].

¹⁷⁰ Ministry of Economic Development, above n 94, at 11.

¹⁷¹ Dynamic efficiency, the key to maximising long-term consumer gain, typically refers to the efficiency of the framework for future decision-making. See Lewis Evans, Neil Quigley and Jie Zhang “An Essay on the Concept of Dynamic Efficiency and its Implications for Assessments of the Benefits from Regulation and Price Control” (New Zealand Institute for the Study of Competition and Regulation, 2000).

¹⁷² Howell, above n 99, at 37.

¹⁷³ Ministry of Economic Development, above n 94, at 83-84.

be proposed in co-operation with Telecom and with regard to providing services beyond the KSO.¹⁷⁴

With regard to the cost of KSO performance, the report recommended that the interconnection prices of Telecom should not include a contribution to any losses arising from the KSO. Moreover, Telecom should continue to bear the cost of the Kiwi Share uncompensated until such time as it could demonstrate financial impairment¹⁷⁵ sufficient to require it to apply to the government to increase its prices, as well as being prevented from charging ISPs for calls made using the 0867 numbers.

The Inquiry recommended that an industry-specific regulator, with the power to regulate prices using a cost-based methodology for a range of Telecom services, should be set up, and that Telecom should bear the costs of the KSO.¹⁷⁶ However, these ‘Kiwi Share’ recommendations were not included in the Telecommunications Act 2001.

According to some statistics, in 2001 New Zealand’s residential line rental was among the highest¹⁷⁷ and ranked the 2nd most costly in the OECD.¹⁷⁸ Residential line rental also more than doubled between 1982 and 1990 before the privatisation of Telecom.¹⁷⁹ The price cap applied under the Kiwi Share was less efficient than that of many other price capping regimes under which incumbent carriers had to reduce their local service charges by an amount less than inflation.¹⁸⁰

2 The Telecommunications Act 2001: TSO legal framework and institutional arrangements

Although there had been significant reforms in the economy since the 1990s, outcomes in the telecommunications market and particularly the universal service arrangements remained limited. The Telecommunications Act 2001 was enacted in response to a ‘significant gap’ in pricing performance between New Zealand and countries in the top

¹⁷⁴ Ibid, at 90.

¹⁷⁵ Ibid, at 89.

¹⁷⁶ Ibid.

¹⁷⁷ Ministry of Economic Development “Benchmarking the Comparative Performance of New Zealand’s Telecommunications Regime” (2005), at 1.

¹⁷⁸ Clear Communications Limited “Oral Submission to Commerce Select Committee on the Telecommunications Bill, 2001”, at 12.

¹⁷⁹ Ministry of Economic Development, above n 84, at [11].

¹⁸⁰ Clear Communications Limited “Submission to the Commerce Select Committee on the Telecommunications Bill 2001”, at 53.

half of the OECD.¹⁸¹ The Act set up industry-specific regulation in the telecommunications sector,¹⁸² and reformed the telecommunications regulatory environment in New Zealand so as to deliver a better deal for consumers.¹⁸³ The key objective of the Telecommunications Act 2001 was to promote competition in the telecommunications markets for the long term benefit of service users in New Zealand by regulating the supply of services between service providers.¹⁸⁴ The following specific components in the Act illustrate the shift:¹⁸⁵

- (a) The establishment of a Telecommunications Commissioner with responsibility to regulate the telecommunications industry (Subpart 2).
- (b) Access systems for interconnection and wholesale to enable competitors to access Telecom's network and retail services, with some standard access principles, such as timely supply consistent with international best practice and applying the same terms and conditions of supply to competitors as to Telecom itself (Part 2).
- (c) A new approach to universal service schemes to establish a regime for monitoring and enforcing TSO instruments (Part 3).
- (d) General network regulation - to deal with rules relating to the operation of the physical telecommunications infrastructure (Part 4).
- (e) A system of self-regulation - to enable industry fora to prepare telecommunications access codes in relation to designated and specified services (Schedule 2).

With regard to the TSO, the Act provided a mechanism whereby the Government's social objectives for the telecommunications sector could be achieved (for example, the

¹⁸¹ Ministry of Economic Development, above n 177, at [117].

¹⁸² Ministry of Economic Development "Background Information for the Telecommunications Amendment Bill" (2005), at 1.

¹⁸³ Ministry of Economic Development "Implementation Review of the Telecommunications Act 2001" (2004), at 1.

¹⁸⁴ Telecommunications Act 2001 s 18.

¹⁸⁵ David Carter "Crossing the Wires: The Interface between Law and Accounting and the Discourse Theory Potential of Telecommunications Regulation" (PhD, Victoria University of Wellington, 2008), at 44-48.

deaf relay service and the Kiwi Share)¹⁸⁶ and paid for by telecommunications service providers.¹⁸⁷ The Act set up a new approach to telecommunications service obligations (TSO) and a process to declare TSO instruments,¹⁸⁸ provided for the determination of the cost of a TSO instrument levied on liable persons, and allocated the TSO cost to be paid by each liable person¹⁸⁹ based on market share and revenue.¹⁹⁰ Telecommunications service providers who did not supply telecommunications services under a TSO instrument would contribute towards the net cost of the supply of the telecommunications services as determined by the Commerce Commission.¹⁹¹

(a) Institutional arrangements for TSO delivery in New Zealand

The Commerce Commission is a functionally and operationally independent Crown entity,¹⁹² and a regulatory and investigatory body with the responsibility of enforcing competition, fair trading and consumer credit contract laws.¹⁹³ The Commerce Commission is also the telecommunications industry regulator and has general responsibility for monitoring and information dissemination in the telecommunications sector, and overseeing the achievement of long-term benefits for end-users.¹⁹⁴ The general universal service obligation (the TSO) was imposed on Telecom and it was left to Telecom to decide how to achieve the outcomes and what amounts to spend. The Commission was only involved after the event in deciding whether the service standards for the TSO had been met, calculating the cost of providing the TSO service, and allocating that cost through levies on all operators.

(i) Performance measurement of public agencies

A core character of public management in New Zealand has been a strong focus on

¹⁸⁶ See Ministry of Economic Development *Background Information for the Telecommunications Amendment Bill (2005)*.

¹⁸⁷ Office of the Minister of Communications “Submission to the Implementation Review of the Telecommunications Act 2001” (2005), at [51].

¹⁸⁸ The agreed Kiwi Share service requirements between the Crown and Telecom were converted into a Telecommunications Service Obligations (TSO) instrument under the TSO regulatory framework established in the Act 2001.

¹⁸⁹ Ministry of Economic Development, above n 183, at [88].

¹⁹⁰ Carter, above n 185, at 48.

¹⁹¹ There was some evidence to suggest that Telecom as a TSO provider had also the opportunity to recover at least part of the cost of the TSO through the interconnection charges. See ‘*Determination for TSO Instrument for Local Residential Service for period between 20 December 2001 and 30 June 2002*’, at 15.

¹⁹² Crown Entities Act 2004 s 7.

¹⁹³ Commerce Commission “State of Intent 2008-2011” (2008) at 8.

¹⁹⁴ Telecommunications Act 2011, s 9 (A).

performance measurement, and the performance accountability of public agencies for the delivery of public services.¹⁹⁵ Any public agency with a policy, delivery, and regulating or monitoring sector role should have a robust performance measurement framework.¹⁹⁶ Performance measurement requires agencies acting within and according to the law, and being accountable for outputs and outcomes.¹⁹⁷ The overall emphasis in New Zealand has been on the broader and joint responsibilities of related agencies.¹⁹⁸

The Public Finance Act 1989 and the Crown Entities Act 2004 require compliance with robust performance measurement and reporting systems for all public sector agencies.¹⁹⁹ The focus on inputs and outputs, and the reporting requirements for departments and the whole of government were spelled out in the Public Finance Act 1989.²⁰⁰ As demand for an increased focus on outcomes in the public sector became more significant,²⁰¹ performance management has put more emphasis on the alignment of outputs with outcomes.²⁰²

Public sector performance in New Zealand is currently assessed and measured at three levels: (1) outcomes; (2) intermediate outcomes or impacts, and (3) outputs.²⁰³ Any evaluation of outcomes and outputs for public sector performance must link with the real cost for the delivery of services by which the public and stakeholders (internal or external) can assess value-for-money.²⁰⁴ In addition, public sector agencies have been required to inform the public and stakeholders about progress being made towards outcomes, build more robust evidence-based data upon which decisions are made, and report performance results in a verifiable, comprehensive and simple way.²⁰⁵ Enhanced performance measurements are required to ensure a greater integration between internal

¹⁹⁵ Anna-Luis Cook “Managing for Outcomes in the New Zealand Public Management System” (working paper 04/15, New Zealand Treasury, 2004), at 14.

¹⁹⁶ New Zealand Government “Performance Measurement: Advice and examples on how to develop effective frameworks” (State Service Commission and the Treasury, 2008), at 3.

¹⁹⁷ Rodney Dormer and Derek Gill “Managing for Performance in New Zealand’s Public Service - A Loosely Coupled Framework” (paper presented to the Performance Management Association Conference, Performance Measurement: Theory and Practice, Dunedin, April 2009), at 4.

¹⁹⁸ *Ibid.*, at 5.

¹⁹⁹ New Zealand Government, above n 196, at 8.

²⁰⁰ Pallot June “Innovations in National Government Accounting and Budgeting in New Zealand” (1996) 9 *Research in Governmental and Non-profit Accounting* 323 at 324.

²⁰¹ Cook, above n 195, at 9.

²⁰² Meaw-Fong Phang “Outputs and Performance Measures: A Case Study of Two New Zealand Public Sector Organisations” (Master, Canterbury University, 2006), at 1.

²⁰³ New Zealand Government, above n 196, at 12.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*, at 7.

management information systems, management reporting system, and performance budget and accountability documents.²⁰⁶

Outputs (and outcomes more recently) are key performance measures to enhance performance accountability and also to improve efficiency of the public sector.²⁰⁷ An output agreement is produced annually as a composite accountability document between the responsible Ministers and agencies such as the Commerce Commission.²⁰⁸ Output agreements establish expectations by the Commission of performance outputs. The Commerce Commission itself is accountable to the Minister of Commerce and, in respect of telecommunications, the Minister of Communications and Information Technology, for its performance.²⁰⁹ These output agreements enable the respective Ministers to monitor and hold the Commerce Commission to account for its outputs delivery and performance.²¹⁰ The Commission delivers outputs under an Output Agreement with both ministers. Its performance is measured against a detailed set of Output Measures, which are agreed with an external monitoring agency, the Ministry of Economic Development.²¹¹ Statements of Intent are produced annually to set future work programmes; there is also quarterly reporting to the Ministry, and annual reporting to the Government, and also to taxpayers via the Commission Annual Report.²¹²

Public and stakeholder involvement in performance measurement has been an important part of performance management in New Zealand. This not only drives the performance measurement of public sector agencies themselves but also underpins the process of delivering performance information needed by internal and external stakeholders.²¹³ Policy-making processes in New Zealand are open to public review. The Commerce Commission's governance and regulatory decision-making processes, for example, are open and transparent, and stakeholders are able to provide input before a final decision is made. The Commerce Commission undertakes stakeholder analysis during the processes

²⁰⁶ Derek Gill "Managing for Performance in New Zealand: The Research for the Holy Grail? in *Holy Grail or Achievable Quest – International Perspectives on Public Sector Management* (KPMG International, Canada, 2008).

²⁰⁷ Phang, above n 202, at 1.

²⁰⁸ Minister of Commerce and Commerce Commission "Output Agreement for the period 1 July 2006 and 30 June 2007" (2006), at [1.1].

²⁰⁹ Commerce Commission, above n 193.

²¹⁰ Minister of Commerce and Commerce Commission, above n 208, at [1.2].

²¹¹ Ministry of Economic Development was replaced with the Ministry of Business, Innovation and Employment on 1 July 2012.

²¹² Commerce Commission <www.comcom.govt.nz/accountability/>.

²¹³ New Zealand Government, above n 196, at 23.

of strategic design and implementation so as to better understand stakeholders' interests before determining strategic directions. In addition, cross-submission²¹⁴ is evidence of the two-way transparent engagement in decision-making processes of the Commerce Commission and between stakeholders. Public and stakeholder involvement in Commerce Commission processes reflects symmetric rights of cross-submission rather than simply a process of consultation.²¹⁵

(ii) Institutional arrangements for TSO delivery: the establishment of the specific industry regulator for telecommunications sector

The Commerce Commission is responsible for competition enforcement and regulatory control over a number of specific industries, including the telecommunications sector.²¹⁶ Its primary purpose is to promote market efficiency by enhancing “healthy competition amongst businesses, informed choice by consumers and sound economic regulation”.²¹⁷ It has considerable scope to make judgments on how policy can be most efficiently implemented.

With regard to the telecommunications sector, the Commerce Commission has responsibility for monitoring and information dissemination, and for overseeing the final outcomes of long-term benefits for end-users of telecommunications service.²¹⁸ Related particularly to TSO delivery, as provided in Part 3 of the Act, the Commerce Commission has the key statutory function of TSO administration. In addition, it has the function of enforcement of TSO conditions. These functions are carried out annually through monitoring compliance of TSO delivery with TSO instruments, determining the TSO net costs, determining TSO contributors (liable persons) and allocating this TSO

²¹⁴ Cross-examination or cross-submission is a process by which one stakeholder (telecommunications operator, for example) can submit their viewpoint and discussion over another stakeholder's submission.

²¹⁵ Neil Quigley “Governance and Regulatory Decision-Making at the Commerce Commission” (paper presented to the Contemporary Issues in the Regulatory Theory and Practice Workshop, Wellington, 2005).

²¹⁶ Commerce Act 1986, Fair Trading Act 1986, Electricity Industry Reform Act 1998, Telecommunications Act 2001 and Credit Contracts and Consumer Finance Act 2003.

²¹⁷ Commerce Commission “Annual Report for the Year Ended 30 June 2002” (2002), at 4.

²¹⁸ Telecommunications Act 2001, s 9A.

net cost among these liable persons (TSO levies).²¹⁹ It releases TSO costs allocation determinations annually for each fiscal year.²²⁰

The monitoring function of the Commission is undertaken on a regular basis, releasing information through quarterly reports and through an annual comprehensive set of statistics, along with commentary and analysis of the telecommunications market. The Commission also carries out a specific evaluation of compliance with the service quality standards for TSO service delivery.

All these reports and information are available to the public and ensure sufficient evidence-based analysis for decision-making related to TSO delivery. The monitoring function of TSO delivery is also ensured through the assessment of compliance with TSO instruments. This assessment must be completed within a determined period (60 working days) after the end of each financial year.²²¹ The Commission must make reasonable efforts to assess the annual TSO cost not later than 40 working days after the closing date for submissions.²²²

Accountability arrangements for the TSO objectives and outcomes in New Zealand are clearly identified in order to improve the performance of TSO delivery. The Commission is accountable to the Minister for Communications and Information Technology for the performance of the efficient and effective delivery of its functions in regulating the telecommunications sector.²²³

In practice, an output agreement will be reached annually²²⁴ between the Responsible Minister(s) and the Commerce Commission in a composite accountability document.²²⁵ This determines the outputs to be provided by the Commission and also establishes expectations of the Commission's performance.²²⁶ These outputs involve the preparation and provision of reports on any specified matters to the respective ministers, such as the

²¹⁹ Ibid, s 10(a).

²²⁰ Commerce Commission "A Guide to Regulatory Decision Making by the Commerce Commission for the Telecommunications Sector" (2009), at 14-15.

²²¹ Telecommunications Act 2001, s 80.

²²² Ibid, s 90.

²²³ Ministry of Commerce "Output Agreement for the period 1 July 2009 and 30 June 2010" (2009), at 7.

²²⁴ Output agreements are entered annually between the responsible ministers (Minister of Commerce, Minister of Energy and Minister of Communications) and the Commerce Commission. Before 2004, Memorandum of Understanding was used instead.

²²⁵ Ministry of Commerce, above n 208, at [1.1].

²²⁶ Ibid, at [1.2].

Minister for Communications under the Telecommunications Act.²²⁷ It also included determinations of TSO cost to TSO providers complying with the TSO, and the allocations of these costs across the telecommunications industry.²²⁸ These annual output agreements enable the respective Ministers to monitor the Commission and hold it to account for its outputs delivery and performance.²²⁹ Accordingly, the Commission is required to maintain systematic measurement and verification of performance against the specified standards, and deliver the outputs in accordance with the specified performance undertaking.²³⁰ The Commission also has to provide information consistent with its role and responsibilities in response to official requests for information related to ministerial correspondence and speeches, Parliamentary questions, and Select Committee examinations and investigations.²³¹ These activities of the Commission's enforcement and regulatory control are funded through appropriations of public money by Parliament and allocated to each of specific functions,²³² including money for performance in telecommunications industry and TSO delivery particularly.²³³

The Commission produces a Statement of Intent annually setting out its future work programme. The outputs are linked with outcomes in order to ensure effective governmental policy. Inputs-outputs analysis is undertaken to arrive at a better understanding of desired policy outcomes and how strategy actions can be best achieved.²³⁴ Ultimately, this clear role and structure helps to achieve genuine accountability.

In addition, because of focus on residents, the system of accountability is improved. Public managers pay attention to managing the relationship with clients (citizens) in order to be accountable to the public. The public is better able to contribute to the policy-making process while administrators gain greater understanding of public needs. This could lead to more satisfaction for the public through greater participation in

²²⁷ Minister of Commerce "Memorandum of Understanding for the period 1 July 2002 and 30 June 2003" (2002), at 21.

²²⁸ Minister of Commerce, above n 223, at 27.

²²⁹ Minister of Commerce, above n 208, at [1.2].

²³⁰ *Ibid*, at 7.

²³¹ Minister of Commerce, above n 227, at 11.

²³² Minister of Commerce, above n 223, at 9.

²³³ *Ibid*, at 26-27.

²³⁴ Ryan, above ch 2, n 260, at 60.

policy-making.²³⁵ Along with investigation and litigation, the provision of information to the public plays an important role in the Commission's enforcement activities.²³⁶

In summary, the institutional arrangements for the management of TSO delivery in New Zealand reflect key features close to the best practice. An appropriate monitoring and evaluating mechanism by an independent specific-industry regulator with sufficient performance information systems and involvement by the public and stakeholders results in the effective management and economically efficient delivery of TSO services. In addition, other core features of the management for outcomes in the public sector in New Zealand, such as performance accountability and transparency, have important roles in enhancing the effective performance of TSO delivery.

(b) Definition of TSO and declaration of TSO instrument

The Telecommunications Act 2001 for the first time formalised the definition of the original KSO as the obligations that were set out in clause 5 of the First Schedule of Telecom's Memorandum of Association. These provisions²³⁷ required Telecom and those of its subsidiaries that provided a local residential telephone service to offer free local calling and capped monthly access charges.²³⁸ Free local-calling and capped monthly fixed charges should observe principles relating to the supply of that service.

In addition, s 5 created the concept of a TSO instrument, which incorporated the KSO and any instrument declared by Order in Council to be a TSO instrument. The purpose of these provisions was to "facilitate the supply of certain telecommunications services to groups of end-users within New Zealand to whom those telecommunications services may not otherwise be supplied on a commercial basis or at a price that is considered by

²³⁵ Hughes, above ch 2, n 192, at 248.

²³⁶ Minister of Commerce "Output Agreement for the period 1 July 2004 and 30 June 2005" (2004), at 5.

²³⁷ Telecom New Zealand Limited "Constitution of Telecom Corporation of New Zealand Limited: First Schedule: Kiwi Share and Rights of Kiwi Shareholder" (1989), at [5.2].

²³⁸ Telecommunications Service Obligations Deed for Local Residential Telephone Service (December 2001), s 7 also required that Telecom had to provide directory assistance on the basis set out in the exchange of letters between the Crown and Telecom (1997); and to meet a number of service quality measures in areas including connection speed for standard internet calls, unsuccessful call attempts and complete switch downtime.

the Minister to be affordable to those groups of end-users”.²³⁹ The criteria required to be met for an agreement to be declared as a TSO instrument were that it must:²⁴⁰

- (a) Record a contract or arrangement or understanding between the Crown and a service provider for the supply of a particular telecommunications service or range of telecommunications services;
- (b) Identify the group of end-users to whom the service must be supplied;
- (c) Define the geographical area within which the service must be supplied;
- (d) Specify the retail price at, or below which, the service must be supplied; and
- (e) Specify the criteria that must be met for the standard of the service to be supplied.

Currently there are two TSOs in New Zealand: one for Local Residential Telephone Services (Local Service TSO) Deeds,²⁴¹ and the other for the Telecommunications Relay Service (TRS)²⁴² for meeting the telephone communication needs of deaf, hearing impaired and speech impaired people in New Zealand. This study is focused on the TSO for local residential telephone service only.

(c) Determining the net cost of a TSO instrument

One of the most important changes in the Telecommunications Act was the removal of the cost burden of the TSO from Telecom alone and the confirmation of telecommunications operators’ responsibility to share the TSO cost. In particular, Part 3 subpart 2 created an annual procedure for determining the costs of TSO instruments and the amounts payable by service providers (liable persons) in the telecommunications industry to the TSO service provider.²⁴³ Allocating TSO costs to telecommunications operators in New Zealand prior to the Telecommunications Amendment Act 2011 was based on the cost of TSO services provided by the TSO service provider (Telecom) as

²³⁹ Telecommunications Act 2001, s 70 (1).

²⁴⁰ Ibid, s 70(2) and (4).

²⁴¹ Telecommunications Service Obligations (TSO) Deed for Local Residential Telephone Service (November 2011) between the Crown and Telecom, and the TSO Deed for TSO Network Services between the Crown and Chorus Limited.

²⁴² Telecommunications Service Obligations (TSO) Deed for Telecommunications Relay Services (TRS) (September 2004).

²⁴³ Telecommunications Act 2001 s 5 provided that “TSP or telecommunications service provider means a provider of a telecommunications service under a TSO instrument”.

identified annually by a cost-based model developed by the Commission. In order to ensure cost-effectiveness, the net cost of the TSO was defined as the “unavoidable net incremental cost to an efficient service provider of providing services required by the TSO instrument to commercially non-viable customers”.²⁴⁴

(i) Unavoidable incremental cost

The concept of incremental cost is well established in economic theory and referred to as an additional cost a company would incur if it chooses to serve an extra group of customers or provide an extra unit of output.²⁴⁵

The incremental cost of an obligation to provide services to commercially non-viable customers is equal to the difference in the TSO service provider’s total cost between the circumstances where it supplies those customers in conjunction with all its other customers, and where it does not.²⁴⁶ This incremental cost is the long-run incremental cost (LRIC), including the costs of all the inputs used to provide the service.²⁴⁷ Accordingly, unavoidable incremental costs are the difference between the long-run costs an efficient service provider would incur with and without the obligations imposed by the TSO instrument.²⁴⁸

The Commission is required to take the following matters into account in calculating the net cost:²⁴⁹

- (a) Direct and indirect revenues and associated benefits derived from providing telecommunications services to commercially non-viable customers, less the costs of providing those telecommunications services to those customers.
- (b) The provision of a reasonable return on the incremental capital employed in providing the services to those customers.

²⁴⁴ Telecommunications Act 2001 s 5.

²⁴⁵ William Baumol and Gregory Sidak *Toward Competition in Local Telephony* (Massachusetts Institute of Technology Press, Cambridge, 1994) at 57.

²⁴⁶ Commerce Commission “Determination for TSO Instrument for Local Residential Service for Period between 20 December 2001 and 30 June 2002” (2003), at [32].

²⁴⁷ *Ibid*, at [36].

²⁴⁸ *Ibid*, at [34].

²⁴⁹ Telecommunications Act 2001, s 84.

- (c) Include or exclude profits from any new telecommunications services that involve significant capital investment and that offer capabilities not available from established telecommunications services;
 - (d) Exclude any losses from telecommunications services other than services that the TSO instrument requires the TSP to provide;
 - (e) Consider the purpose set out in section 18.²⁵⁰
- (ii) Efficient service provider

The existence of the TSO would impact on all telecommunications service providers and consequently on all users. However, the term ‘efficient service provider’ was not defined in the Act and s 5 only referred to “...an efficient service provider as providing the service required by the TSO instrument...”²⁵¹ in calculating the net cost of the TSO instrument.

The Commerce Commission annually has modelled the costs of an efficient service provider in delivering the TSO service²⁵² and used its own cost models to calculate the net cost to the TSO provider using a ‘bottom-up’ approach²⁵³ to design the network of an efficient operator providing the TSO service.²⁵⁴

Generally, an efficient service provider could be defined as one producing a given quantity and quality of service at the lowest possible cost.²⁵⁵ Accordingly, the relevant benchmark for the level of costs associated with the concept of ‘efficient service provider’ was that of a competitive market,²⁵⁶ where incentives operate to ensure that

²⁵⁰ Telecommunications Act 2001 s 18(1) provides that:

(1) The purpose of this Part and Schedule 1 to 3 is to promote competition in telecommunication in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand...

²⁵¹ Telecommunications Act 2001 s 5.

²⁵² Commerce Commission “Determination for TSO Instrument for Local Residential Service for Period between 1 July 2007 and 30 June 2008” (2008), at 6.

²⁵³ A modelling approach progressing from small units to a larger or more important unit. See *Final Determination for TSO Instrument for Local Residential Service for Period Between 1 July 2004 and 30 June 2005* (2008).

²⁵⁴ Commerce Commission “Final Determination for TSO Instrument for Local Residential Service for Period between 1 July 2004 and 30 June 2005” (2008), at [12].

²⁵⁵ Commerce Commission, above n 246, at [39].

²⁵⁶ *Ibid*, at [45].

costs are minimised.²⁵⁷ Therefore, s 84 (2) (c) required the Commission to consider the legislative purpose in s 18 of the promotion of competition in telecommunications markets in determining the TSO net cost.²⁵⁸

(iii) Commercially non-viable customers

The concept of ‘commercially non-viable customers’ (CNVCs) played an important role in determining the TSO net cost.²⁵⁹ However, the Act did not define CNVCs. The Commission decided that CNVCs could be identified by determining which groups of customers in the absence of the TSO would neither be supplied on a commercial basis nor be supplied at an affordable price.²⁶⁰

In order to identify CNVCs, the Commission considered which ‘clusters of customers’ would incur costs for TSO services exceeding the standard residential line rental plus expected supplementary revenue, and by how much that cost would exceed that revenue.²⁶¹ The smallest logical group of customers served by the access network to which costs ought to be attributed was a ‘cluster’, as an efficient network provider was unlikely to roll out its network on a customer-by-customer basis.²⁶² Each cluster would be identified as either ‘viable’ or ‘non-viable’ and the summation of the net costs of all the non-viable clusters would determine the total TSO net cost.²⁶³

(iv) Determination of the TSO net cost

Litigation arose between Vodafone and Telecom concerning the method used by the Commerce Commission to determine the TSO net cost for periods 2004-2005 and 2005-2006. Vodafone claimed that the Commission made errors when it determined the TSO net cost that liable persons must pay Telecom to subsidise the cost of serving its non-viable rural customers.²⁶⁴ Vodafone argued that the TSO should be based on the most

²⁵⁷ Commerce Commission, above n 254, at [44].

²⁵⁸ Telecommunications Act 2001 s 84(2)(c).

²⁵⁹ Commerce Commission, above n 246, at [43].

²⁶⁰ Commerce Commission “Determination for TSO Instrument for Local Residential Service for Period between 1 July 2002 and 30 June 2003” (2005), at [29].

²⁶¹ Commerce Commission, above n 246, at [46].

²⁶² Ibid, at [49].

²⁶³ Ibid, at [50].

²⁶⁴ *Vodafone New Zealand Limited v Telecom New Zealand Limited* [2008] CIV-2008-485-002194, [2008] CIV-2008-485-002195, [2008] CIV-2008-485-002341, [2010] HC WN CIV 2008-485-2194, [2010] SC 44/2010, [2010] SC 45/2010, [2010] SC 46/2010, [2011] NZSC 138, at [3].

efficient technology and the Commission should consider both wireless and mobile technologies when determining Telecom's net cost in providing the TSO service.²⁶⁵ This was again proposed in Vodafone's submission to the TSO Review in 2007.²⁶⁶

The company argued that the charging system adopted by the Commission precluded competition from new alternative technologies, as the network model was based entirely on Telecom's fixed network nodes, and the Commission had decided not to include alternative technologies in its cost modelling.²⁶⁷ Vodafone claimed that the Commission excluded new technologies from its calculation of net cost. Instead Vodafone contended that the Commission was using a method of calculation, which was likely to have significantly overstated the TSO net cost²⁶⁸ and consequently overstated the amount that liable persons must pay to Telecom.²⁶⁹

During the submission process for determining the TSO net cost, Vodafone had argued that the cost should be calculated on the basis of a model utilising existing mobile sites and efficiently located new sites. The Commission rejected this argument.²⁷⁰ Costs for delivery of universal services to CNVCs in some areas with certain geographical conditions and population areas, such as mountainous areas with discrete populations, were lower for using wireless and mobile technologies instead of fixed line telephones. Hence, considering costs of wireless and mobile technologies in calculating TSO costs in these areas would reduce universal service levies on other operators.

In 2010, the High Court found in favour of Vodafone and concluded that an error of law had occurred in the course of the determination by failing to introduce new technology into the modelled network.²⁷¹ Accordingly, the Commission had failed to determine the unavoidable costs of an efficient service provider and thus set the net cost at a level higher than Telecom's actual costs.²⁷² The High Court referred the determination back to

²⁶⁵ Ibid, at [4].

²⁶⁶ Vodafone New Zealand Limited *Submission on the TSO Reform and Funding Telecommunications Development* (2009).

²⁶⁷ Ibid, at 6.

²⁶⁸ *Vodafone New Zealand Limited v Telecom New Zealand Limited*, above n 264, at [5].

²⁶⁹ Ibid, at [7].

²⁷⁰ *Vodafone New Zealand Limited v Telecom New Zealand Limited*, above n 264, at [33].

²⁷¹ *Vodafone New Zealand Limited v Telecom New Zealand Limited* [2008] CIV-2008-485-002194, [2008] CIV-2008-485-002195, [2008] CIV-2008-485-002341, [2010] HC WN CIV 2008-485-2194, at [75].

²⁷² Ibid.

the Commission for further consideration,²⁷³ raising the possibility that the Commission would have to review its approach to cost modelling not only for these determinations but potentially for all of the other TSO determinations.²⁷⁴

In summary, the calculation of the net costs of providing universal services to be used for allocating levies has been contentious and complex. There is continuing litigation with regard to the net cost determination for the 2004/2005 and 2005/2006 years and the Commerce Commission has been reviewing its approach, after the Court's judgment.²⁷⁵

(d) Allocation of TSO costs charged by each liable person and TSP

An essential part of the TSO determination is to allocate the net cost of the TSO amongst telecommunications operators serving end-users in New Zealand.²⁷⁶ Allocating TSO costs (TSO levies) in New Zealand prior to the Telecommunications Amendment Act 2011 was based on the cost of TSO services provided by the TSO provider. The allocation of such TSO costs was carried out only after the TSO provider had provided services, and was linked with outputs (such as the number of commercially non-viable customers). This helped to avoid overcharging or unused collected TSO levies.

Other important matters taken into account in allocating the net costs of the TSO included the definition of liable person, liable revenue, weighted revenue, and the TSO component of interconnection charges.

(i) Determination of liable person

The determination of telecommunications operators' liability for TSO levies (liable person for TSO levies) in New Zealand is based on interconnection between networks. The Telecommunications Act defines 'liable person' as follows:²⁷⁷

Liable person, in relation to a TSO instrument, means (except when they are the TSP),

²⁷³ Ibid, at [99].

²⁷⁴ Jenny Keown "Vodafone wins TSO Appeal" (New Zealand, 8 April 2010) <www.stuff.co.nz/timaru-herald/business/3561080/Vodafone-wins-TSO-appeal>.

²⁷⁵ See *Vodafone New Zealand Limited v Telecom New Zealand Limited* [2010] SC 4/2010, [2010] SC 44/2010, [2010] SC 45/2010, [2010] SC 46/2010, [2011] NZSC 138.

²⁷⁶ *Vodafone New Zealand Limited v Telecom New Zealand Limited*, above n 264, at [104].

²⁷⁷ Telecommunications Act 2001, s 5.

(a) Telecom; and

(b) A person-

- (i) whose network is interconnected with a fixed PSTN operated by Telecom; and
- (ii) who provides a telecommunications service in New Zealand to end-users by means of some component of a PSTN that is operated by the person.

In order to identify which telecommunications operators were eligible to be defined as a ‘liable persons’, the Commission concluded that these operators needed to (1) own a network that interconnected to Telecom’s fixed telephone network and (2) provide telecommunications services to end-users in New Zealand by operating a component of a PSTN located in New Zealand.²⁷⁸

As there was no definition of the term ‘interconnected’ in the Act, the Commission considered several possible interpretations, before concluding that networks were ‘interconnected with a fixed PSTN operated by Telecom’ when there is a direct physical linkage between the originating and terminating networks.²⁷⁹

With regard to the criterion of the ‘provision of telecommunications services to end-users in New Zealand by operating a component of a telephone network’, the Commission noted that determining the criterion of ‘provision of telecommunications services to end-users’ was not complicated, but the criterion of ‘component of a PSTN’ was more difficult:²⁸⁰ for example, in the case of an internet service provider (ISP), which operated a component of a PSTN and terminated telephone calls from the PSTN for the purpose of providing access to the Internet.²⁸¹

‘PSTN’ was defined by the Act as a “dial-up telephone network used, or intended for use, in whole or in part, by the public for the purpose of providing telecommunication

²⁷⁸ Commerce Commission, above n 246, at [477].

²⁷⁹ Commerce Commission, above n 260, at [420].

²⁸⁰ Commerce Commission, above n 246, at [484].

²⁸¹ Ibid, at [485].

between telephone devices”.²⁸² While ISPs might operate telephone devices so as to terminate calls which were provided on a PSTN infrastructure, calls terminated by an ISP were not passed across any components of a PSTN operated by the ISP specifically for connection with another telephone device. Thus, ISPs were not to be accounted as liable persons.²⁸³ However, an ISP that was interconnected with Telecom’s fixed PSTN for the purpose of providing voice services to end-users in New Zealand by means of a component of a PSTN operated by the ISP would be a liable person.²⁸⁴

The Commission noted that it received no evidence that there were any ISPs who met both criteria of the definition of liable person.²⁸⁵ When allocating the TSO net cost, the Commission determined that liable persons were those firms with an interconnection agreement with Telecom during the TSP’s financial year.²⁸⁶

In summary, there was competitive neutrality and no discrimination between technology and services in determining telecommunications operators’ liability for universal service levies in New Zealand. Instead, any operators interconnected with Telecom’s fixed PSTN were responsible for paying universal service levies. However, some service providers who benefited by using some components of Telecom’s fixed PSTN, such as ISPs and content service providers, were not liable to pay levies.

(ii) Determination of liable revenues

With regard to the approach of ‘liable revenue’, there was no definition provided in the Act of ‘revenue’ for the amount of revenue that was used to calculate the TSO liability of liable persons and the TSP.²⁸⁷ The Telecommunications Act 2001 ss 92(b)(i) and 92(a)(ii) provided that the amount of revenue received during the financial year by that liable person or the TSP (in relation to the TSO instrument from providing a telecommunications service either by means of its PSTN or by means that relied primarily on Telecom’s PSTN) was to be counted as liable revenue.²⁸⁸

²⁸² Telecommunications Act 2001 s 5.

²⁸³ Commerce Commission, above n 246, at [486].

²⁸⁴ Ibid, at [487].

²⁸⁵ Ibid, at [488].

²⁸⁶ Ibid, at [488-489].

²⁸⁷ Ibid, at [490].

²⁸⁸ Telecommunications Act 2001 s 92(a)(ii) and 92(b)(i).

The amount of revenue received from providing telecommunications services could be interpreted ordinarily as amounts received in the nature of income for providing telecommunications services.²⁸⁹ According to the Commission, it was normally a gross amount and expenses were unable to be deducted from the amount submitted by liable persons.²⁹⁰ This included all revenues received by the TSP and each liable person for the provision of telecommunication services, regardless of whether those services were provided to end users or to other carriers, and without deduction of expenses incurred either for intermediate inputs or services that were resold.²⁹¹

The Act provided that the Commission, in determining the net cost of the TSO, must consider the purpose set out in s 18, “to promote competition in the telecommunications market for the long-term benefit of end-users of telecommunications services within New Zealand”.²⁹² Thus, the Commission considered that the interpretation of liable revenue should have the following requirements:²⁹³

- (1) To avoid distorting end-user choices of the same services provided by different operators;
- (2) To exclude any capital-nature item so as to avoid distorting welfare-enhancing investments by operators;
- (3) To avoid distorting the relative costs of different supply arrangements for providing the same service; and
- (4) To minimise the level of competitive advantage arising from the impact of the TSO charge enjoyed by non-liable persons providing the same services as liable persons.

The Commission considered whether alternative approaches, including two possible approaches: ‘retail revenue’ or ‘net revenue’, would lead to an outcome consistent with the purposes of the Act. Retail revenue, determined as earnings by the TSP and liable persons from providing telecommunications services directly to end-users,²⁹⁴ would be ineffective in removing market distortions that would be disadvantageous to the long-

²⁸⁹ Commerce Commission, above n 246, at [493].

²⁹⁰ Ibid, at [494].

²⁹¹ Ibid, at [495].

²⁹² Telecommunications Act 2001 s 84(2).

²⁹³ Commerce Commission, above n 246, at [498].

²⁹⁴ Ibid, at [504].

term interests of end-users²⁹⁵ and might result in the distortion of customer choice between different suppliers of the same service.²⁹⁶

Net revenue - earned revenue after eliminating intra-industry sales of telecommunications services, by deducting from gross revenue any amounts payable to other carriers for the provision of telecommunications services²⁹⁷ - would be a better option. The Commission argued that this option could significantly lessen the distortion of the TSO charge on liable persons and the TSO provider.²⁹⁸ The revenues eligible for determining TSO levies were then interpreted as the net revenue excluding intra-industry payments.²⁹⁹

In summary, allocating universal service levies to telecommunications operators in New Zealand illustrated the key features of competitive and technological neutrality. In addition, it was also aligned with the cost-effective principle when the allocation was based on the net (actual) costs of providing services through using cost modelling and specific criteria for an efficient service provider.³⁰⁰ Calculating liable revenues for paying universal service levies in New Zealand reflected a significant aim at mitigating levies placed on telecommunications operators by deducting revenues receivable from providing universal services. In addition, revenues from intra-industry payments were also subtracted from liable revenues for paying levies. However, the determination of gross (before-tax) revenue as liable revenues and the absence of a minimum threshold of liable revenues of operators for paying levies could place financial burdens on small and new service providers.

(e) Subsidies to TSO service providers

The Telecommunications Act 2001 had several significant features in regard to the TSO service provider:

(i) The TSO net cost was calculated retrospectively following the completion of each financial year of the TSP;

²⁹⁵ Ibid, at [508].

²⁹⁶ Ibid, at [506].

²⁹⁷ Ibid, at [504].

²⁹⁸ Commerce Commission, above n 246, at [512].

²⁹⁹ Commerce Commission, above n 260, at [488].

³⁰⁰ See Chapter Three III.C.3(c).

(ii) Levels of subsidy were linked to the net cost of providing TSO services;

(iii) The process for the TSO net cost determination was to be based on a detailed and transparent process, with performance information and stakeholder involvement/submission. The determination of the net cost was based in part on performance information provided by the TSO service provider and calculated by the regulator with appropriate cost modelling updated annually;³⁰¹

(iv) The determination of net cost was aimed at cost-effectiveness and producing given outputs at the lowest possible cost so as to mitigate TSO costs levied on telecommunications operators.³⁰²

(v) The subsidies to the TSO service provider were made by levy payers to the TSP only after the Commission had calculated the net cost and allocated it to liable persons.

In order to mitigate the financial burden of TSO service provision due to the retrospective funding model and delayed subsidies, the Act fixed a period for the completion of the TSO net cost allocation determination, an applicable extra charge for ‘loss of use of money’ in TSO levies, a fixed period after the date of the determination for payment of TSO levies and payment of interest on any outstanding TSO levies.

In addition to the actual amount of TSO net cost levied on liable persons and paid to TSO service providers by liable persons, an extra payment for ‘loss of use of money’ is added for the period from the last day of the fiscal year to the date of the final allocation determination of TSO costs.

The Act provided that any delay or unpaid payment of TSO levies to TSO providers in relation to a TSO instrument would incur interest. Any service provider liable to pay a levy, who fails to pay the whole amount of that levy by the date specified, must pay interest on the unpaid amount at the rate of 1.5% per month calculated from the due date for payment.³⁰³

³⁰¹ See Chapter Three III.C.3.(c).

³⁰² See Chapter Three III.C.3.(c).

³⁰³ Telecommunications Act 2001 s 14.

In addition, any liable person in relation to a TSO instrument must pay to the TSO provider the amounts set out in the determination not later than 20 working days after the date of the determination. In cases where they have not paid the whole amount before the expiration of the 20-working day period they must pay to the TSO provider interest on the unpaid amount at the 90-day bank bill rate, plus 5% for the period commencing on that working day to the date of payment of the whole amount.³⁰⁴

These measures help to avoid any losses incurred by TSO providers due to delays in the determination of the TSO net cost and subsidies to TSO service providers.

4 The Telecommunications Amendment Act 2006

(a) Situation of the telecommunications industry

The 21st century has witnessed rapid increases in the use of computers, Internet, mobile and digital technology. This caused more social and economic change than any other aspect of information and communications technologies.³⁰⁵ In 2005 New Zealand had good broadband access availability (over 95% of households)³⁰⁶ and business penetration of broadband technology was comparatively high, compared with other OECD countries.³⁰⁷

However, there was a significant gap in pricing performance between New Zealand and some OECD countries.³⁰⁸ The average price of residential fixed to mobile calling was significantly higher in New Zealand and needed to be reduced by 50% to rank in the top half of the OECD.³⁰⁹ In addition, New Zealand had substantially higher residential local call usage than the standard OECD comparison basket. The free-local-calling option and the extensive use of this option for dial-up Internet access were the principal causes of this.³¹⁰

³⁰⁴ Ibid, s 94(3).

³⁰⁵ Ministry of Economic Development “Telecommunications Amendment Bill – Background Briefing Paper” (2006), at 2.

³⁰⁶ Ministry of Economic Development “Benchmarking the Comparative Performance of New Zealand’s Telecommunications Regime” (2005), at 2.

³⁰⁷ Ministry of Economic Development “Background Information for the Telecommunications Amendment Bill: General” (2006), at [11.3]

³⁰⁸ Ministry of Economic Development, above n 306, at [104].

³⁰⁹ Ibid, at [11].

³¹⁰ Ibid, at [8].

There was also no infrastructure-based alternative supplier of residential telephone service with a national reach, except a limited infrastructure-based competitive provision by TelstraClear in some areas of the country.³¹¹ Further, New Zealand's mobile service pricing performance ranked in the bottom half of the OECD; mobile calling usage was among the lowest in the OECD, but there was high text usage compared to other countries.³¹²

Broadband Internet access uptake in New Zealand as at December 2004 was low at 4.7 lines per 100 residents (10.9% of households), compared with 10.34 lines per hundred residents (21.2% of households) for the OECD.³¹³ In addition, broadband access pricing was high relative to most other OECD countries,³¹⁴ especially with advanced broadband services requiring upstream speeds significantly higher than 128 kbps.³¹⁵

In December 2006, the Telecommunications Amendment Act 2006 was enacted. This was a vital part of the Government's aim to transform the economy and improve broadband performance in the country relative to other OECD countries. The Amendment Act made major changes to the Commission's regulatory functions for monitoring competition in the telecommunications market, and the overall performance of telecommunications markets.³¹⁶ These amendments included the introduction of new regulated services (such as unbundled copper local loop - UCLL and unbundled bit-stream access backhaul),³¹⁷ the introduction of a standard terms determination regime,³¹⁸ and provisions for the operational and accounting separation of Telecom so as to enhance competition for the long-term benefit of telecommunications service end-users with transparency, non-discrimination and equivalence of supply.³¹⁹

Another significant change was a requirement for the Commission to monitor competition, the performance and development of telecommunications markets, and to

³¹¹ Ibid, at [22].

³¹² Ibid, at [24].

³¹³ Ibid, at [2] & [11].

³¹⁴ Ibid, at [13].

³¹⁵ Ibid, at [117(d) & (e)].

³¹⁶ Commerce Commission "2007 Telecommunications Market Monitoring Report" (2008), at [14-15].

³¹⁷ Ibid, at [14].

³¹⁸ Telecommunications Amendment Act 2006 Subpart 2A.

³¹⁹ Ibid, s 69A.

make public relevant outputs of its monitoring activities.³²⁰

(b) Amendments related to TSO

The framework for TSO cost determinations under Part 3 of the 2001 Act was modified by providing more details on the process of determining TSO net cost, and amending the formula to be used in calculating the amount payable by a liable person.³²¹ The definition of net cost and the substance of the relevant considerations applied in determining the net cost to the TSO provider³²² however remained the same.³²³

A cost formula for calculating the amount of TSO levies payable by each liable person was added, so that a TSO levy payable by a liable person was to be calculated by:³²⁴

- a. Multiplying the TSO qualified-revenue of that liable person with a deficiency between the TSO net cost of TSO provider and any amount receivable from all liable persons in relation to the TSO instrument; and
- b. Dividing the sum of the TSO provider's qualified-revenue and the TSO qualified-revenue of such a liable person.

Sections 100B and 100C require the Commission to disclose information for disaggregated geographical areas for the purpose of calculating the TSO net cost to the TSO provider in both the draft and final TSO cost calculation determinations. Those

³²⁰ Ibid, s 9A.

³²¹ Telecommunications Act 2001 s 93(b) and the Telecommunications Amendment Act 2006 s 93(F)(b).

³²² The concept of TSP in the Act 2001 was replaced by the new definition of 'TSO provider' in section 5 of the Amendment Act 2006.

³²³ Commerce Commission "Draft TSO Cost Calculation Determination for TSO Instrument for Local Residential Telephone Service for period between 1 July 2006 and 30 June 2007" (2008), at 4.

³²⁴ Telecommunications Amendment Act 2006 s 93F(b) states that:

(b) for a TSO instrument that does not contain a specified amount, the amount calculated using the following formula: $a \times (f - e)$

b + c

Where—

a is the amount of the liable person's TSO-qualified revenue that is referred to in section 91(1)(b) (excluding any part of that revenue that was received for performing any obligation under a TSO instrument that contains a specified amount)

b is the amount of the TSO provider's TSO-qualified revenue referred to in section 91(1)(a) (excluding any part of that revenue that was received for performing any obligation under a TSO instrument that contains a specified amount)

c is the sum of the amounts of each liable person's TSO-qualified revenue referred to in section 91(1)(b)

e is the amount of the reduction (if any) referred to in section 93E(c)

f is the net cost referred to in section 93E(a)

geographical areas must correspond to the areas that the Commission has identified in assessing the commercial viability of supplying the TSO service to customers.³²⁵

The key parts of the new reporting requirement are:³²⁶

- (a) the name, location, and limits of each geographical area within which the TSO provider supplies the service under the deemed TSO instrument; and
- (b) the number of subscriber lines for that service in each geographical area; and
- (c) the number of those subscriber lines for which—
 - (i) the revenue attributed by the Commission is greater than, or equal to, the respective cost attributed; and
 - (ii) the revenue attributed by the Commission is less than the respective cost attributed; and
- (d) the net cost of the deemed TSO instrument in each geographical area; and
- (e) any related information that is necessary to assist in understanding the information specified in paragraphs (a) to (d).

This imposition of the public disclosure requirement was a response to concerns that the Commission had not previously released details of non-viable customer groupings in documents of determination of TSO net cost and allocation.³²⁷ Draft and final determinations of TSO net cost included the total number of CNVCs only.³²⁸ The reason for excluding information of the location and number of CNVCs was that it could damage Telecom's commercial interests.³²⁹ However, providing adequate information about location and number of CNVCs within each of commercially non-viable customer clusters would make it possible for competitors to provide services where it was less costly to do so than compensating Telecom.³³⁰

³²⁵ Ibid, s 100B (3).

³²⁶ Ibid, s 100B (2).

³²⁷ Ministry of Economic Development "Regulatory Impact Statement: Reforms of the Telecommunications Service Obligations Framework and Industry Levy Arrangements" (2009), at [45(a)].

³²⁸ Determinations for TSO instrument for Local Residential Telephone Service for periods before 2006.

³²⁹ See Submissions of 2Degrees, TeamTalk, Woosh, WorldxChange, TUANZ, Northpower Limited, New Zealand Regional Fibre Group.

³³⁰ Ministry of Economic Development, above n 327, at [45(b)].

5 The Telecommunication Amendment Act 2011 - TSO and Broadband

(a) TSO reviews and rural broadband in New Zealand

Several reviews of the TSO regime were carried out so as to ‘future-proof’ the regulatory regime in terms of market developments and technological changes. The first TSO review was in 2006 (the Government’s Telecommunications Stocktake) and there were further TSO reviews in 2007 and 2009. The fundamental areas to be addressed were: (1) how to arrive at suitable compensation for the TSO provider (Telecom) for supplying TSO local residential telephone service in commercially non-viable areas; and (2) whether there should be TSO requirements for rural broadband services.

With regard to TSO local residential telephone service, Telecom’s competitors argued that the compensation Telecom received for supplying TSO local residential telephone service did not reflect economic efficiency.³³¹ Vodafone argued that the TSO scheme had given rise to consequences which were both ‘inefficient’ and ‘unfair’.³³²

The TSO net cost for local residential telephone service steadily increased from 2002 to 2009. It was NZD 56.8 million for the fiscal year 2002-2003, but this increased sharply to NZD 69.72 million in 2008-2009 although the number of CNVCs decreased from 65,679 to 59,301 (See Figure 2).³³³

³³¹ Ministry of Economic Development “Telecommunications Service Obligations Regulatory Framework” (2007), at 9.

³³² Vodafone New Zealand Limited “Submission to the Ministry of Economic Development on Telecommunications Service Obligation Discussion Document” (2007), at 2.

³³³ See Commerce Commission, Final determination for TSO Instrument for Local Residential Telephone Service for periods 2001-2002 (2003) and 2006-2007 (2008).

Figure 2: TSO Net Cost and Residential CNVCs of Telecom from 2001 to 2009³³⁴

Financial year	TSO Net cost (NZD million)	Residential CNVCs (Subscribers)	Cost per CNVC (NZD/subscriber)
2001 - 2002 ³³⁵	34.72	68,689	505.5
2002 - 2003	56.8	65,679	864.8
2003 - 2004	63.8	60,960	1,046.6
2004 - 2005	52.0	42,930	1,211.3
2005 - 2006	58.24	48,291	1,206.07
2006 - 2007	61.36	50,801	1,207.92
2007 - 2008	72.07	59,240	1,216.66
2008 - 2009	69.72	59,301	1,175.76

In addition, there were an increasing variety of ways in which end-users in New Zealand could access telephone service, and a wide range of alternative voice services, such as voice over Internet protocol (VoIP), wireless access services, and home phone service via the mobile network.³³⁶ Thus, some providers proposed the creation of a ‘contestable Local Service TSO’.³³⁷

One potential way to achieve these goals of TSO reform was to establish a competitive process to select the providers, who would then guarantee a minimum level of basic services to the relevant households. Other firms would be given incentives to compete in TSO areas by being offered a subsidy proportional to each commercially unviable household. This would make them able to compete for TSO funding on a per-customer-basis, by which operators were able to win the customers’ revenue as well as the TSO subsidy.³³⁸ A subsidy for TSO provision would only be considered for a network

³³⁴ Commerce Commission <www.comcom.govt.nz/telecommunications-service-obligations>

³³⁵ Commerce Commission, above n 246.

³³⁶ Telecom Corporation of New Zealand Limited “Telecom’s Comments on telecommunications Service Obligations Regulatory Framework Discussion Document” (2007), at 3.

³³⁷ Some others also expressed their support of contestable feasibility among qualifying entrants for providing relevant telecommunications services to groups of customers that are deemed uneconomic by incumbent TSO provider. See CallPlus’s *TSO Submission on Telecommunications Service Obligation Discussion Document* (2007), at 1 and NZCL’s *Response to the Ministry of Economic Development: Discussion Paper on telecommunications Service Obligations regulatory Framework* (2007), at 6-7.

³³⁸ Woosh “Submissions to the Ministry of Economic Development on Telecommunications Service Obligation Discussion Document” (2007), at 3.

provider in those areas where only one network operator was able to provide connectivity.³³⁹

In 2009, TSO delivery structures still hampered competition in supplying local telephone services to most rural areas in New Zealand. The TSO provider (Telecom) was seen by most industry participants as being over-compensated for meeting its TSO obligations.³⁴⁰ The Government decided to investigate TSO arrangements to ensure that they were efficiently and effectively focused on long-term benefits to end-users, and to re-consider the TSO provisions.³⁴¹

With regard to rural broadband, the Government's Telecommunications Stocktake in 2006 identified that accessibility of broadband services for residents in rural areas was adversely impacted by the regulatory reforms.³⁴² The TSO Review in 2007 proposed a possible universal broadband access TSO.³⁴³ It was argued that the availability of advanced and affordable broadband services was essential to economic growth in New Zealand, and the benefits of broadband to rural New Zealand were very significant.³⁴⁴ Concerns about rural broadband were also raised by the Government.³⁴⁵ Establishing a broadband TSO was one of several possible mechanisms for improving the availability of broadband access services in rural areas.³⁴⁶ In addition, concerns had arisen around issues of TSO funding,³⁴⁷ including a Supreme Court review³⁴⁸ of past TSO payments to Telecom.³⁴⁹

Rural broadband policy has gained an increasing profile in New Zealand,³⁵⁰ due to the economic importance of rural New Zealand and the issue of inefficient telecommunications in many rural areas. In international terms, the New Zealand

³³⁹ Smartlinx 3 Limited *Comment on Telecommunications Service Obligations Regulation Framework Discussion Document* (2007), at 3.

³⁴⁰ Ministry of Economic Development, above n 340, at [26(b) (i)] and [132].

³⁴¹ Ministry of Economic Development, above n 327, at [3].

³⁴² Ministry of Economic Development, above n 331, at 8.

³⁴³ *Ibid.*, at 5.

³⁴⁴ *Ibid.*

³⁴⁵ Mosby and Purre, above n 163, at 42.

³⁴⁶ Ministry of Economic Development, above n 331, at 5.

³⁴⁷ Stanford Levin "Issues and Policies for Universal Service and Net Neutrality in a Broadband Environment" (paper presented to the First Asia-Pacific ITS Regional Conference, Wellington, August 2010), at 4.

³⁴⁸ *Vodafone New Zealand Limited v Telecom New Zealand Limited* [2011] SC 4/2010, at [3].

³⁴⁹ Telecommunications Industry in New Zealand during the last decade witnessed disputes over the TSO net cost calculation with five separate legal challenges lodged with the High Court.

³⁵⁰ Mosby and Purre, above n 163, at [11.1].

broadband situation in 2007 was ranked lower than the Government considered desirable, although it had advanced from 21st to 19th place in OECD rankings.³⁵¹

Rural areas in New Zealand and rural industries play an important role in the country's economy. There is now an increasing emphasis on the development of rural telecommunications.³⁵² In 2008 the Government announced a doubling of the government funding available from NZD 24 million to NZD 48 million, with the focus on accelerating "high-speed broadband roll-out to rural and remote areas".³⁵³ The Rural Broadband Initiative was then announced in 2009 with an estimated cost of NZD 300 million, emphasising the integral role of rural communities in the national economy.³⁵⁴ Although only 13.2% of New Zealand's population lives in remote rural areas - constituting approximately 86 percent of the land area³⁵⁵ - these rural regions contribute significantly to the New Zealand economy - approximately 64% of total exports in 2009.³⁵⁶

While the benefits of broadband to rural New Zealand are clearly significant, the availability of broadband services to users in rural areas is still far below the availability to most households in urban areas.³⁵⁷ In addition, there is some evidence that re-investment levels in key telecommunications access and backhaul infrastructure, particularly in rural areas, may still be low.³⁵⁸

In spite of the economic success in rural and remote regions, the availability and quality of telecommunications services in these areas remains relatively poor. Although the country had virtually 100 percent broadband coverage through satellite technology, the telecommunications sector has been slow to bring higher quality services to many regional areas.³⁵⁹

³⁵¹ OECD Broadband Penetration <www.oecd.org/statistics/>.

³⁵² Mosby and Purre, above n 163, at [11.2.1].

³⁵³ New Zealand National Party's Government "Step Change - Better Broadband for New Zealand" (press release, 22 April 2008).

³⁵⁴ Mosby and Purre, above n 163, at [11.3.2].

³⁵⁵ Statistics New Zealand 2006.

³⁵⁶ Mosby and Purre, above n 163, at [11.2.1].

³⁵⁷ Ministry of Economic Development, above n 331, at 5.

³⁵⁸ *Ibid.*

³⁵⁹ Mosby and Purre, above n 163, at [11.2.2].

According to the Government,³⁶⁰ while 87 percent of rural fixed copper access lines could potentially support DSL-based broadband speeds, only 30 percent of these lines have been DSL-enabled. The low percentage of lines upgraded for DSL broadband is due to several factors:³⁶¹ copper local loops in rural areas are longer than loops in urban areas, backhaul in rural areas is often via copper or radio rather than optical fibre, and DSL technology which is most effective at short distances, is often ineffective at distances beyond seven kilometres.

(b) The Telecommunications Amendment Act 2011: Telecommunications Development Levy (TDL) and rural broadband

(i) Overview

During the period 2009-2010, the Government decided to drive the deployment of ultra-fast broadband³⁶² and commenced a series of major telecommunications policy initiatives to improve the quality of telecommunications services in rural areas.³⁶³ These included the Ultra-Fast Broadband (UFB) Initiative with the goal of achieving ultra-fast broadband for the majority of New Zealanders³⁶⁴ and the Rural Broadband Initiative (RBI) with the objective of ensuring broadband services to rural schools and communities.³⁶⁵ In addition, the Telecommunications Amendment Act 2011 replaced the TSO regime with a new and different regime.³⁶⁶ There were some key amendments related to TSO delivery:

(1) The TSO liability allocation determination process with TSO levies for the period 2001-2010 was replaced by the Telecommunications Development Levy (TDL), which streamlined the process for industry contributions, and was aimed at

³⁶⁰ Ministry of Economic Development “Proposal for Comment: Rural Broadband Initiative” (2009).

³⁶¹ Mosby and Purre, above n 163, at [11.2.2].

³⁶² *Ibid*, at 11.

³⁶³ Ministry of Economic Development, above n 360, at 6-8.

³⁶⁴ Ministry of Economic Development “New Zealand Government Ultra-Fast Broadband Initiative: Overview of Initiative” (2009), at [3]

³⁶⁵ Ministry of Economic Development “Rural Broadband Initiative: Request for Proposals for the Zone 4 Rural Broadband Initiative” (2010), at 1.

³⁶⁶ Supreme Court of New Zealand “Media Release: Press Summary” (press release, 17 November 2011), at 2.

assisting the Government in its funding of improvements to New Zealand's telecommunications rural broadband infrastructures³⁶⁷ and paying TSO charges.³⁶⁸

(2) The process of TDL Liability Allocation Determination was focused on ensuring the following key outcomes:³⁶⁹ (a) economic efficiency; (b) technology independence; (c) competitive independence; and (d) enforceability, simplicity, transparency and certainty.

(3) The TDL liability allocation determination for each financial year was based on new definitions of 'liable persons' and 'qualified revenue' (a minimum telecommunications revenue threshold for liability to contribute to the TDL).³⁷⁰ Apart from a grant of NZD 48 million distributed by the Government, a TDL of up to NZD 252 million was to be allocated to liable persons within 5 years.³⁷¹ TDL is currently scheduled to be NZD 50 million per year until 2015-2016, and NZD 10 million in 2016-2017, and subsequent to 2016-2017 will be calculated as in an inflation adjusted figure.³⁷² However, the process for TDL liability allocation determination, which mostly remains the same as the process for the TSO levy allocation determination during 2001-2010, has some specific amendments in identifying those liable for paying TDL, qualified revenues with a minimum threshold of revenues for paying TDL, and subsidies to universal service providers and projects.

(ii) Identifying potentially 'liable persons' for the purpose of the TDL

Determining potentially liable persons to pay the TDL has a primary and important role in allocating the TDL. The Amendment Act 2011 defined a liable person as "a person who provides a telecommunications service in New Zealand by means of some components of a PTN that is operated by that person".³⁷³ PTN was defined as being a network used, in whole or in part, by the public for the purpose of telecommunications,

³⁶⁷ Commerce Commission "Notification of Potential Liability for the Telecommunications Development Levy 2012" (2012), at [6].

³⁶⁸ *Ibid.*, at [4].

³⁶⁹ Ministry of Economic Development, above n 327, at [51].

³⁷⁰ Commerce Commission, above n 367, at [4].

³⁷¹ Ministry of Economic Development, above n 365, at 1.

³⁷² Commerce Commission, above n 367, at [7].

³⁷³ Telecommunications Amendment Act 2011 s 5.

including a PSTN and a public data network (PDN).³⁷⁴ This amendment aimed to capture a wider range of technologies in determining the service providers liable to pay TDL levies, so as to ensure technological neutrality.

Determining service providers who are potentially ‘liable persons’ for the purpose of TDL was described by the Regulatory Impact Statement (RIS) as starting out from the status quo of the previous TSO liability allocation process; this was updated to include Internet protocol interconnection revenue.³⁷⁵ The Commerce Commission, in harmony with the Ministry of Economic Development’s interpretation, defined potentially liable persons as all service providers that do all of the following:³⁷⁶

- (1) Provide a telecommunications service, which may include the transmission of voice, data, SMS, or any other content, but not including broadcasting (the transmission of programmes for reception by the public);
- (2) Provide a telecommunications service in New Zealand;
- (3) Operate a component of the public telecommunications network (PTN) over which telecommunications service is provided;
- (4) Operate a component of a PTN that falls on the public side of the network demarcation point;
- (5) Provide a telecommunications service that is publicly available, not just limited to a private use.

Based on these criteria, in addition to retail voice and broadband service providers, and mobile voice operators as liable person paying for TSO levies for the period 2001-2010, since 2011 ISPs were counted as liable persons to contribute to the TDL. These groups include those previously captured by the TSO, plus VoIP operators and ISPs - and wholesale service providers such as local access network and backhaul service providers.³⁷⁷ This determination of potential liable persons reflects better competitive

³⁷⁴ Telecommunications Amendment Act 2011 s 5.

³⁷⁵ Ministry of Economic Development, above n 327, at [220].

³⁷⁶ Commerce Commission, above n 365, at 9-10.

³⁷⁷ Ibid, at 10.

neutrality and non-discrimination between operators with regard to different technology and services.

(iii) Qualified revenues

Another part of the TDL liability determination was to determine qualified revenue which is used to calculate a liable person's percentage of the TDL liability.³⁷⁸ The Amendment Act defined 'qualified revenues' as:³⁷⁹

... the revenue (as determined in accordance with any specifications set by the Commission) that a liable person receives during a financial year for supplying either or both of the following (excluding any amount paid to the liable person by the Crown as compensation for the cost of complying with a TSO instrument that contains a specified amount):

- (a) telecommunications services by means of its PTN;
- (b) telecommunications services by means that rely primarily on the existence of its PTN or any other PTN.

This determination of qualified revenues covers revenue received from supplying telecommunications services.

The net revenue approach³⁸⁰ will be used by the Commerce Commission³⁸¹ as the most appropriate revenue assessment method.³⁸² This net revenue approach would eliminate revenue that is neither covered by the statutory definition of qualified revenue nor captured in the revenue of other liable persons.³⁸³ In addition, the net revenue approach could minimise the risk of deterring the resale of retail services. It is seen as superior to a 'gross revenue' approach, which captures all revenue, regardless of whether those

³⁷⁸ Commerce Commission, above n 360, at [45].

³⁷⁹ Telecommunications Amendment Act 2011 s 5.

³⁸⁰ From 2001-2011 the revenue base relied on use of a component of a PSTN. The Telecommunications Amendment Act 2011 expanded the revenue base to include revenue derived from services that rely on either a telephone network or a data network. This change meant that service providers providing voice, data, SMS or other content services may be liable if they own or operate a network.

³⁸¹ Telecommunications Amendment Act 2011 s 85(2).

³⁸² Commerce Commission "Establishing the Qualified Revenue Framework for the Telecommunications Development Levy: Consultation Document" (2012), at [5.1].

³⁸³ Ministry of Economic Development, above n 360, at [50].

services are provided to end-users or other carriers, and without deduction of purchases from other liable persons (through intra-industry sales).³⁸⁴

The net revenue approach is seen as most likely to promote competition in telecommunications markets for the long-term benefit of end-users within New Zealand.³⁸⁵ This determination of qualified-revenues reflected competitive neutrality and non-discrimination between operators, regarding technology they use or service they provide. In addition, the deduction of revenues generated from intra-industry sales such as amounts payable to other liable persons for telecommunications services and amounts receivable from providing universal services³⁸⁶ could be helpful in avoiding double-dip levies on some revenues of operators.

(iv) Minimum telecommunications revenue

The Amendment Act introduced a minimum telecommunications revenue threshold in determining service providers who are liable to contribute to the TDL.³⁸⁷ This new rule will exclude some small operators. Service providers are liable to contribute to the TDL if they traded in the preceding financial year and earned more than the minimum telecommunications revenue of NZD 10 million in that preceding year.³⁸⁸

In order to identify who qualifies as liable persons to contribute the TDL, only those potentially liable persons that meet the minimum telecommunications revenue threshold are required to provide financial information on the year being assessed for the purpose of the TDL.³⁸⁹ All information requested for determining the TDL allocation must be accompanied by an audited report that details the extent to which this information is 'correct and complete'.³⁹⁰ This enhances the transparent and fair process for calculating and allocating the TDL among telecommunications operators.

(v) TDL subsidies to TSO service provider

³⁸⁴ *Ibid.*, at [51].

³⁸⁵ *Ibid.*

³⁸⁶ Commerce Commission, above n 382, at [5.2].

³⁸⁷ Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011, s 80(b).

³⁸⁸ *Ibid.*, s 81(1).

³⁸⁹ *Ibid.*, s 83.

³⁹⁰ *Ibid.*, s 83 s 2(b).

The Amendment Act reflected some significant changes in TDL subsidies. In particular, the TDL is to cover subsidies for:³⁹¹

- (1) TSO charges, including TSO local residential telephone and relay service for the hearing impaired,
- (2) deployment of rural broadband infrastructure, and
- (3) upgrades to the 111 emergency calling system.

Subsidies for providing TSO services under a TSO instrument are not determined without a written notification from TSO providers within 90 working days after the end of the financial year requesting a TSO cost calculation determination.³⁹² However, the determination of TSO net cost must be calculated within the provision of the TSO service throughout the country.

The Amendment Act provides that the range of direct and indirect revenues and associated benefits derived from the provision of telecommunications services to all residential end-users, less the cost of providing these services to these end-users, must be taken into account.³⁹³ At the same time, the net cost must not include any losses from telecommunications services other than those the TSO instrument requires the TSO provider to provide.³⁹⁴ If the Commission finds the TSO charges for the instrument to be zero, a TSO service provider must pay the costs for this process of TSO cost calculation determination.³⁹⁵

In addition, the Amendment Act defined the fixed period of time the Government has to pay the total amount to the TSO provider as 30 working days after the date that the final TSO cost calculation determination is publicly notified.³⁹⁶ Otherwise the Government must pay interest on the unpaid amount at the 90-day bank bill rate (as at 31 working days after the date on which the final cost calculation determination is publicly notified) plus 5% for the period from the time the amount was due until the time at which it is

³⁹¹ Ministry of Economic Development, above n 327, at 9.

³⁹² Telecommunications Amendment Act 2011 s 94(2).

³⁹³ *Ibid*, s 94E(1)(b).

³⁹⁴ *Ibid*, s 94E(3)(b).

³⁹⁵ *Ibid*, s 94A(1).

³⁹⁶ *Ibid*, s 94L(1).

paid.³⁹⁷ This helps to mitigate financial burdens on TSO providers due to the retrospective funding model and delayed subsidies.

(c) Rural Broadband Initiative: broadband universal access and competitive bidding process

(i) Overview

The Rural Broadband Initiative (RBI), which was launched by the Government in September 2010, aims at investing directly in rural communities to provide fast broadband to rural users and improve the effectiveness of the local service TSO.³⁹⁸ The RBI was as a complement to the Government's NZD 1.5 billion UFB Initiative (2009) which sought to accelerate the roll-out of ultra-fast broadband to 75% of New Zealanders in urban areas.³⁹⁹ The RBI, a NZD 300 million grant funding initiative, targeted the 25% of New Zealanders in rural areas and aimed particularly to support the roll-out of faster broadband to rural communities, and subsidise the connection of rural schools to ultra-fast broadband networks.⁴⁰⁰ The RBI, with its emphasis on the integral role of rural communities in the national economy, was to be implemented through a competitive commercial bidding process.⁴⁰¹

(ii) RBI overall objectives

The Government's overall objectives for the RBI were confirmed as follows:⁴⁰²

- (1) To improve coverage of fast broadband services so that 97 percent of New Zealand households and enterprises are able to access broadband services of 5 Mbps or better, with the remaining 3 percent to achieve speeds of at least 1 Mbps ('the rural community objective'); and
- (2) To connect 97 percent of schools to fibre, enabling speeds of at least 100 Mbps, with the remaining 3 percent to achieve speeds of at least 10 Mbps ('the rural schools objective').

³⁹⁷ Ibid, s 94L(2).

³⁹⁸ Ministry of Economic Development "Rural Broadband Initiative Final Proposal" (2011), at 1.

³⁹⁹ Ibid.

⁴⁰⁰ Steven Joyce "Government announces targets for rural broadband" (press release, 2009).

⁴⁰¹ Mosby and Purre, above n 163, at 43.

⁴⁰² Ministry of Economic Development, above n 365, at [2.1].

Health-care sites in rural areas would also be considered for connection to fibre subject to some conditions, such as the incurred additional cost, local needs, and significant benefits to the local rural communities from a fibre connection.⁴⁰³

With regard to the 3 percent of remote rural schools, which would not be connected to fibre, the Government is concurrently considering a Remote Schools Broadband Initiative (RSBI) to provide faster broadband. Accordingly, technical tests are being undertaken to determine the suitability of satellite technology for the provision of high speed services to these schools.⁴⁰⁴

(iii) RBI funding

The Government stated that up to NZD 300 million would be made available over six years to fund RBI projects.⁴⁰⁵ This funding will include a Government grant of up to NZD 48 million, plus a Telecommunications Development Levy (TDL) of up to NZD 252 million.⁴⁰⁶ Although broadband service was not included in the Local Service TSO requirements,⁴⁰⁷ TDL, as the consolidated industry levy, would pay for all TSO charges and be collected from telecommunications operators on the same basis as the current TSO levies.⁴⁰⁸

As in the submissions to the TSO Reviews in 2009 (also in 2007), there were concerns that the Government would use public funding to fund the public policy objective of RBI, rather than impose costs on private industry or its customers. Rural businesses (tourist operators, ski resorts, farmers and others who stand to gain most from the availability of such rural broadband service) would be expected to contribute to this cost.⁴⁰⁹

Vodafone suggested that the TDL be capped at a level below the current TSO levy costs.⁴¹⁰ In contrast, Federated Farmers of New Zealand argued that the amount proposed for the TDL should be increased from NZD 50 million per year to at least what

⁴⁰³ Ministry of Economic Development, above n 398, at 2.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid.*

⁴⁰⁶ Ministry of Economic Development, above n 365, at [2.1 (b)].

⁴⁰⁷ Steven Joyce “Rural Telecommunications Plans Finalised” (press release, 2010).

⁴⁰⁸ Ministry of Economic Development, above n 360, at [61].

⁴⁰⁹ Vodafone “Submission on RBI: Proposal for Comment” (2009), at 5-6.

⁴¹⁰ *Ibid.*

is raised by the current TSO Levy (about NZD 70 million per year).⁴¹¹ The TDL was finally determined to include NZD 252 million from the telecommunications industry within six years, lower than the current TSO net cost⁴¹² at approximately NZD 70 million per annum, to compensate for supplying local service to rural customers by Telecom.⁴¹³

(iv) RBI target funding

In accordance with the Government's objectives to connect rural communities with high quality broadband infrastructure, the RBI scope is focused on funding for:⁴¹⁴

- (1) Upgrading existing fibre backhaul routes where required to meet the Government's RBI objectives;
- (2) Providing new fibre connections to rural areas without existing fibre connections for services of either fixed line broadband networks, mobile phone networks or rural wireless operators;
- (3) Providing fibre connections to schools in the RBI coverage areas; and
- (4) Providing alternative connections (satellite or terrestrial wireless) to rural areas and schools for which the development of fibre-based networks would not be economically effective.

Thus, due to lower population densities in rural areas, alternative options (mobile, wireless and satellite services) were suggested to be more economically efficient than constructing a fibre network to all premises in remote areas.⁴¹⁵ The proposal was finalised by the Government in the Rural Broadband Initiative Final Proposal (2011).⁴¹⁶

(v) Minimum requirements to ensure a pro-competitive, future-proof outcome, open access and non-discrimination

⁴¹¹ Federated Farmers of New Zealand "Submission to MED on: The Rural Broadband Initiative" (2009), at [4.9].

⁴¹² Percentage reduction in total levies for six-year period of non-Telecom levy payers would be 35%, at NZD 52 million. See Ministry of Economic Development, above n 360, at 22.

⁴¹³ Steven Joyce "Government releases coverage and funding plan for rural telecommunications" (press release, 2009).

⁴¹⁴ Mosby and Purre, above n 163, at [11.4.2].

⁴¹⁵ Vodafone, above n 409, at 6.

⁴¹⁶ Ministry of Economic Development, above n 398, at 2.

According to the Government, all projects funded under the RBI must meet a number of minimum requirements in order to ensure a pro-competitive, future-proof outcome,⁴¹⁷ including open access and non-discrimination requirements. Open access is an important requirement of public policy for rural infrastructure subsidised through the RBI. The requirement would enable full retail competition with improved choices becoming available to rural consumers.⁴¹⁸ The Government provided guiding principles of open access that a respondent to the RBI Request for Proposals must comply with, namely:⁴¹⁹

- (1) Any-to-any connectivity: allowing different networks to inter-operate and interconnect over each service layer and between the service layers;
- (2) Any network technology: technology choices are market driven and the open access framework should be designed to outlive the technology choices;
- (3) Low cost to change providers: end-users are entitled to competition among suppliers and other network providers, application and service providers, and content providers and are easily able to switch between providers, subject to the commercial terms such end-users have with their existing network providers; and
- (4) Non-discrimination: services provided by the preferred supplier(s) should be offered to all access seekers on the same terms and conditions except where variations can be objectively justified, even if the access seeker is a competitor or a downstream arm of a network competitor.

In terms of the non-discrimination requirement, the Respondent was required to abide by the non-discrimination requirements set out in Appendix 3 of the RBI.⁴²⁰ Non-discrimination is a measure intended to ensure that the supplier does not give itself an unfair advantage when both the supplier and its access seeker customers compete in the marketplace for the provision of Layer 2 services.⁴²¹ It is also a means of ensuring that supply of Layer 2 services does not favour the supplier's downstream retail arm.⁴²²

⁴¹⁷ Ibid, at 4-5.

⁴¹⁸ TelstraClear "Submission on the Rural Broadband Initiative, TSO Reform and Funding of Telecommunications Development" (2009), at [12].

⁴¹⁹ Ministry of Economic Development, above n 365, at [9.2].

⁴²⁰ Ibid, at [9].

⁴²¹ Layer 2 of the OSI Model, which is associated with active fibre optic network infrastructure. See Rural Broadband Agreement between the Government and Telecom (2011), at [1.1].

⁴²² Ministry of Economic Development, above n 365, at [2.2].

In addition, non-discrimination ensures that like access seekers are treated in a like manner, and that any differences are objectively justifiable, reasonable and transparent.⁴²³ The supplier must provide the following services on non-discriminatory terms to all access seekers: (1) Layer 1 and 2 backhaul services; (2) Layer 1 and 2 connections to schools and priority users; and (3) Layer 2 broadband services to end-users.⁴²⁴

(vi) Competitive bidding process

With regard to the RBI supplier selection process, the allocation of funding to successful telecommunications operators is conducted through a competitive commercial tender process.⁴²⁵ The Government decided to split the RBI tender process into two stages: Expression of Interest (EOI), and Request for Proposals (RFP). This two-stage tender process would enable the Government to gather more information as to the interest, intent and initial ball park estimates of potential bidders so that it can make more informed decisions when finalising the RFP.

In addition, this two-stage process would give bidders more time to prepare detailed proposals, provide greater flexibility to take into account developments with the UFB Initiative, and is expected to enable a larger number of potential bidders to express interest in participating at relatively low cost.⁴²⁶

The process of the RBI supplier selection and the allocation of funding to successful telecommunications operators were divided into two phases: (1) phase 1 for deployment of broadband infrastructure in Zone 4 areas;⁴²⁷ and (2) phase 2 for Non-Zone 4 and Non-UFB areas, and remote schools broadband.

After releasing the RBI Phase 1 Request for EOI on 22 April 2010, the Government received 39 EOIs, including nine for national implementations of the RBI.⁴²⁸ A request

⁴²³ Ibid, at [2.3].

⁴²⁴ Ibid, at [2.1].

⁴²⁵ Mosby and Purre, above n 163, at 43.

⁴²⁶ Ministry of Economic Development, above n 360, at 3.

⁴²⁷ Zone 4 areas or rural areas (except the Chatham Islands) that are not in Telecom's Zone 1, 2 and 3, which are known as urban areas served by telephone exchanges with a total line count of greater than 500 lines and which at 30 June 2008 together include not less than 80% of total existing PSTN lines. See Rural Broadband Agreement between the Government and Telecom (2011), at [1.1].

⁴²⁸ Mosby and Purre, above n 163, at [11.5.1].

for proposals (RFP) was released on 25 August 2010 to invite potential suppliers to provide detailed proposals for the provision of appropriate broadband infrastructure for Zone 4 areas.⁴²⁹

Traditional rivals Telecom and Vodafone made a joint bid for the Government's RBI project.⁴³⁰ The joint bid from the full telecommunications service provider (Telecom) and the largest mobile company by subscribers (Vodafone) was seen as an effort to beat off rival bids from four other consortiums.⁴³¹

It was argued that this situation would be a 'tragedy for rural New Zealand'⁴³² and awarding Telecom and Vodafone the task of building the rural broadband network could stifle competition.⁴³³ The Labor Party called on the Government to re-tender the RBI because they argued that the preferential bidders (Telecom and Vodafone) could carve up rural areas and offer whatever prices they wanted. This would mean less competition and less choice for New Zealand consumers.⁴³⁴ However, the Government entered into commercial negotiations and reached agreements with Telecom and Vodafone on 20 April 2011⁴³⁵ to roll out more and faster broadband to much of New Zealand rural areas until 2016.⁴³⁶

In summary, the Rural Broadband Initiative in New Zealand illustrates some features close to the best practice model.

Firstly, the scope of universal broadband access in New Zealand was extended to cover rural institutions, such as health-care sites and rural schools. Thus, the universal service arrangements in New Zealand aligned with international experience and the ITU's recommendations.⁴³⁷

⁴²⁹ Ministry of Economic Development, above n 365, at [2.2 (a)].

⁴³⁰ "Telecom, Vodafone bid one of five" *Stuff.co.nz* (New Zealand, 12 November 2010).

⁴³¹ "RBI tender awarded to Telecom and Vodafone; Kordia calls decision a 'tragedy for rural New Zealand' *Tele-geography* (7 February 2011).

⁴³² *Ibid.*

⁴³³ Hamish Fletcher "Rural Broadband Build 'Will be Open'" *nzherald.co.nz* (New Zealand, 8 February 2011).

⁴³⁴ Clare Curren "*Labour calls on the Government to re-tender rural broadband scheme*" (1 April 2011).

⁴³⁵ Telecom was allocated a grant of NZD 225 million to complement its investment for Zone 4 backhaul, schools and hospitals while Vodafone's grant was NZD 60 million to complement its investment for Zone 4 community coverage.

⁴³⁶ Rural Broadband Agreement between the Government and Telecom (2011).

⁴³⁷ See Chapter Two II.C.

Secondly, the Initiative reflected the main objective of universal broadband access through a focus on the deployment of broadband infrastructure in rural areas. The enhanced development of infrastructure for providing broadband services in rural areas would be pro-competitive with minimum guiding requirements of open access, ensuring sustainable outcomes and non-discrimination between service providers.

Thirdly, funding arrangements for rural universal broadband access were improved with a kick-off contribution from the Government budget, in addition to the industry levies. This illustrated the higher awareness of the Government and its shared financial resources for a public policy of universal broadband.

Finally, a contestable bidding process was used to select the most efficient operator to deploy the broadband infrastructure. This could mitigate the net costs for broadband infrastructures but avoid complicated arrangements for calculating actual costs and potential litigation proceedings, which happened with calculation for actual costs of fixed residential telephone services.

IV Some Important Elements in the New Zealand TSO Experience

This examination of the development of telecommunications universal service in New Zealand is informative in that it mirrors many of the elements of a best practice model.⁴³⁸ It is also instructive for universal service structures in Vietnam, in that it demonstrates:

- (1) The steady progression from complete government monopoly to a situation where the government has removed itself completely from the delivery of telecommunications services;
- (2) The movement from a sole incumbent (Telecom) to a multi-provider competitive market, and the creation of regulations in that market which protect the basic social aims of universal service, especially the competitive and technological neutrality of liability for contributing to universal service levies, and the contestable bidding process for deployment of universal rural broadband infrastructures.

⁴³⁸ See Chapter Two.

- (3) The establishment of key institutional arrangements such as independent external monitoring for the performance measurement of TSO delivery (Ministry of Economic Development, Commerce Commission and Telecommunications Commissioner);
- (4) The transition from a largely laissez faire management model where there was only basic interest in the good performance management of commercial aspects of public service provision, to a highly competitive market where good performance management (public and corporate) is of high importance;
- (5) The on-going adjudication of commercial interests and funding arrangements by an independent judiciary, which is an additional way of enhancing performance accountability of agencies involved in TSO delivery;
- (6) The persistent upholding and protection of the fundamental social (and political) policies and aims in universal service telecommunications provision, namely accessibility, affordability, and particular needs of residents/citizens in a rural society;
- (7) The continued involvement of stakeholders and the general public in the performance of universal service policy, particularly through the transparent performance information and reporting systems, cross-submissions, and public access to information (Official Information Act);
- (8) The establishment of persistent protection for economic cost-effectiveness, particularly through the continuous updating of the cost model for TSO net cost determination, along with deduction of revenue generated from intra-industry sales, and the calculation of TSO net cost within the provision of the TSO service throughout the country;
- (9) The use of contestable bidding processes for universal rural broadband to mitigate the TSO net cost;
- (10) The prospective and virtual TSO funding model does not require highly-complicated institutional arrangements, nor create unnecessary burdens on telecommunications operators; it avoids either under- or over-collections of levies and ensures the benefits to TSO providers by including an additional amount for loss of use

of money, interest for the period between the end date of financial years and determined TSO levy allocation dates, and payment of interest for any delayed payment of TSO levies so as to mitigate financial burdens on TSO providers.

(11) The persistent support for a competitive market through the establishment of a minimum telecommunications revenue as the threshold for determining liable persons qualified for paying TSO levies; this facilitates the access of new and small service operators into the competitive market.

CHAPTER FOUR

TELECOMMUNICATIONS UNIVERSAL SERVICE LEGAL FRAMEWORK AND ITS IMPLEMENTATION IN VIETNAM

I Introduction

Since the beginning of economic reforms 25 years ago, Vietnam has progressed rapidly from being a poor country to one experiencing an improvement in middle-class incomes and high rates of growth. It has actively reformed its laws, institutions, policies, and administrative systems. All this has been aimed at making Vietnam better integrated into the international economy.

The telecommunications sector has played an important role in Vietnam's social and economic growth, and has witnessed considerable progress in establishing policies on universal service delivery. However, in recent years some concerns relating to the effectiveness and efficiency of this universal service policy have emerged, most notably inadequate performance management and inefficient funding structures.

This chapter will review the evolution of the legal framework and institutional arrangements for the delivery of universal services in Vietnam. Universal service delivery will be examined over three distinct periods: (1) the monopoly period (1976-1995); (2) the period of market liberalisation (1995-2001); and (3) the period of telecommunications regulatory reforms (since 2002). The chapter also identifies the key obstacles to the effective and efficient delivery of universal services, and describes significant defects or problems in the universal service legal framework and institutional arrangements. The latter part of this chapter identifies key issues and problems.

II Institutional and Regulatory Structure for the Telecommunications Industry

A Vietnam Profile

1 Overview

Vietnam, situated in Southeast Asia, has a population of 87 million people.¹ The population consists of 54 different ethnic groups, living in a land area of 331,698 square kilometres, which has more than 3,000 km of coastline. About 70% of the population lives in rural areas. The predominantly rural density and dispersal of the population has implications for universal service implementation.

Vietnam has 63 provinces and centrally governed cities,² and 9,084 communes³ (See Figure 3).⁴ Hanoi in the north serves as the capital; Ho Chi Minh City in the south is the largest urban area, with a population estimated at 7.39 million.⁵

Figure 3: Vietnamese regions: administrative units and population by rural and urban at 31 December 2010⁶

	Red river delta	Northern midlands	North Central	Central Highlands	South East	Mekong River Delta	Total
Number of provinces	11	14	14	5	6	13	63
Number of communes	1,944	2,274	2,474	598	490	1,304	9,084
Rural population (million)	13.78	9.33	14.17	3.72	6.21	13.18	60.41
Urban population (million)	6.02	1.84	4.76	1.48	8.33	4.06	26.51

¹ General Statistics Office “Population and population density in 2010 by province” (2011) <www.gso.gov.vn/default_en.aspx?tabid=467&idmid=3&ItemID=11728>.

² Centrally governed city is an administrative unit equivalent to a province in Vietnam. Centrally governed cities are under the management of the Central Government, different from cities under the management of provinces, which are equivalent to districts. There are 5 centrally governed cities in Vietnam: Can Tho, Da Nang, Hai Phong, Hanoi and Ho Chi Minh City.

³ Commune, the smallest administrative unit of population (including commune, precincts and towns under districts) in Vietnam, includes 11,111 communes nationwide as of 1 June 2010. See Ministry of Information and Communication “Report on the national survey of telecommunications, Internet and broadcasting situation in Vietnam in 2010” (Ministry of Information and Communication’s Publishing House, Hanoi, 2011) at 33.

⁴ General Statistics Office “Administrative Units at 31 December 2010” (2011) <www.gso.gov.vn>.

⁵ General Statistics Office “Population and population density in 2010 by province” (2011) <www.gso.gov.vn>.

⁶ General Statistics Office <www.gso.gov.vn/default_en.aspx?tabid=466&idmid=3&ItemID=11653>.

2 Economic background

After the unification of the country in 1975, a centralised government was established. The State and collective⁷ sectors, highly subsidised by the State budget, became the foundation of the economy. This model proved to be both inefficient and costly, and resulted in budget deficits and increasing foreign debt.

Economic reforms put in place in the period 1980-1986 focused on policies aimed at encouraging economic efficiency and loosening central management control. However, the economy continued to suffer from inefficient centralised bureaucratic management and over-use of state subsidies. The economy remained underdeveloped: annual inflation was over 700% and exports were less than 50% of imports.⁸ Further economic reforms (called Doi Moi) were embarked upon in 1986 and involved the replacement of a centrally planned economy by a socialist-oriented market economy, widespread national industrialisation and modernisation, together with diversification of external economic relations.⁹ The Doi Moi has had a direct effect on Vietnam's economic development, especially its economic growth.¹⁰

B The Legal System

The Vietnamese legal system and the institutional structures are based on the role of the Vietnamese Communist Party (CPV) and on a system of legal documents which serve as sources of law in Vietnam.

⁷ Law on Collective Economic Entities 18/2003/QH11 (2003) art 1 provided:

Collective economic entities are formed by individuals, households, legal entities (hereinafter referred to as member of collective economic entities), who have mutual demand and benefit, voluntarily invest capital and contribute their manual work in accordance with applicable regulations so as to enhance the collective strength of each member...

Collective economic entities operate as one kind of business entity, have their own legal entities, self-management and take all responsibility with their registered capital, accumulative capital and other resources in accordance with relevant regulations.

⁸ Arkadie Brian and Raymond Mallon *Vietnam - A Transition Tiger* (Australian National University E Press and Asia Pacific Press, Canberra, 2003) at 29.

⁹ CPV's Political Report of the Congress VI (18 December 1986).

¹⁰ Brian and Mallon, above n 8, at 1.

Vietnamese law and its legal system is a complex mixture of neo-Confucian concepts of ‘virtue’, French colonial legality, and revolutionary and war morality.¹¹ Mixed in with this are elements of Socialist state law and Western legal concepts.¹² More recently there have been, post-Doi Moi, efforts to align some elements of commercial law with international legal concepts and standards.¹³ Adding to this complexity are two principal factors: (1) the multi-dimensional, hierarchical sources of law in Vietnam, and (2) the role of the CPV within a one-party state.

All this effectively creates two levels of law: ‘high level law’ (from the National Assembly, including the National Assembly’s Standing Committee) and ‘low level’ or subordinate law (decrees, decisions, directives and the like).¹⁴ In practice, the National Assembly passes laws, which are often neither sufficiently debated nor well formulated, and sometimes inconsistent.¹⁵ The effective legislators are the administrators, ranging from Ministers to People’s Committees. All these formulate ‘implementing decrees’, and ‘implementing circulars’ (rules, instructions and directives) for putting laws into effect.

The other complex factor in the Vietnamese world of law and the legal system is the role of the CPV within the State. The CPV maintains a firm control over all government systems and society.¹⁶ There is no fundamental separation of powers, and a considerable history (from the revolutionary and war years) of CPV policies such as resolutions of the CPV’s National Congress being used as a directive for law and policy-making progress. The CPV exercises control over the appointment of officials and administrators at various levels, particularly to the highest positions in the key state organs.¹⁷ Hence law and legal regulation are closely tied to CPV policy, creating a ‘socialist legality’ - a sort of ‘rule by law’ which permeates all aspects of society.

¹¹ John Gillespie “Understanding Legality in Vietnam” in Stephanie Balme and Mark Sidel (eds) *Vietnam’s New Order: International Perspectives on the State and Reform in Vietnam* (Palgrave MacMillan, New York, 2007) 137 at 139.

¹² Ibid, at 143-146.

¹³ John Gillespie “Concepts of Law in Vietnam: Transforming Statist Socialism” in Randall Peerenboom (ed) *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the United States* (RoutledgeCurzon, New York, 2004) 146 at 161.

¹⁴ Legal Document Act 1996 art 2.

¹⁵ CPV Politburo’s Resolution 48-NQ/TW (2005) on the Strategy of Building and Improving Vietnam Legal System by 2010 and Orientation by 2020, at 1.

¹⁶ Gillespie, above n 13, at 148.

¹⁷ Mark Sidel “Vietnam: Historical Development of the Legal System” in Poh-Ling Tan (ed) *Asian Legal System: law, society, and pluralism in East Asia* (Butterworth, Sydney, 2002) 360 at 364.

Thus Vietnam has a fundamentally socialist influenced legal system. At the same time it has a rapidly developing economy and an increasingly sophisticated society.¹⁸ It is notable that before the legal reforms, law did not play a significant role in the political, economic and social system in Vietnam. Rather, the CPV policy documents and administrative directives were the primary instruments of governance.¹⁹

Since the 1990s, Vietnam has actively pursued legal reforms, which have promoted (with varying success) a socialist law-based state. Numerous laws and regulations have been enacted.²⁰ However, there are still considerable inconsistencies between higher legislation and subordinate regulation in Vietnam.²¹

1 The concept of the Socialist Rule-of-Law State in Vietnam

In Vietnam, the idea of a rule-of-law state was first put forward by Nguyen Ai Quoc in 1919.²² Establishment of the rule-of-law principles in Vietnam has been a slow process.²³ The transition to a market economy was a major factor in promoting this move.²⁴ The notion of a rule-of-law state was first officially introduced during the economic and political reforms (Doi Moi).²⁵ The CPV's Political Report of the 6th National Congress determined that building this state should be one of the main goals of political and institutional reforms, in order to meet the requirements of a market economy in Vietnam.²⁶ The 7th CPV Congress in 1991 introduced a concept of '*Nha Nuoc Phap Quyen*', translated as 'rule-of-law state' or 'law-based state'.²⁷

¹⁸ John Gillespie and Albert Chen "Comparing Legal Development in China and Vietnam: An Introduction" in John Gillespie and Albert Chen (eds) *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (Routledge, New York, 2010) 1 at 2.

¹⁹ Ibid, at 19.

²⁰ Ibid, at 11.

²¹ Gillespie and Chen, above n 18, at 19.

²² The collection on President Ho Chi Minh, volume 1 (National Political Publishing House, Hanoi, 2002), at 438.

²³ Nguyen Xuan Tung *Đẩy mạnh xây dựng Nhà nước pháp quyền XHCN Việt Nam dưới ánh sáng đại hội Đảng lần thứ XI* <moj.gov.vn/ct/tintuc/lists/nghin%20cu%20trao%20i/view_detail.aspx?ItemID=4376>.

²⁴ Randall Peerenboom "Varieties of Rule of Law: An Introduction and Provisional Conclusion" in Randall Peerenboom (ed) *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asia Countries, France and the United States* (Routledge Curzon, New York, 2004) 1 at 39.

²⁵ Vietnam embarked upon the Doi Moi (Reforms) in 1986. According to the CPV's Political Report Congress VI (18 December 1986) the economic reforms involved the replacement of the centrally-planned economy with a socialist-oriented market economy, national industrialisation and modernisation together with multi-lateralisation and diversification of external economic relations, openness and international integration.

²⁶ Truong Chinh *Introduction to the Political Report* (The Sixth National Congress of Vietnamese Communist Party, 1986), part 4.

²⁷ Gillespie, above n 16, at 151.

According to Gillespie, the concept was adopted in Vietnam from the Russian concept of ‘*пробобое государтбо*’ and the German principle of ‘*Rechtsstaat*’. It was considered more as a label than a coherent philosophical foundation for legal reforms.²⁸ Vietnamese legal literature simply referred to the rule-of-law as legal compliance by all members of society, including the State.²⁹

After the concept of a 'socialist rule-of-law' state appeared at the 7th CPV Congress (1991),³⁰ the Vietnamese government aimed at building its own ‘socialist rule-of-law’ state, borrowing the concept previously used in the former Soviet Union, which was notably different from that of Western countries.³¹ One of the most significant differences was the principle of centralisation of powers; this is still applied in Vietnam, whilst Western countries generally apply the doctrine of separation of powers. Another difference is that while all western countries apply the concept of pluralist democracy in their politics, Vietnam’s leadership reconfirmed the one-party ruling system.³²

The 8th CPV Political Report (1996) reaffirmed the necessity of building up a state governed by law in Vietnam, and the term ‘socialist state governed by the rule of law’ was accepted into the legal system of Vietnam at the 9th National Congress (2001). The concept of 'socialist rule-of-law state' was established as a constitutional principle in the 2001 Amendment of the 1992 Constitution³³ thus defining the direction for establishing and improving institutional structures in Vietnam.

Recently, the concept of the 'socialist rule-of-law' state in Vietnam has been defined to mean that state management of society is based on the legislation, and that administrative intervention in economic activities needs to be minimised.³⁴ The state

²⁸ Ibid, at 152.

²⁹ Nguyen Quoc Viet “The Role of Informal Institutions and the Delegation of Powers to Independent courts” (PhD, Universität Kassel, 2006), at 56.

³⁰ The new terminology of rule-of-law (Nha Nuoc Phap Quyen) first appeared in a speech by Do Muoi at the 7th National Congress of CPV in 1991. See *Amending the Constitution, Establishing a 'Rule-of-Law state' and promoting Doi Moi Achievements* (1992).

³¹ Nguyen, above n 29, at 57-59.

³² Ibid.

³³ Vietnam Constitution 1992 (amended in 2001), art 2.

³⁴ In Political Report on the 9th Congress of CPV, building up the socialist law-based state was not only re-mentioned but also emphasised at a new level that is “to build up socialist law-based state must be conducted under the leadership of CPV” See Resolution of the 8th Conference of the 7th Central Executive Committee (National Politics Publishing House, 1995) at 25.

promulgates legislation, and organises and governs society by legislation.³⁵ The CPV Politburo Resolution in 2005³⁶ indicated a key goal of building up the 'socialist rule-of-law' state, along with the improvement of socialist-oriented market economy institutions.³⁷ One of its main focuses was to build up and improve legal frameworks for the organisation and operation of institutions within the political system, in accordance with requirements of the 'socialist rule-of-law' state of the people, by the people and for the people in Vietnam.³⁸

2 Institutional structures in Vietnam

Vietnamese institutional structures are marked by the principle of centralisation, not by the separation of powers. The institutional structure reflects the principle of a unitary state system, maintaining a close control of all delegation of functions, and the structure closely supervises the co-ordination of activities between state departments in carrying out their legislative, executive and judicial responsibilities.³⁹

The controlling role of the CPV is a key feature of how the state goes about maintaining the socialist rule-of-law in Vietnam. Regardless of the introduction of a functional separation between the CPV and state organisations, the CPV's leadership is still supreme.⁴⁰ The Constitution provides that Vietnam is directly and entirely under the leadership of the CPV.⁴¹ The CPV's policies and resolutions determine overall strategies and direction of socio-economic matters. These strategies and directions are established as legally binding directives by the government and then implemented.

The Constitution 1992 provided that "state power is unitary, and controls the delegation and coordination of power among state organs in the implementation of legislative,

³⁵ Vietnam Communist Party *Resolution on building up the country in the transition to socialism (amendment, development in the National Congress XI, 2011)*, at [III (1)].

³⁶ CPV Politburo's Resolution 48-NQ/TW on the Strategy of Building and Improving Vietnam Legal System by 2010 and Orientation by 2020 (2005).

³⁷ *Ibid.*, at 2.

³⁸ *Ibid.*

³⁹ Vietnam Communist Party, above n 35, at [IV (2)].

⁴⁰ Gillespie and Chen, above n 18, at 17.

⁴¹ Vietnam Constitution 1992 (amended in 2001), art 4.

executive and judiciary powers”.⁴² The state apparatus of Vietnam is divided into three groups: (i) the Legislative branch; (ii) the Executive branch, and (iii) the Judicial branch.

The Legislative Branch is the National Assembly. It has three fundamental functions: (1) it is the supreme legislative organ of the state and the only state organ which has the right to promulgate the Constitution and laws;⁴³ (2) it has the power to decide the most fundamental policies of the country; and (3) it is charged with supreme supervision of all activities of the state.⁴⁴ It operates on the basis of democratic centralisation, collective discussion, and approval by majority decisions.⁴⁵ Most members of the National Assembly are CPV members and the President of the National Assembly is nominated by the CPV’s Central Committee.

The Government (Cabinet) is the Executive Body of the National Assembly,⁴⁶ and is the highest administrative agency of the state.⁴⁷ The Government makes policies either by general discussions and majority decisions⁴⁸ or by the authority of individual members of the government, including the Prime Minister (PM), Ministers and Heads of ministerial-level agencies.⁴⁹ The term ‘Government’ is specifically used to refer to the Executive at the central level (ministerial level), rather than the entire national system of state executives, including local authorities or local government.⁵⁰ The basis of executive powers in the country in practice rests with both central (ministries) and local executive bodies (local people’s committees).⁵¹

⁴² CPV’s Strategy of building the socialist rule-of-law state within transitioning period (amended in 2011) also determined that there were delegation, co-ordination and supervision among government organisations in the performance of legislative, executive and judicial powers.

⁴³ Law on Organisation of the National Assembly 2001 art 1.

⁴⁴ Vietnam Constitution 1992 (amended in 2001) art 83.

⁴⁵ Law on Organisation of the National Assembly 2001 art 4.

⁴⁶ The determination of the government’s role as the executive body of the National Assembly has been criticised as an imperfection and it should be only as the highest executive organ of the state powers. See Pham Duy Nghia *General Introduction to Law* (People’s Police Publishing House, Hanoi, 2011), Nguyen Thi Hoi and Pham Quang Tien “Improving institutions of the State President and the Government in Vietnam” (2011) 187-188 *Journal on Legislative Study*.

⁴⁷ Vietnam Constitution 1992 (as amended in 2001), art 109.

⁴⁸ *Ibid*, art 115.

⁴⁹ Pham Duy Nghia *General Introduction to Law* (People’s Police Publishing House, Hanoi, 2011) at 129.

⁵⁰ David Koh, Dang Duc Dam and Nguyen Thi Kim Chung ‘Government Organisation Structure and Excellent Public Service: The Case of Vietnam and Some Recommendations for Changes’ in Jairo Acuna-Alfaro (ed) *Reforming Public Administration in Vietnam* (The National Political Publishing House, Hanoi, 2009) 252 at 269.

⁵¹ Gillespie, above n 16, at 148.

Ministers are members of the Government⁵² and thus Ministers are the persons who on behalf of the Government perform state administration in one or several specific industries.⁵³ Thus, ministries (and ministerial-level agencies) are the institutional structures supporting ministers.⁵⁴ However, there has been a confused comprehension or misunderstanding both in theory and practice in Vietnam by which ministries are defined as component structures of the Government⁵⁵ so ministries are entities to perform state management,⁵⁶ rather than ministers. The Government's Organisation Act 2001 art 2 provided that the institutional structure of the Government consists of ministries and ministerial-level agencies. Therefore, ministries and ministerial-level agencies are typically defined as being responsible for performing state management of specific industries.⁵⁷

The judicial branch in Vietnam includes people's courts and people's procuracies. The judicial system reflects the three main levels of the unitary state: the Supreme Court, the provincial or city courts, and district-level courts.⁵⁸ The structure of procuracies is also designed similarly: the Supreme Procuracy, the provincial or city procuracies, and district-level procuracies.⁵⁹ Since 2002, the judicial reforms initiated by the CPV⁶⁰ and the National Assembly⁶¹ have put emphasis on the promotion of the independence of the court system. Although the CPV and the state leaders have promoted a more independent judiciary,⁶² this does not seem to have been implemented in practice.⁶³ The performance of the judicial branch, including courts and procuracies, remains under the extensive leading role of the CPV.⁶⁴ There has been overused intervention by the local

⁵² Government Act 2001 art 3.

⁵³ Pham, above n 49, at 128-129.

⁵⁴ Pham Hong Thai "Some discussion on the Government and Ministries" (2008) 24 Science Journal of Vietnam National University, 201 at 203.

⁵⁵ Government Act 2001 art 2.

⁵⁶ Pham, above n 54, at 204.

⁵⁷ Decree 187/2007/ND-CP (2007) art 1 provided that the "The Ministry of Information and Communications is a Government's agency to perform the state management in press, media... telecommunications and Internet...".

⁵⁸ People's Court Act 2002, art 2.

⁵⁹ People's Procuracy Act 2002 art 1 provided that people's procuracies are responsible for performing prosecution and supervision of judicial activities in criminal, civil, marriage and family, administrative, economic and labour cases. The People's Procuracy system is organised into 3 levels, including the Supreme People's Procuracy, the People's Procuracies of provinces and centrally-governed cities and the People's Procuracies of districts and cities under provincial authority (art 30). In addition, there are Military Procuracies, which are organised into the Central Military Procuracy, the Regional Military Procuracies and the Local Military Procuracies.

⁶⁰ CPV's Resolution 8 on Forthcoming Principal Judicial Tasks (2002).

⁶¹ People's Court Act 2002 and the Ordinance on Judges and People's Assessors of People's Courts 2002.

⁶² Nguyen, above n 29, at 134.

⁶³ Ibid. at 138.

⁶⁴ Pham, above n 49, at 269.

administrative authority and the CPV into the local judicial performance due to the locally-designed structure.⁶⁵ It is difficult to maintain an independent judiciary when the financial budgets for the operation and salary of the courts and procuracies is allocated and distributed by the local administration authority.⁶⁶

3 Sources of law and the system of legal documents in Vietnam

The CPV's policies and resolutions include overall strategies and directions for the socio-economic development of the country as fundamental means for the implementation of public policies. These strategies and directions of the CPV are reflected in legal documents so they can be implemented in practice. All legal documents must be in line with and not conflict with the CPV's policies.⁶⁷ This is different from other judicial systems, where legal documents must not reflect any directive from the governing political party and are based on primary principles of constitutional legislation.

Legal documents are the most important, principal and fundamental expression of the Vietnamese legal system. All state agencies, in their dealing with legal cases in their sphere of responsibility, must abide by these legal documents.⁶⁸ The Legal Document Act 2008 provides that:⁶⁹

Legal documents are documents issued or jointly issued by state agencies in accordance with the authority, formats, sequence of steps and procedures prescribed in this Law or the Law on the Promulgation of Legal Documents of People's Councils and People's Committees, which includes common rules of conduct, which have compulsory effect, and the implementation of which is guaranteed by the Government to regulate social relations.

The system of legal documents in Vietnam includes a wide range of documents with different levels of authority. These are issued by responsible state organs according to legally determined processes. The primary principle of legal authority is that legal documents of superior state organs have higher legal authority than those of lower state

⁶⁵ Nguyen Trong Ty "Some viewpoints of judicial reforms" (2005) Hanoi Bar Association <luatsuhanoi.vn/index.php?page=productView&viewParent=301&id=520>.

⁶⁶ Ibid, at 275.

⁶⁷ See Nguyen Thi Hoi "Current Sources of Law in Vietnam" (2008) Journal of Legislative Study 12 (128).

⁶⁸ Ibid.

⁶⁹ Legal Documents Act 2008, art 1 s 1.

organs. For example, the Prime Minister's decisions have lower legal authority than Government's decrees but higher than Ministers' decisions and circulars (See Table 1). Similarly, more recent legal documents take precedence over older ones promulgated by the same state organs.⁷⁰

Table 1: The hierarchy of Vietnamese legal texts in descending order⁷¹

Authority	Text
National Assembly	Constitution, Act, ⁷² Resolution
Standing Committee of the National Assembly	Ordinance, Resolution
President	Order, Decision
Government	Decree
Prime Minister	Decision
Ministers and Head of Ministerial Agencies ⁷³	Circular, Joint Circular ⁷⁴
Justice Council of the Supreme People's Court	Resolution
Chief Justice of the Supreme People's Court or Head of the Supreme People's Prosecutor	Circular
People's Council	Resolution
People's Committee	Decision

The supreme position of legal validity lies in the Constitution itself as the primary, fundamental code of the country. It is followed by Acts (also Codes or Laws) and Resolutions issued by the National Assembly, and Ordinances and Resolutions of the National Assembly's Standing Committee.

⁷⁰ Legal Documents Act 2008 art 83 ss 2 and 3 provided that:

2. In the event of legal documents having different rulings on the same issue or problem, those legal documents having superior legal effect shall be applied.
3. In the event of legal documents promulgated by the same State agency but having different rulings on the same issue or problem, the rulings of the legal documents promulgated later shall be applied.

⁷¹ Legal Documents Act 2008, art 2.

⁷² In Vietnam, the word of 'Luật' is normally translated as 'Code' or 'Law'. 'Luật' is primary legislation; in this thesis it is translated by 'Act'.

⁷³ Decision and Directive were also legal documents issued by Ministers and head of ministerial agencies until 2008. See the Legal Documents Act 1996 (amended in 2002), art 1.

⁷⁴ Legal Documents Act 2008, art 20 s 3 provided that:

3. Joint Circulars are jointly issued by Ministers and head of ministerial agencies to guide the implementation of acts, ordinances... decrees, PM's decisions concerning functions, tasks, and powers of such Ministers and head of ministerial agencies.

Legal documents issued by the Government include Government's decrees and the Prime Minister's decisions⁷⁵ which guide or stipulate the implementation of relevant legal documents of the National Assembly and the Standing Committee of the National Assembly.⁷⁶ In addition, legal documents issued by members of the Government (Ministers and Heads of Ministerial-level agencies)⁷⁷ and Chairmen of Local People's Committees,⁷⁸ also called subordinate documents, are legal documents of the Government, and play an important role. They are very numerous in the Vietnamese legal system.⁷⁹

The majority of legal documents in Vietnam are produced by the Government and Ministries, which particularly regulate economic management and specific industries. In 2008, while the National Assembly promulgated only 28 Acts, the Government issued up to 2,641 legal documents.⁸⁰ Ninety five percent of policies issued by the National Assembly were prepared and submitted to the Assembly by the Government.⁸¹

Administrative documents are different from legal documents⁸² but in practice administrative documents and directives have considerable effect in terms of legal implementation in Vietnam. These administrative documents are internal directives to

⁷⁵ According to the Legal Documents Act 2008 art 15, PM's Decisions are more likely to focus on the stipulation of solutions to manage and administer the Government's operations and public administration system from the central to grassroots levels, working regimes of the cabinet members, Chairmen of People's Committees of provinces and cities under central management and other issues within the PM's authority.

⁷⁶ Legal Documents Act 2008, arts 14 and 15.

⁷⁷ Legal Documents Act 2008, art 16 provided that:

Circulars of Ministers and Heads of Ministerial-level agencies shall provide:

1. Detailed guidelines on the implementation of laws and resolutions of the National Assembly, ordinances and resolutions of the Standing Committee of the National Assembly, orders and decisions of the State President, decrees of the Government and decisions of the Prime Minister;
2. Regulations on technical processes and standards as well as techno-economic norms of the industry, sector covered by each Ministry or Ministerial-level agency;
3. Ways to exercise management of the industry, sector covered by each Ministry or Ministerial-level agency and other issues upon instruction by the Government.

⁷⁸ Decisions issued by People's Committees in accordance with the authority, formats, sequence of steps and procedures prescribed in the Law on the Promulgation of Legal Documents of People's Councils and People's Committees, which includes common rules of conduct, has local applicable validity and is guaranteed by the Government to regulate social relations within localities in the following circumstances: (i) to implement the constitution, acts and legal documents of superior state organs, people's councils at the same level; (ii) to perform state economic management and other policies within the localities; (iii) to carry out specific duties delegated by superior state organs' documents. See Legal Document Act of People's Council and People's Committees 2004, arts 1, 2 & 13.

⁷⁹ Pham, above n 49, at 132.

⁸⁰ Ibid, at 139.

⁸¹ Ibid, at 131-132.

⁸² Legal Documents Act 2008 art 1 s 2 provided that documents which are issued or jointly issued not in accordance with the authority, formats, sequence of steps and procedures prescribed by law (Legal Document Act and Legal Document Act of People's Council and People's Committees) are not legal documents.

lower-level departments in the administrative structure. While they are not strictly enforceable as legal documents, a survey by the Vietnam Chamber of Commerce and Industry showed that about 9,470 administrative documents issued in the period 2005-2008 were used as legal documents.⁸³ This illustrates that the executive state organs still have significant influence on activities within society by means of non-legal/administrative documents.⁸⁴

C Legal Frameworks and Institutional Arrangements for Telecommunications in Vietnam

There was a state monopoly in the telecommunications sector in Vietnam until the mid-1990s. The sole ministerial agency of the Vietnam Government responsible for telecommunications was the Department General of Posts and Telecommunications (DGPT).⁸⁵ The DGPT had a dual function. It was the state administrator and business operator for telecommunications.⁸⁶ The Government embarked upon liberalisation of the telecommunications markets in 1995. The process included the establishment of a competitive environment and the establishment of a separate regulator. Further reforms in the telecommunications sector were introduced by the CPV's Directive 58-CT/TW (2000) and the CPV's Strategy for Socio-Economic Development in the period 2001-2010 (2001).

The Strategy for Socio-Economic Development in the period 2001-2010 (2001-2010 Strategy) defined the country's overall strategic goal as being "to set the stage for accelerated industrialisation and modernisation in accord with a socialist orientation, laying the foundation for Vietnam to become an industrialised nation by 2020".⁸⁷ At the same time, the 2001-2010 Strategy directed that telecommunications infrastructure should be developed and fundamentally modernised.⁸⁸ It also indicated a specific target that basic telecommunications (and postal) services should be available for almost all

⁸³ For example, the Minister of Information and Communications issued an administrative document 3593/BTTTT-KHTC (2011) on subsidies for fixed telephone household and individual subscribers.

⁸⁴ Pham, above n 49, at 19-20.

⁸⁵ DGPT was initially set up, from the Posts, Telecommunications and Radio Bureau belong to the Ministry of Transportation under Decree 480/TTg (1955).

⁸⁶ Decree 121-HDBT (1987), art 1.

⁸⁷ Vietnam Communist Party "The Strategy for Socio-Economics Development period 2001-2010" (2001) the IX National Congress, at 1.

⁸⁸ Ibid, at [2.3].

communes in the country by the end of 2010.⁸⁹ In addition, the CPV's Directive 58-CT/TW defined the overall target of promoting the development of telecommunications and information technology, so as to establish a foundation for socio-economic development in the country, improving service quality and reducing service charges to a level equal to or lower than the average tariffs of countries within the region.⁹⁰

1 Improvements in the legal framework for telecommunications

Following the development of the 2001-2010 Strategy, the Government moved to codify relevant goals in law. Accordingly, the government issued a range of legal documents, in addition to the national and regulatory documents issued by the Government over the previous decade. In the telecommunications industry, the Post and Telecommunications Ordinance 2002 was enacted in order to implement many of Vietnam's commitments under the 2001 Bilateral Trade Agreement (BTA) with the United States.⁹¹ The Ordinance 2002 was a reinforcement of the policy principles outlined in the 2001-2010 Strategy with further implementation details and clarifications. It also created rules on licensing, market dominance, interconnection, and the delivery of universal services.⁹²

The Telecommunications Act 2009 was enacted to replace the Ordinance 2002 as of 1 July 2010. This was prompted by Vietnam's WTO commitments. The Act provided a legal framework for telecommunications regulation, with specific regulatory items to be determined in detail by regulatory legal documents. For example, it provided a legal basis for foreign and domestic private investors to participate in the telecommunications sector. In particular, art 18 indicated that the form, condition and percentage of capital contribution in telecommunications services applicable to foreign investors must comply with Vietnamese law and Vietnam's international commitments, without further specifying the maximum foreign investment ceilings for each of the service categories. In addition, the Act included provisions for a pro-competitive regulatory regime, covering aspects such as regulation of abuse of market power, interconnection rules and

⁸⁹ Ibid, at 4.

⁹⁰ CPV's Directive 58-CT/TW (2000) on the enhancement of application and deployment of ICT serving the national industrialisation and modernisation.

⁹¹ Roy Chun Lee "Telecommunications in Vietnam" (paper presented to the Symposium on APEC's New Strategy for Structural Reform, Montana, 16 May 2011), at 3.

⁹² Nguyen Thanh Ha, Pham Quang Thanh and Jacob Gullish "Competition Review of the Vietnamese Telecom Sector" (2005) United States Agency for International Development, at 11 <pdf.usaid.gov/pdf_docs/PNADE784.pdf>.

access to essential facilities (art 19). The Act also made some amendments related to the legal framework and institutional arrangements for universal service delivery in Vietnam.

2 Establishment of a regulator

The Department General of Posts and Telecommunications (DGPT) was established in October 1992⁹³ as the government agency to carry out regulatory and policy making functions in post and telecommunications.⁹⁴ In 2002, DGPT was restructured and became the Ministry of Posts and Telecommunications (MPT)⁹⁵ with a policy-making and regulatory function in the fields of posts, telecommunications and information technology.⁹⁶ In August 2007, the MPT was renamed the Ministry of Information and Communications (MIC)⁹⁷ and entrusted with the state management of media and publishing, which were previously under the state management of the Ministry of Culture and Information.⁹⁸

The Telecommunications Act 2009 established a telecommunications regulator, the Vietnam Telecommunications Authority (VNTA) within the MIC. The VNTA was established by the merger of two agencies within the MIC - the Department of Telecommunications and the Authority of Information and Communications Technology Quality Control.⁹⁹ It inherited the regulatory and the consultative roles of these departments in making policies. The authority is responsible for regulating the telecommunications industry throughout the country.¹⁰⁰ According to Decision 35/2011/QĐ-TTg, the VNTA is an agency within the MIC, charged with performing consultative and regulatory functions in the field of telecommunications nationwide,¹⁰¹

⁹³ Decree 3-CP (1992) on setting up the Department General of Posts and Telecommunications, art 1.

⁹⁴ Decree 28-CP (1993) on the organisation and operation of the DGPT, art 2.

⁹⁵ Decree 90/2002/ND-CP (2002) the organisation and operation of the MPT; Decree 86/2002/ND-CP on the organisation and operation of the Ministries and Ministerial-level agencies.

⁹⁶ Decree 90/2002/ND-CP (2002) the organisation and operation of the MPT, art 1.

⁹⁷ Decree 187/2007/ND-CP (2007) the organisation and operation of the MIC.

⁹⁸ Decree 50/2011/ND-CP (2011) amending and supplementing Decree 187/2007/ND-CP (2007) setting up the Telecommunications Authority under the MIC; the PM's Decision 35/2011/QĐ-TTg (2011) stipulating functions, tasks, powers and structural organisation of the Telecommunications Authority, article 1 provided the Telecommunications Authority's function of organising the implementation of state management of telecommunications nationwide.

⁹⁹ Ministry of Information and Communications "Announcement of the Establishment of the Vietnam Telecommunications Authority" (press release, 15 August 2011).

¹⁰⁰ Telecommunications Act 2009, art 10.

¹⁰¹ PM's Decision 35/2011/QĐ-TTg (2011), art 1.

and in charge of regulating competition issues. It is also responsible for settling disputes about shared infrastructure.¹⁰²

3 The creation of a competitive telecommunications environment

Vietnam has generally conducted its economic reforms through a variety of relevant Acts, including the Competition Act, Enterprise Act and Commercial Act. This has led to many changes in terms of the competitive environment in telecommunications.

Until 1995, there was only one state-owned enterprise providing post and telecommunications services throughout the country. The state monopoly was effectively terminated in 1996. Vietnam has steadily created a competitive market which has resulted in positive consequences for the telecommunications industry. Decree 109/1997/ND-CP was aimed at enhancing competition. It was also aimed at promoting the effectiveness of state administration, and speeding up the development of posts and telecommunications business. There were soon three telecommunications operators in the telecommunications market instead of the sole state-owned corporation. Saigon Posts and Telecommunications Joint Stock Company (SPT)¹⁰³ and Military Electronics and Telecommunications Corporation (Viettel)¹⁰⁴ officially entered the market, and have competed with VNPT in the telecommunications market.¹⁰⁵ New entrants were allowed, in order to create a competitive market. However, no private telecommunications operators have entered the market.¹⁰⁶ Competitive activity was limited because the three

¹⁰² Decree 25/2011/ND-CP art 2, PM's Decision 35/2011/QĐ-TTg (2011) arts 1 and 2.

¹⁰³ Saigon Posts and Telecommunications Joint Stock Company is a Joint Stock Corporation, established under the direction of the Prime Minister in the document 7093/DMDN (1995) with the initially-registered capital of VND 50 billion. The charter capital was increased to VND 250 billion (225 billion from domestic shareholders) in 2006 with the equity capital from state-owned enterprises of VND 161 billion (approx. 64.4% of charter capital). Apart from the two biggest shareholders VNPT (13.43%) and Housing Management Company of District 1 (14.46%), some others with the equity shares of around 4% each are Vietnam Investment Fund, Communist Party Unity's committee in the District 1-Ho Chi Minh City, Financial Department of Communist Party Unity's committee in Ho Chi Minh City, Ben Thanh Corporation, SAIGONPETRO. SPT's charter capital was increased to VND 711 billion in 2010 and the equity shares of VNPT (13.43%) and Housing Management Company of District 1 increased accordingly to 14.43% and 15.53%. SPT is a facility-based operator and provides telecommunications services such as fixed (2002) and mobile (2003) services, Internet service (1997), VoIP and leased line services nationwide.

¹⁰⁴ Viettel, established previously as Information Electronics and Equipment Company before being renamed in 1995, is the second enterprise having the full licence for providing telecommunications services since 1998, including fixed and mobile services, Internet access, VoIP and leased line services in Vietnam. Viettel is the state-owned corporation under the Ministry of Defence.

¹⁰⁵ There were no specific regulations on competition either between state-owned or joint-stock corporations predominantly financed by state-owned enterprises until the Competition Act 2005.

¹⁰⁶ Decree 109/1997/ND-CP (1997) art 95 states:

telecommunications operators were either wholly state-owned enterprises or were predominantly financed by state-owned enterprises. The market shares of the two new entrants had not increased significantly by the end of 2001.

Since 2002, enterprises from all types of economic sectors (including private-owned providers) have entered the market. By the end of 2011, there were 10 enterprises providing fixed telephone services,¹⁰⁷ 7 mobile (2G) service providers (5 of those were also 3G mobile service providers)¹⁰⁸ and 91 ISPs. However, a small number of operators still retain dominance over specific markets while others face difficulties in developing their market share (See Charts 1, 2 and 3).

Operators providing postal and telecommunications services are the state-owned or joint-stock corporation predominantly financed by state-owned enterprises, established by the Prime Minister's Decisions or by the Prime Minister's permission....

¹⁰⁷ Among 10 licensed operators for fixed telephone services there were only 6 operators who provided service in reality by the end of 2011. They were Vietnam Post and Telecommunications Group (VNPT), Military Telecommunications Group (Viettel), Saigon Postel (SPT), EVN Telecom, FPT and VTC. EVN Telecom, however, merged with Viettel on 1 January 2012, in accordance with the PM's Decision 2151/QĐ-TTg (5 December 2011).

¹⁰⁸ 4 licences for setting up infrastructures and providing IMT-2000 mobile service (3G mobile) at the frequency band 1900-2200 MHz were granted to 5 service providers through a contestable bidding process: VinaPhone (VNPT), VMS MobiFone (VNPT), Viettel, EVN-Telecom and Hanoi Telecom (EVN-Telecom and Hanoi Telecom were a joint-bidder and shared a 3G licence).

Chart 1: Number of telecommunications operators and ISPs (2005-2011)¹⁰⁹

Chart 2: Market share (subscribers) of fixed telephone service providers (2011)¹¹⁰

¹⁰⁹ See Ministry of Information and Communications *Vietnam Information and Communication Technology: White Book 2012* (Information and Communications Publishing House, Hanoi, 2012) at 49; Nguyen Thanh Ha, Pham Quang Thanh and Jacob Gullish “Competition Review of the Vietnamese Telecom Sector” (2005) United States Agency for International Development, at 23.

¹¹⁰ Ministry of Information and Communications *Vietnam Information and Data on Information and Communication Technology: White Book 2012* (Information and Communications Publishing House, Hanoi, 2012) at 51.

Chart 3: Market share (subscribers) of Internet fixed broadband providers (2011)¹¹¹

III Universal Service Legal Framework and Institutional Arrangements in Vietnam

A The State Monopoly Period of Telecommunications Sector between 1976 and 1994

In this period, there were neither defined objectives nor any legal framework for universal service delivery.¹¹² Post and telecommunications services were far from universal. Telecommunications services were limited to state institutions, state-owned enterprises and some large companies, and were not available to households or individuals.¹¹³

The Government altered the post and telecommunications management system several times to improve the effectiveness of the telecommunications sector.¹¹⁴ In 1993, the Government established the Vietnam Post and Telecommunications Corporation

¹¹¹ Ibid.

¹¹² Decree 51/CP (1995) on VNPT's Organisation and Operation, art 13 s 2.

¹¹³ General Statistics Office "Vietnam Economic-social report for ten years 1990-2000" (2001) <www.gso.gov.vn/default.aspx?tabid=418&ItemID=1466>.

¹¹⁴ DGPT was initially set up in 1955 under the Decree 480/TTg.

(VNPT), a state-owned telecommunications corporation, so as to avoid the overlapping responsibilities between state administration and business operations.¹¹⁵ This was a separate entity, and not linked to any Ministry of the State.¹¹⁶ In reality, the relevant state agency (DGPT) continued to have a major role in directing business operations.¹¹⁷

In 1994 the functions of state management of telecommunications at the provincial level were delegated temporarily by the DGPT to Post and Telecommunication offices which were business units of VNPT in the provinces.¹¹⁸ This was a further indication that the overlapping functions of state management and business interests had not yet been separated and that duplications remained unresolved.

Despite these several changes in the structure of institutional arrangements and legal frameworks, there was very little substantive change during the State monopoly period (1976-1994). There was no specific framework for universal service delivery, and barriers to the development of the sector were not removed.

B The Period of Liberalisation of Telecommunications Markets: 1995-2001

During the period 1995-2001, the Government established legal frameworks for creating competitive markets in many areas, including the telecommunications sector. From the end of 1995 there were notable improvements in institutional arrangements and legal frameworks, and an overall liberalisation in the telecommunications sector. It was the first time there had been a complete separation of state administration and business operations in the telecommunications sector.¹¹⁹

Although no specific objective for universal services was defined in this period, the Government determined the general responsibilities of the telecommunications industry with regard to universal service delivery. These determinations were aimed at satisfying

¹¹⁵ Decree 28/CP (1993) on functions, powers, tasks and structure of DGPT and the PM's Decision 249/TTg (1995) on setting up the VNPT.

¹¹⁶ Decree 3/CP (1992) on setting up the DGPT.

¹¹⁷ History of Vietnam Post and Telecommunication Volume 3 (Post and Telecommunications Publish House, Hanoi, 2003), at 575.

¹¹⁸ Ibid.

¹¹⁹ VNPT was re-established under the PM's Decision 249/TTg (29 April 1995) by re-organising relevant departments in DGPT so as to carry out post and telecommunication business. DGPT became the state-agency to undertake the state management in the fields of posts and telecommunications according to Decree 12/CP (March 1996).

the needs of the Vietnamese people for telecommunication services.¹²⁰ The 1995 Decree 51/CP determined that VNPT was to be responsible for the provision of all basic telecommunications services to remote areas, along with the provision of other communications services throughout the country.¹²¹

Decree 109/1997/ND-CP determined that telecommunications enterprises had specific obligations, particularly giving priority to providing and meeting the communications requirements of the CPV and the Government.¹²² They would also be entitled to special subsidies, compensation and favourable regulation¹²³ from the Government for the provision of products and services during natural disasters, and for service provision to rural, mountainous and off-shore areas.¹²⁴ They were to provide products and services in accordance with the regulated price policy of the Government.¹²⁵ This meant that the standard pricing frameworks for highly-dependent social and public utility telecommunications services¹²⁶ would be determined by the Government.¹²⁷

This period also witnessed the introduction (1998) of the ‘post and telecommunications commune cultural house’¹²⁸ as a means of delivering universal services. The ‘posts and telecommunications commune cultural house’ model in Vietnam was a combination of a postal and telecommunications shared service centre (along with other services for residents in rural communes). These service centres were set up by the dominant operator (VNPT), subsidised by universal service funds and supported by local

¹²⁰ Decree 109/1997/ND-CP (1997), art 2.

¹²¹ Decree 51/CP (1995), art 13 s 2.

¹²² Decree 109/1997/ND-CP (1997), art 96 s 7 & 10.

¹²³ Decree 56-CP (1996) on state-owned enterprises providing public-utility services provided favourable regulations such as reduction of profit tax for contributing to the enterprise’s capital (art 5 s 1(a)); exemption or reduction of income tax (art 6), and entitlement to subsidies or subsidised-price for public-utility services (art 14).

¹²⁴ There was no specific regulation on these special subsidies, compensation and favourable entitlements. Because operators were state-owned companies or companies with equity capital dominated by state-owned shareholders, the Government typically ordered them to perform some public utility activities on request and then provided some reimbursements directly or simply as deductions from their tax payments.

¹²⁵ Decree 109/1997/ND-CP (1997) art 96 s 5.

¹²⁶ Such as a residential monthly fee and volume charge for local residential telephone service. See art 4 s 1(b) of the PM’s Decision 217/2003/QĐ-TTg (2003) on the management of prices of posts and telecommunications services.

¹²⁷ Decree 109/1997/ND-CP (1997), art 71 s 1 and 2.

¹²⁸ The deployment of ‘posts and telecommunications commune cultural house’ originated from the 8th Communist Party’s Resolution V. It has been carried out by VNPT since 1998 and has given special priority to communes (administrative divisions in Vietnam) in rural areas that have no public service counter for postal and telecommunications services. The purpose has been the provision of basic postal and telecommunications services, contribution to the economic and socio-cultural development and to ensure that residents in remote and rural areas benefit from postal and telecommunications services. By the end of 2010, there were 8,082 posts and telecommunications commune cultural houses nationwide. See “Report on Evaluation of ten years of establishment and operation of posts and telecommunications commune cultural houses (1998-2008)”, VNPT (2008).

authorities (for example reserved places in rural communes, favourable land tax rates, and so on).¹²⁹

Notwithstanding all these changes, the telecommunications sector was unsuccessful in meeting its objectives. The performance of universal services in Vietnam during this period was limited. By the end of 2001 total subscriptions were 3.049 million for fixed telephone service and 1.251 million for mobile service.¹³⁰ The density per 100 inhabitants was 3.83 for fixed telephone service and 1.57 for mobile service.¹³¹ This was low in comparison with average world and developing countries' rates, being about one-fifth of the average world density.¹³² The level of competition during this period remained only moderate. The main reason was the small number of competitors, who were either state-owned enterprises or companies with equity capital dominated by state-owned shareholders.¹³³

The legal framework provided very few specific rules and merely general principles about universal service delivery. The provision of universal services in Vietnam during this period was the responsibility of VNPT. Until 2002 VNPT compensated itself for providing universal services on a nation-wide basis through a mechanism of internal cross-subsidies.¹³⁴ It also recovered compensation for the provision of universal services from interconnection charges levied on other operators interconnected with its network. There was however no specific regulation about what the precise definition of universal service costs was, and what percentage of interconnection charges paid to VNPT was attributable to universal service cost.

¹²⁹ Organisation, management and operation of 'posts and telecommunications commune cultural house' are defined in the VNPT's Decision 267/1998/HDQT-BC (1998) (Amended in 2000).

¹³⁰ ITU World Telecommunications/ICT Indicators Database <www.itu.int/ITU-D/ict/statistics/>.

¹³¹ Ibid.

¹³² Ministry of Post and Telecommunications *History of Vietnam Post and Telecommunication - Volume 3* (Post and Telecommunications Publishing House, Hanoi, 2003) at 736.

¹³³ VNPT and Viettel are 100% state-owned corporations. The third company, SPT, is the first joint-stock company in the posts and telecommunications business in Vietnam but the equity capital from non-state shareholders (including non-state enterprise, organisations and individuals out of SPT) is less than 29% (31/12/2006). See General Meeting SPT's Report 2006.

¹³⁴ Decree 109/1997/ND-CP (1997) art 96 s 5 provided that telecommunication companies providing telecommunication services for rural and remote areas or other telecommunication universal services may be entitled to a regime of subsidy, price-subsidy or state-adjustment. However, the main regime for compensating the universal service provider was internal cross-subsidy within the telecommunications services of VNPT. VNPT did not do separate business accounting reporting for the cost of providing fixed telephone service nationwide. In addition, fixed telephone charges were regulated by DGPT. Thus, losses for providing fixed telephone service, especially in rural/remote (for commercially non-viable customers) areas, were recovered by revenues from other services.

C Universal Service Legal Framework and Implementation since 2002

1 Period 2002-2010

(a) Improvements to universal service legal framework

The Standing Committee of the National Assembly's Post and Telecommunications Ordinance 2002 was the first legal document determining the Government's policy on telecommunications universal service. There followed a range of regulatory documents aimed at spelling out the universal service legal framework and various institutional arrangements, including the Prime Minister's Decisions (2004) on setting up the universal service fund (Vietnam Public Utility Telecommunications Service Fund) and promulgating in 2006 a five-year universal service programme 2006-2010.

(b) Universal service institutional arrangements

Since Ordinance 2002 and the various regulatory documents following it, the roles of various people, ministries and local committees have been spelled out much more precisely as part of the legal framework surrounding universal service delivery in Vietnam. The five key roles and players are: (1) The Prime Minister; (2) The Ministry of Information and Communications (MIC); (3) Vietnam Public Utility Telecommunications Service Fund (VTF); (4) other ministerial agencies; and (5) Local People's Committees (Provincial Department of Information and Communications).

(i) The Prime Minister

The Prime Minister (PM) is responsible for approving the programme on the provision of universal services and stipulating which universal service tasks are entitled to State budget funding.¹³⁵ He also makes decisions about the establishment, and determines mechanisms for contributing to and using, the VTF's financial resources.¹³⁶

(ii) The Ministry of Information and Communications

¹³⁵ Post and Telecommunications Ordinance 2002 art 51 provided that the Government takes the responsibility to regulate specific policies and measures for implementation of universal service provision on the basis of requirements for socio-economic development and the development of the telecommunication market in each stage.

¹³⁶ Telecommunications Act 2009, art 22 s 4.

As a policy-making and regulatory body, the Ministry of Information and Communications (MIC)¹³⁷ is responsible for state management of information and communications, including universal service.¹³⁸ Its main functions are drafting laws, strategies and development plans, and promulgating subordinate regulations. In addition, the MIC is involved in directing and organising the implementation of relevant legal documents and policies, such as investment in telecommunications, resale of telecommunications services, programmes on telecommunications universal services, and regulation of telecommunications and Internet services quality and prices.¹³⁹ In particular, the MIC determines the list of universal service-qualified areas and targeted groups that shall be provided with universal service. It is also responsible for organising, setting up, approving, managing and directing the performance of programmes on the provision of universal services; stipulating the scale of public access points for telecommunications services; and stipulating types of subsidies and approving levels of subsidies.

(iii) Vietnam Public Utility Telecommunications Service Fund

The Ordinance 2002 art 50 s 1(b) established a universal service fund, namely ‘Vietnam Public Utility Telecommunications Service Fund’ (VTF), from contributions of telecommunications operators and other financial sources so as to facilitate telecommunications operators in providing universal services. Decree 160/2004/ND-CP art 49 s 1(b) and s 2 defined further that the VTF is a State non-profit financial institution under the direct management of the Ministry of Post and Telecommunications.¹⁴⁰ The VTF has responsibility for collecting universal service levies and providing subsidies for programmes and projects to provide universal services, organising the selection of operators and projects to provide universal services, and monitoring the implementation of universal service programmes, plans and projects.

The VTF’s organisation and operation were defined by the Prime Minister’s Decision in 2004.¹⁴¹ According to Decision¹⁴² 191/2004/QĐ-TTg¹⁴³ the VTF is responsible for the

¹³⁷ Before 2007 it was the Ministry of Posts and Telecommunications. See Decree 90/2002/ND-CP (2002).

¹³⁸ Decree 187/2007/ND-CP (2007), art 1.

¹³⁹ Ibid, art 2 s 9.

¹⁴⁰ MPT was renamed MIC in 2007. See Decree 187/2007/ND-CP (2007).

¹⁴¹ Decree 160/2004/ND-CP (2004), art 49 s 4.

implementation of the State's policies on universal service delivery throughout the country. Its main tasks are to collect and mobilise universal service financial resources, make subsidies to universal service programmes and projects, and co-ordinate the delivery and execution of these programmes and projects.

The VTF's managerial and executive apparatus consists of a Management Board, an Inspection Division and an Executive Board. The Management Board comprises five members, who are appointed and dismissed by the Minister of Information and Communications. All members of the Board of Management are government officials. The chairman of the VTF's Management Board is the Minister or a Vice Minister.¹⁴⁴ Other members are the managing director and members from relevant departments in the Ministry.

(iv) Other ministerial agencies

Other government agencies are also involved in the state management of telecommunications and universal service policy in Vietnam. Ministries and ministerial agencies (within their power and scope of duties) are responsible for cooperating with the MIC to carry out the state management of telecommunications in accordance with the Government's directions.¹⁴⁵ In particular, the Ministry of Finance has responsibility for collaborating with the MIC in determining cost accounting, collecting universal service levies and stipulating the regulations for financial management of the VTF.¹⁴⁶ The State Bank of Vietnam is responsible for regulations on the provision of loans at below-market rates from universal service funds.¹⁴⁷

(v) Local people's committees

¹⁴² PM's Decision is a legal document issued by the Prime Minister pursuant to the Constitution, law, resolution of the National Assembly, Ordinance and resolution of the National Assembly's Standing Committee, Decision of the State President, Resolution and the Decree of the Government (Cabinet) so as to stipulate solutions for the state management regarding the Cabinet's operation and public administrative system from central to local levels as well as working regulations of the Cabinet's members and Chairmen of People's Committees of provinces. See the Legal Document Act 2008 art 15 (1) & (2).

¹⁴³ PM's Decision 191/2004/QĐ-TTg (2004) on setting up Vietnam Public Utility Telecommunications Service Fund.

¹⁴⁴ Until July 2010, Chairman of VTF's Management Board was a Vice Minister.

¹⁴⁵ Telecommunications Act 2009, art 9 s 3.

¹⁴⁶ Ibid, art 22 s 4.

¹⁴⁷ PM's Decision 191/2004/QĐ-TTg art 10 s 2(b).

People's Committees are responsible for state economic management of telecommunications within their local areas. In particular, the Department of Information and Communications within the local committees of the provinces and centrally governed cities are responsible for the management of universal service delivery in their respective localities. They are required to coordinate with the MIC and the VTF in order to facilitate the implementation of universal service programmes and projects in localities, in a timely and efficient manner.¹⁴⁸ For example, the MIC's Decision 51/2008/QD-BTTTT on the evaluation and subsidy of universal service costs for period 2008-2010 art 4 s 5 determined that the Department of Information and Communications is responsible for evaluating and certifying the performance of universal service providers in localities¹⁴⁹ quarterly or every 6 months (applicable to provinces and cities with small-size universal service performance).¹⁵⁰ In addition, the Department of Information and Communications is responsible for checking, and supervising the implementation of universal service contracts between the VTF and universal service providers in localities.¹⁵¹

(vi) Persistent issues of universal service institutional arrangements

In summary, there were some improvements in institutional arrangements for the delivery of telecommunications services to rural and isolated areas after the passage of Ordinance 2002 along with numerous ministerial regulations. In particular there was the establishment of a separate financial institution within the MIC to administer the performance of service delivery; along with established structures for administration of levy collection and provision of subsidies.

However, the current institutional arrangements provide weak monitoring and evaluation of universal service performance, due mainly to diffuse accountability amongst departments involved in the measurement of service delivery. Roles remain unclear and give rise to role-conflict. The institutional framework does not support effective public and stakeholder involvement. At the same time, the lack of transparent performance information and reporting systems is further evidence of unsatisfactory and insufficient

¹⁴⁸ Ibid, art 10 s 3.

¹⁴⁹ Decision 51/2008/QD-BTTTT (2008), art 4 s 2.

¹⁵⁰ Ibid, art 5 s 1.

¹⁵¹ Ibid, art 4 s 2 (b).

universal service arrangements. Finally, poor systems of performance accountability are an obstacle to efficient and effective universal service delivery in Vietnam.

The diffuse and unclear responsibility of central authorities are shown in the lack of regulations on provision of loans at below-market rates to telecommunications operators.¹⁵² According to Decision 191/2004/QĐ-TTg, the State Bank of Vietnam is responsible for promulgating and approving regulations for loans at below-market rates.¹⁵³ However, there were no such regulations enacted during the period 2006-2010 by the State Bank of Vietnam. Instead, the Ministry of Finance determined only a few principles and conditions for the provision of loans at below-market rates.¹⁵⁴ There were confused responsibilities among relevant government agencies and little performance accountability for inefficient performance of universal service subsidies owing to the lack of regulations for loans at below-market rates.

Nor did the MIC issue any specific regulation on the provision of loans at below-market rates. In practice, there was only some in-house guidance issued by the Board of Management of the VTF in 2008.¹⁵⁵ This non-legally binding document did not outline clear, specific, transparent and effective processes for loan eligibility, loan terms, and evaluation and external monitoring of the effectiveness of the loan programme. This led to fragmentation of the process of approving loans at below-market rates and difficulties in evaluating the effectiveness of loans at below-market rates and in determining the performance accountability of the authorities involved in making those loans.¹⁵⁶ There was also scope for officials to exceed their authority in approving projects for loans at below-market rates, unfairness and non-transparency in allowing some loans, and no requirements for performance accountability from individuals and institutions involved.

At the same time, the organisational structure of the VTF reflected diffuse accountability, role conflict and did not effectively support public and stakeholder involvement. According to Decision 191/2004/QĐ-TTg, the VTF was a financial institution with responsibility to monitor, evaluate and report on the implementation of

¹⁵² See Chapter Four III.C.2.(c).(v).

¹⁵³ Decision 191/2004/QĐ-TTg (2004), art 10 s 2 (b).

¹⁵⁴ Circular 67/2006/TT-BTC (2006) Part III s 3.

¹⁵⁵ Decision 2/QĐ-VTF-HĐQ (2008) on loans at below-market rates.

¹⁵⁶ Vietnam Public Utility Telecommunications Service Fund “Evaluation of the Implementation of the universal service Programme 2006-2010” (prepared for the Ministry of Information and Communications, 2010), at 4.

universal service programmes, plans and projects supported by universal service funds.¹⁵⁷

This situation basically eliminates the function and involvement of the MIC's advisory departments in monitoring and evaluating the performance of universal service policy. In addition, there were no members on the Board from other ministries, telecommunications operators, or any external or outside experts.

In addition, overlapping and ineffective performance between the VTF and provincial Departments for Information and Communication also results in ineffective and delayed evaluation of service delivery and subsidies. These provincial Departments are involved in monitoring and evaluating the delivery of universal services within geographical areas. However, their monitoring activities are inefficient. In addition, there is no on-going adequate supervision and control of the approval processes for annual universal service plans, or decisions on the selection of universal service providers and approval of subsidies.¹⁵⁸

The MIC allocated 0.5% of universal service subsidies for evaluating and certifying outputs of the delivery of universal services locally¹⁵⁹ and delegated the responsibility for overseeing and certifying outputs of service delivery by telecommunications operators in each province to the Department of Information and Communication.¹⁶⁰

Interviews with the group of government officials (see Appendix One) involved in the measurement of universal service delivery in Vietnam in 2011-2012 showed that the VTF was still involved in this process. It took longer for the VTF to re-check the performance information and there was typically disagreement. As a result, the approval and provision of subsidies were also delayed.¹⁶¹ Up to December 2010 (the end of the programme 2006-2010), the VTF had not settled any contracts for universal service

¹⁵⁷ Decision 191/2004/QĐ-TTg (2004), art 3 s 4.

¹⁵⁸ Ministry of Information and Communications "Document 2203/TT-BTTTT submitted to the Prime Minister for the approval of the universal service Programme 2011-2015" (2011), at 6.

¹⁵⁹ Decision 14/2008/TT-BTTTT (2008) Part II s 1(a) defined:

(a) Compensation to provincial Departments for Information and Communication for evaluation and approval of universal service delivery in provinces will be 0.5% of subsidies to telecommunications operators for maintaining and providing universal services.

¹⁶⁰ Circular 05/2006/TT-BBCVT, Part V s 5(d).

¹⁶¹ Ministry of Information and Communication, above n 158, at 6.

provision but had only prepaid limited amounts to telecommunications operators for providing universal services.¹⁶²

Finally, there has been inadequate evidence-based independent analysis around the performance of universal service delivery in Vietnam. This is caused mainly by the lack of regulation on performance information and reporting systems. Up to 2009, there were no detailed regulations on the provision of universal service public reports.¹⁶³ Some important issues relating to reporting data (eg annual reports on universal service levies of telecommunications operators to the VTF) were set out only as non-binding administrative documents. For instance, the MPT's document 398/BBCVT-KHTC in 2006 required that before 30 April every year, telecommunications operators should submit reports to the VTF on the accounting balance of universal service levies for the previous year. The VTF in turn was to report in writing, certifying final information about these universal service levies.¹⁶⁴ This, however, has never been done properly and there have been considerable differences in information about universal service performance released by the VTF and telecommunications operators.¹⁶⁵

As a result, stakeholders and the public have had insufficient information about planning approval, budgeting, monitoring and evaluation.¹⁶⁶ Important information relating to collection of universal service levies, subsidies, and projects for loans at below-market rates between 2006 and 2010 was unavailable and not released publicly until mid-2012,¹⁶⁷ in breach of the MIC's regulations on public disclosure of this financial information.¹⁶⁸

Some current regulations on telecommunications reporting (the MIC's Circular 24/2009/TT-BTTTT on information reports applicable to telecommunications operators¹⁶⁹ and 25/2009/TT-BTTTT on comprehensive information reports applicable to government departments)¹⁷⁰ do not require sufficient data on the performance of

¹⁶² Vietnam Public Utility Telecommunications Service Fund, above n 156, at 3.

¹⁶³ Decision 4/2009/TT-BTTTT (2009) on the reports of universal service delivery.

¹⁶⁴ Document 398/BBCVT-KHTC (2006).

¹⁶⁵ Ministry of Finance "Inspection Report on the financial management at VTF" (2011), at [2.1].

¹⁶⁶ Interviews with telecommunications operators' officers (the author, December 2011).

¹⁶⁷ The VTF only published this relevant information on their website on 12 April 2012 <www.vtf.vn/vi/vtci/tttk/2012/04/4F1B657E/>.

¹⁶⁸ Decision 1130/QĐ-BTTTT (2009) on the regulation of public disclosure of financial information of VTF.

¹⁶⁹ Circular 24/2009/TT-BTTTT (2009).

¹⁷⁰ Circular 25/2009/TT-BTTTT (2009).

universal service policy. In particular, these reports are insufficient for any accurate statistical monitoring and evaluation of universal service performance (eg fixed subscribers were counted on the geographical areas of districts, which are not the same as universal service-qualified areas of communes).¹⁷¹ In turn, reports of local Departments of Information and Communications are mostly dependent on reports of telecommunications operators (eg Annexes 5/SB and 5/DB).¹⁷²

(c) Universal service legal framework and the universal service programme 2006-2010

The basic legal framework for universal service delivery in Vietnam was shaped by the Ordinance 2002 along with a number of subordinate regulations. However, improvements in universal service delivery began to be seen only after the establishment of the VTF and the universal service programme 2006-2010.

The most significant change in the legal frameworks was the precise definition of universal services, and the removal of the asymmetric obligation (on VNPT) of universal service delivery and the universal service levy on the sole dominant operator. Instead, all telecommunications operators were now made responsible for universal service delivery.¹⁷³ The financial resources for universal service delivery were to be funded by universal service levies on the telecommunications industry. In addition, regulations on the administration of universal service delivery, collection of universal service levies and provision of universal service subsidies were improved over the period.

(1) Immediate background to the universal service programme 2006-2010

From the early 2000s,¹⁷⁴ the telecommunications industry witnessed the advent of an open market and increasing competition among new entrants.¹⁷⁵ This resulted in a

¹⁷¹ Form 5/DB and Form 5/SB of MIC's Circulars 24/2009/TT-BTTTT (2009) and 25/2009/TT-BTTTT (2009).

¹⁷² Circular 25/2009/TT-BTTTT (2009), s 4 [30].

¹⁷³ Post and Telecommunications Ordinance 2002, art 51 s 3.

¹⁷⁴ Nguyen, Pham and Gullish, above n 92, at 9.

¹⁷⁵ In 2005, Vietnam had 6 facility-based operators providing services based on their own network infrastructure (3 for domestic fixed telephone services and 3 for international fixed telephone services), 6 mobile service providers and 13 ISPs.

service boom from 2003 onwards, as well as a significant increase in subscriptions to all services¹⁷⁶ and decreases in service prices.¹⁷⁷

Up to 2005 however, Vietnam remained well behind many developing countries.¹⁷⁸ The growth of universal service delivery was slow and imbalanced in Vietnam.¹⁷⁹ There was a considerable disparity in accessibility and availability of telecommunications services for residents living in urban and rural areas.¹⁸⁰ As late as 2005, the average density of fixed telephone lines per 100 residents in rural, remote and mountainous areas in Vietnam was less than 2%.¹⁸¹ The lowest density within these communes was 0.8 per 100 residents,¹⁸² compared with the average density of 8.46 per 100 for the country as a whole.¹⁸³ There were some 600 rural communes without any telephone.¹⁸⁴

Key indicators of telecommunications subscriptions in Vietnam remained low in comparison with developing countries, Asia-Pacific economies and average world telecommunications density. The ITU database showed (2005) the fixed telephone density in Vietnam as being 8.46 per 100 inhabitants, compared with average densities of 12.7, 15.1, and 19.1 in developing countries, Asia-Pacific and the world respectively.

The situation was the same with mobile and fixed (wired) broadband subscriptions. These densities in Vietnam were 11.54 and 0.25 per 100 inhabitants, compared with 33.9 and 3.4 (the world), 22.9 and 1.3 (developing countries) and 22.6 and 2.2 (Asia-Pacific).¹⁸⁵ Thus, in 2005 the provision of universal services (telecommunications) was still a big challenge for Vietnam (see Figure 4 and 5).

¹⁷⁶ See Ministry of Information and Communications *Information and Data on Information and Communication Technology: Vietnam 2010* (Information and Communications Publishing House, 2010) at 39, Nguyen Thanh Ha, Pham Quang Thanh and Jacob Gullish *Competition Review of the Vietnamese Telecom Sector* (United States Agency for International Development, VNCI Policy Paper #3, 2005); Ministry of Information and Communications (2011) <mic.gov.vn/uploads/20100318/DNhatangmang.xls>.

¹⁷⁷ Vietnam Government “Official Dispatch to the National Assembly on the Telecommunications Bill” (2009), at 1.

¹⁷⁸ Nguyen, Pham and Gullish, above n 92, at 4.

¹⁷⁹ Vietnam Public Utility Telecommunications Service Fund, above n 156, at 1.

¹⁸⁰ Ministry of Information and Communications, above n 158, at 6.

¹⁸¹ *Ibid.*, at 2.

¹⁸² *Ibid.*

¹⁸³ ITU World Telecommunications/ICT Indicators Database (2000-2010).

¹⁸⁴ Ministry of Information and Communications “Project submitted to the Prime Minister for the approval of the universal service Programme 2011-2015” (2011), at 3.

¹⁸⁵ International Telecommunications Union Database: Key Global Telecom Indicators for the World Telecommunication Service Sector (2005-2010).

Figure 4: Key telecommunications indicators in Vietnam period 2001-2005¹⁸⁶

Year	Fixed telephone lines		Mobile cellular		Fixed (wired) broadband	
	Total	Density per 100 inhabitants	Total	Density per 100 inhabitants	Total	Density per 100 inhabitants
2001	3,049,925	3.83	1,251,195	1.57	0	0
2002	3,929,140	4.88	1,902,388	2.36	1,076	0
2003	4,402,000	5.41	2,742,000	3.37	9,180	0.01
2004	5,481,000 ¹⁸⁷	6.51	4,960,000	6.03	52,709	0.06
2005	7,126,900 ¹⁸⁸	8.46	9,593,200	11.54	210,024	0.25

Figure 5: Key indicators of telecommunications subscription in Vietnam (2005)¹⁸⁹

Indicators (density per 100 inhabitants)	Vietnam	Asia-Pacific	Developed countries	Developing countries	World
Fixed telephone	8.46	15.1	47.2	12.7	19.1
Mobile	11.54	22.6	82.1	22.9	33.9
Fixed (wired) broadband	0.25	2.2	12.3	1.3	3.4

The principal obstacle, among several others, to the effective performance of universal service delivery remained the inadequate legal framework, and the lack of detailed regulations to determine and allocate the obligations of telecommunications operators to provide services or pay levies.

In practice there was an inequality between telecommunications operators in providing universal services.¹⁹⁰ VNPT continued to be the single telecommunications operator to take responsibility for universal service delivery; it was covering all costs for this

¹⁸⁶ Source: ITU World Telecommunications/ICT Indicators Database (2000-2010), Statistical Handbook of Vietnam (2006 & 2010) and Information and Data on Information and Communication Technology: Vietnam White Book (2010).

¹⁸⁷ General Statistics Office *Statistical Handbook of Vietnam* (Statistics Publishing House, Hanoi, 2006) at 115.

¹⁸⁸ General Statistics Office *Statistical Handbook of Vietnam* (Statistics Publishing House, Hanoi, 2010) at 239.

¹⁸⁹ ITU's Key Global Telecom Indicators for the World Telecommunication Service Sector (2005-2010) and Key Country Data (2000-2010)

¹⁹⁰ Ministry of Information and Communications, above n 158, at 2.

obligation by internal cross-subsidies among its services and between regions, and by interconnection charges toward costs of universal service delivery¹⁹¹ up to 2005.¹⁹²

In addition, after the advent of an open market policy and increased competition which resulted in reduced prices of services closer to the real costs, VNPT found it difficult to maintain the internal cross-subsidy between its services.¹⁹³ The internal cross-subsidy thus affected VNPT's competitiveness in other service markets.¹⁹⁴ This required changes in the universal service policy, and the elimination of the internal cross-subsidy.

Further changes to the legal framework were required once Vietnam became a member of the WTO in 2006. Appendix A section 3 of the WTO Regulation Reference Paper, which forms part of the WTO Agreement on Basic Telecommunications,¹⁹⁵ requires any member of the WTO to define the universal services it wishes to maintain. Such universal service policy and universal service funding arrangements should not be anti-competitive, should be administered in a transparent, non-discriminatory and competitively neutral manner, and should not create more burdensome costs than necessary.¹⁹⁶ However, no particular regulations aiming at meeting these principles were enacted.

(2) The 2006-2010 programme: overall target and specific objectives

In order to carry out the CPV's overall target in the Strategy 2001-2010, the Prime Minister's Decision 158/2001/QĐ-TTg 2001 spelled out the objectives for universal service delivery by 2010:

1. Increased quality in all areas of the country;
2. The density of telephones and Internet users per 100 inhabitants to reach the average percentages in the region;¹⁹⁷
3. All districts and most communes being connected by optical fibre and other broadband infrastructures;

¹⁹¹ Decree 160/2004/ND-CP (2004), art 49 s 1 (a).

¹⁹² Ibid.

¹⁹³ Ministry of Information and Communication, above n 184, at 3.

¹⁹⁴ Ibid.

¹⁹⁵ WTO Regulation Reference Paper: Agreement on Basic Telecommunications.

¹⁹⁶ See Chapter Two II.D.

¹⁹⁷ PM's Decision 158/2001/QĐ-TTg (2001), art 1 s 2 (b).

4. At least 30% of telephone and Internet users having access to broadband;¹⁹⁸
5. The fixed telephone density being between 15 and 18 per 100 inhabitants and more than 60 per 100 households.¹⁹⁹

The Government also committed itself to designing policies and frameworks for regulating telecommunication networks in rural, mountainous and remote areas, and to defining obligations of universal service delivery and universal service providers.²⁰⁰

After improvements to the universal service legal framework and institutional arrangements in 2002, and the establishment of universal service funding, the Government approved the first five-year universal service programme. The overall target of this programme (2006-2010), as determined by Decision 74/2006/QD-TTg, Art 1, Part I s 1, was:²⁰¹

to secure the delivery of universal services to citizens throughout the country, in which the focus is the universal service delivery to mountainous, remote, difficult socio-economic conditions areas, in order to narrow the gap of telecommunications and Internet usage between regions and areas, thus creating good conditions for fostering socio-economic development and contributing to ensuring national security and defence.

The programme had a focus on both the development of telecommunications infrastructure and enhancement of service use in communes with especially difficult geographic and socio-economic conditions.²⁰² Some specific objectives of the programme were defined in Decision 74/2006/QD-TTg art 1 s I (2):²⁰³

- Telephone density in the areas provided with universal services reaching 5 per 100 residents;
- 100% communes throughout the country having public telephone service access point;
- 70% communes throughout the country having public Internet service access point;

¹⁹⁸ Ibid, art 1 s 3 (a).

¹⁹⁹ Ibid, art 1 s 3 (d).

²⁰⁰ Ibid, art 1 s 4 (d).

²⁰¹ PM's Decision 74/2006/QD-TTg (2006), art 1 part I s 1.

²⁰² Ministry of Information and Communications, above n 184, at 4 & 5.

²⁰³ Objectives defined in this Decision 74/2006/QD-TTg were not in line with those in the PM's Decision 158 (2001) but will be effective because, according to the Legal Document Act, rules on the same issues in the updated legal documents issued by the same responsible authority/authorised official will be effective against the older one.

- Compulsory telecommunications services with free access for all citizens.

(3) Selection of universal service providers and contestable bidding process

In Vietnam, the selection of universal service providers has been a major problem. Between 2002 and 2005, there were three principal rulings by the Government on the selection process. Ordinance 2002 provided that the selection of telecommunications operator(s) to provide universal service should be conducted through one of following processes:²⁰⁴

- a) The nomination of enterprise to provide universal services on the basis of evaluation of the enterprise's project; and
- b) A competitive bidding process for the selection of telecommunications operators to provide universal services.

At the same time, Decree 31/2005/ND-CP on producing and supplying all public-utility products and services in Vietnam,²⁰⁵ art 5 s 4 stated:

- 4. Public utility products and services should be distributed through one of three methods, the order of priority for methods being as follows:
 - a) Bidding;
 - b) Government allocated projects;
 - c) Direct contracting.

The Prime Minister's Decision 74/2006/QD-TTg 2006 Part VI s 2 stated that:

- a) Universal service programmes are implemented through the Government's annual plans on universal service delivery;
- b) Plans and projects on universal service delivery are carried out in accordance with Government's regulations on bidding, and by direct contracting to provide universal service products and services in accordance with guidance from the responsible authorities.

²⁰⁴ Post and Telecommunications Ordinance 2002, art 50 s 2.

²⁰⁵ Decree 31/2005/ND-CP on producing and supplying public-utility products and services (2005) Annexes A & B included public-utility products and services whose supply must be conducted through 'Government allocated projects' or 'direct contracting'. Annex C listed public-utility products and services that must be supplied through bidding process or direct contracting. None of these Annexes included telecommunications public-utility products and services. However, there was an open clause that other important products and services could be included in this Annex in accordance with the PM's Decisions.

Thus, the selection of universal service providers and universal service projects in Vietnam could be carried out through any of three options: contestable bidding, government allocated projects, or direct contracting. However, the 2006-2010 period saw only ‘Government allocated projects’ and ‘direct contracting’ methods being applied to the selection of universal service providers for the universal service programme 2006-2010. There was no competitive bidding at all.

In practice, any legally established telecommunications operator could have become a universal service provider. They would receive universal service subsidies through the VTF when they supplied telecommunication services under contract with the competent authority within the universal service-qualified areas, in accordance with the relevant regulations.²⁰⁶ During this period, in addition to VNPT, there were only a few telecommunication operators providing local telephone service within the areas that qualified for universal service subsidies from the VTF. Two principal providers were EVN-Telecom and Viettel.²⁰⁷

Given the lack of competitive bidding for service provision and the Government’s use of allocation and direct contracting, considerable confusion arose in the provision of telecommunications services. In some situations, more than one operator was contracted to provide services in the same universal service-qualified communes, even though these are considered as uneconomic business areas for the delivery of services. In other situations more than one operator was operating in the same universal service-qualified area.

The absence of contestable bidding in selecting universal service-providers has led to inefficient investment and non-economic efficiency in costs and subsidies. Operators have had little motivation to reduce their costs in the absence of a competitive bidding process. Duplication in deploying infrastructure in the same universal service-qualified areas has resulted in overlap and wasted investment. At the same time many households have engaged the services of two or even three universal service providers simultaneously so as to get more benefits from government subsidies. As a result, the

²⁰⁶ Decree 160/2005/ND-CP (2005), art 50 s 1 and PM’s Decision 74/2006/QĐ-TTg (2006) Part II.

²⁰⁷ By the end of 2009, there were four telecommunications operators engaged with the VTF in contracts to provide universal services <www.vtf.vn/vi/tintuc/trongnuoc/2010/07/4F1B62AD/>.

Government has had to expend two or three times the basic subsidy amount on residents or households in universal service-qualified areas.²⁰⁸

Without a competitive bidding process for selecting providers, there is no way of knowing whether the most efficient outcome was achieved. For the last five years the government has persisted with the allocation of projects and with direct contracting, and not utilised the competitive bidding process. The failure to use contestable proceedings in determining which enterprises would provide universal services has clearly limited the outcomes of the universal service programme. There has been no real effort to select the most efficient operators or minimise the subsidies to those providing services.

Although the Bidding Act 2005 and its related Decrees have been in existence for some years, criteria or adequate regulation for the fair selection of universal service providers have not been spelled out. The selection of universal service providers and projects of universal service delivery have often been based on unclear criteria, such as giving “prioritisation to the telecommunications provider with existing telecommunications infrastructure in the universal service qualified areas”.²⁰⁹

Lack of performance accountability by responsible authorities and officials has meant that they have preferred to use allocation of projects and direct contracting, rather than the contestable bidding process. This has resulted in uneven treatment of telecommunications operators. It has also left open the potential for bribery and corruption.

(4) Financial resources for universal service delivery and allocation of universal service levies (2006-2010)

Ordinance 2002 determined that the Government should ensure compensation for the delivery of universal services through interconnection charges (a determined proportion of interconnection charges) and subsidies from the VTF, funds from the Government’s

²⁰⁸ Dong Thap Province Department of Information and Communication “Report 81/BC-STTTT on the management of universal service delivery” (2010), at 4.

²⁰⁹ Posts and Telecommunications Ordinance 2002, art 50 s 2.

budget, universal service levies and other resources.²¹⁰ This was reinforced in Decree 160/2004/ND-CP art 49 s 1 which stated:²¹¹

1. The Government supports telecommunications operators for delivery of universal services through:

- a) Interconnection charges;
- b) Subsidies from the VTF.

(i) Funding from interconnection charges

One of the assumptions made by the MIC in setting interconnection charges between operators was that the charges should include a ‘reasonable and proportional’ contribution towards the provision of universal services. This contribution should be determined transparently, without any discrimination between telecommunications operators.²¹² However, in reality the specific proportion of contribution to the VTF was neither defined in the legal framework nor included in interconnection agreements between telecommunications operators.²¹³ On the other hand, Decision 191/2004/QD-TTg art 6 s 2 (b) determined that interconnection charges of operators (if any) has to be paid to the VTF. The Ministry of Finance’s Circular 110/2005/TT-BTC determined that this payment is to be 100% of interconnection charges.²¹⁴ VNPT had qualified revenues from interconnection charges to be paid at VND 16.40 billion²¹⁵ to the universal service fund in 2005.²¹⁶ The Prime Minister’s Decision 186/2007/QD-TTg did not count

²¹⁰ Ibid, art 50 s 1.

²¹¹ Decree 160/2004/ND-CP (2004), art 49 s1.

²¹² PM’s Decision 217/2003/QD-TTg art 3 s 2 (a) provided that:

2. Pursuant to the regulation on the management of service charges applicable to postal and telecommunications operators:

- a) Interconnection charges between telecommunications operators shall be defined on the following bases:
 - Interconnection costs;
 - Non-discrimination between telecommunications services, between affiliation of telecommunications operators and other telecommunications operators;
 - Reasonable analysis of specific elements of the networks or service segments;
 - Reasonable pursuance to interconnection charges of countries within the region and the world;
 - In case interconnection charges included proportional contribution to the provision of universal services, this contribution must be defined reasonably and equally.

²¹³ PM’s Decision 39/2007/QD-TTg on the management of postal and telecommunications charges (2007), which replaced the PM’s Decision 217/2003/QD-TTg, art 2 s 2 defined one of the principles of charge management as ensuring the provision of universal services. However, this provision was not implemented in practice.

²¹⁴ Ministry of Finance Circular 110/2005/TT-BTC (2005) Part 2 s 1.2.

²¹⁵ NZD 1 is equivalent to about VND 17,089 <secure.anz.com/IntInetBank/ANZVietnamIB/English/fxRates/fxrates.asp>.

²¹⁶ Ministry of Information and Communications, above n 184, annex 1.7.

interconnection charges as payments to the VTF by operators nor income from interconnection charges as revenue for levy calculation.²¹⁷

(ii) Funding from the government budget

The Vietnamese legal framework provided that the Government would contribute a kick-off payment to the universal service fund. This reflected a realistic support and financial share by the Government in enhancing universal access or universal service delivery, such as in some other countries (eg New Zealand, Nigeria and Nepal). However, in Vietnam this payment was only made in part.

Decision 191/2004/QĐ-TTg art 6 s 1 provided that of the VTF's initially registered (charter) capital of VND 500 billion, the Government was to provide a one-off contribution of VND 200 billion. However, the Government contributed only VND 100 billion to the VTF's registered capital.²¹⁸ The remainder of the registered capital (VND 400 billion) was sourced from annual universal service levies on telecommunications operators.²¹⁹

In addition, Decision 74/2006/QĐ-TTg Part V s 1 (a) and (b) determined that the funding for universal service delivery during the period 2006-2010 should be VND 5,200 billion.²²⁰ Apart from the VND 5,100 billion to be levied on operators, VND 100 billion would also be received from the ministries and local authorities. According to interviews with the group of participants from the government departments, there is no information available to show that this VND 100 billion was ever contributed.²²¹

(iii) Determination of operators to pay levies

Decree 160/2004/ND-CP art 49 s 3 (a) stated that the Prime Minister was responsible for making regulations on the collection of universal service levies from telecommunications operators. Decision 191/2004/QĐ-TTg art 6 s 2 determined that any legally established telecommunications operator in Vietnam must contribute to the

²¹⁷ PM's Decision 186/2007/QĐ-TTg, art 1.

²¹⁸ Government Office's Document 3723/VPCP-KHTC (2009) allowed the VTF to use VND 100 billion of annual universal service levies to contribute to its registered (Charter) capital.

²¹⁹ Ministry of Finance's Document 160/KL-TTr on the inspection of the financial management in Vietnam Public Utility Telecommunications Service Fund (2011), at 5.

²²⁰ PM's Decision 74/2006/QĐ-TTg (2006) part V s 1 (a) and (b).

²²¹ Interviews with officers in VTF and VNTA (the author, December 2011-January 2012).

performance of universal service delivery through paying universal service levies to the VTF. However, during the period 2006-2010, telecommunications operators who provided mobile services (including local and national), international calling, leased-line services, and national calling and leased-line services (including fixed local access)²²² were liable for universal service levies.²²³ The idea behind this determination was that operators providing this range of benefit or high value services should pay for the costs of the delivery of universal services.

The determination exempted some providers of Internet access - such as ISPs (including VoIP service providers) - from any obligation to contribute to universal service levies.²²⁴ The number of ISPs in Vietnam increased from 19 in 2006 to 91 in 2011 (See Chart 2). In addition, annual revenues from Internet service increased significantly from about VND 2,158 billion in 2006 to approximately VND 7,150 billion in 2009.²²⁵ This revenue was much higher than the total revenue from national telephone services which stood at VND 3,386 billion in 2009 and VND 1,473 billion in 2010.²²⁶ However, the substantial Internet access revenues did not incur universal service levies.

The determination of telecommunications operators to pay universal service levies obviously did not ensure technological and service neutrality, or non-discrimination between service providers. The determination in reality was aimed at creating easier processes for management authorities²²⁷ rather than considering the benefit to operators and equality between them, who all benefit from the greater network connectivity. The management authorities did not need to consider revenues nor calculate levies from other service operators.

There is no obvious reason for different services to be treated differently for universal service purposes or for different percentages of revenues for universal service levies. The justification for levies should be based on the idea that all operators benefit from greater connectivity benefits in exactly the same way as from universal services.

²²² Ministry of Finance's Circular 110/2005/TT-BTC (2005) Part I s 2(a).

²²³ PM's Decision 191/2004/QĐ-TTg art 6 s 2(a).

²²⁴ In New Zealand, ISP revenues were also effectively exempt from obligations to contribute to universal service levies until 2011.

²²⁵ Ministry of Information and Communications, above n 184, chart 6.1.4.

²²⁶ Ibid, chart 1.7.

²²⁷ Ibid, at 38.

(iv) Allocation of universal service levies

The determination of levies in Vietnam did not have a clear connection to the costs for providing universal services. The aggregate amount to be paid from all service providers to the VTF was calculated on a fixed percentage of annual service revenues, and not linked to either the actual or estimated costs of providing universal services. Decision 191/2004/QĐ-TTg art 6 s 2 (a) determined that universal service levies should be 5% of mobile service revenues, 4% of international calling and leased-line service revenues and 3% of national calling and leased-line service revenues. Outcomes from interviews with government officers involved in universal service policy-making and administration in Vietnam illustrate that levy rates imposed on operators were defined by estimating the pre-determined financial requirement for universal service delivery during the whole period 2006-2010 to annually estimated service revenues.²²⁸

The determination of universal service levies was not based on actual or estimated costs or outputs and inevitably resulted in either over-collection or under-collection. Without a clear connection between levies and the actual or estimated costs of service delivery there is an obstacle to the measurement of efficient performance of the universal service policy.²²⁹ Over-collection has a major impact on the financial performance of operators, particularly new and small operators.²³⁰ The outcomes were over-levying of telecommunications operators and the placing of unnecessary financial burdens on the industry. In addition, the allocation of the universal service levies based on a fixed percentage of service revenue and differing between different service types, was not consistent with competitive neutrality.

The failure in forecasting of receivable financial resources from the industry levies and the contributions payable to the universal service programme is still a critically important issue.²³¹ It has generally resulted in over-levying on telecommunications operators. The over-collection of universal service levies was due to a mismatch between levels of levies in Vietnam and actual expenditures, regardless of a downward

²²⁸ Interviews with officers in VTF and VNTA (the author, December 2011-January 2012).

²²⁹ International Telecommunications Union, above ch 2, n 98, at 36.

²³⁰ Interviews with professional and officers from telecommunications operators (the author, December 2011-January 2012).

²³¹ Ministry of Information and Communications, above n 158, at 6.

revision of levies in 2007. This downward revision of levy was made due to the unpredicted increase in revenues of mobile services two years after the implementation of the universal service programme. Fixed determination of funding resources resulted in ineffective use of resources and variable compliance by the telecommunications operators.

For the period 2005-2006, collected universal service levies were very close to 5% of the sector revenues. The levy rate for mobile service revenues was the highest level of 5% of gross revenues, but revenues from mobile services were approximately 7.5 times higher than those from each of the two other liable services. VND 900 million was paid to the VTF from mobile service revenues, compared with VND 121 million from international telephone services, and VND 112 million from long-distance services.²³² Vietnam was ranked among the countries with the highest universal service levy. Most countries²³³ set contributions to universal service funds at less than 2% of service revenues.²³⁴

During the period 2007-2010 the percentages of service revenues for universal service levies in Vietnam were lowered to 3%, 2% and 1%, respectively. Decision 186/2007/QĐ-TTg art 1 amended art 2 s 2 of Decision 191/2004/QĐ-TTg as follows:

a) Every legally established telecommunications operator in Vietnam must contribute to the performance of universal service delivery in Vietnam through paying universal service levies to the VTF. These payments, from the financial year 2007, will be calculated on the revenues from supplying service to customers (excluded interconnection charges), including:

- Mobile services are to be levied at 3% of revenues.
- International telephone and leased-line services are to be levied at 2% of revenues.
- National telephone and lease-line services are to be levied at 1% of revenues.

This revision in the percentages of service revenues for universal service levies was not based on actual costs of universal service delivery. Instead, the downward revision was simply a proportionate revision of the percentages in the pre-determined budget for

²³² Ministry of Information and Communication, above n 184, at 92.

²³³ Intelcom's Research (2011) indicated that universal service levy rates in countries around the world typically range from 0.04% (Estonia) to 6% (Malaysia) of service revenues, and about 40% of countries imposed a rate of 1.5% or less, and another 28% imposed a rate of less than 1%.

²³⁴ InfoDev Programme of the World Bank, above ch 2, n 8, at 62.

universal service, and was due to an unforeseen increase in the revenues from telecommunications services. However, the over-collection of funding continued and total universal service levies were around 3% of sector revenues. For instance, contributions of universal service levies from mobile services in 2010 were nearly 26 times higher than the total levies from revenues of the other two services.

Collected universal service levies from mobile services were approximately VND 1,863.79 billion, in comparison with VND 57.97 billion from international telephone service and VND 14.73 billion from national telephone services.²³⁵ Thus, while the percentages of service revenues for universal service levies were revised periodically, the rates - as a proportion of total sector revenue - remained high and Vietnam has remained among the countries with the highest universal service levies.

(v) Failure or delay in paying levies

A further issue is that there has been weak enforcement in regard to operators in breach of their obligations, such as failure or delay in paying universal service levies. Decree 142/2004/ND-CP²³⁶ on administrative breaches in telecommunications included penalties for breaches related to failure to pay, and delayed payment of universal service levies. The Ministry of Finance's Circular 110/2005/TT-BTC Part II s 3.1 (d) stated that:

d) Any telecommunications operator, who fails to pay universal service levies to the VTF as provided by this Circular, will be penalised in accordance with relevant regulations and fined for delayed payments as defined in Decree 142/2004/ND-CP on administrative breaches in telecommunications.

However, the relevant regulations on penalties of the Decree set penalties at a very low value. Decree 142/2004/ND-CP provided that a fine between VND 10 to 40 million, applicable on the different period of delayed payments (less than 6 months, between 6 months and 1 year, and more than 1 year) would be imposed on any delayed payment of universal service levies to the VTF.²³⁷ The maximum penalty (VND 40 million) for delayed payments for more than 1 year was extremely low. It was therefore financially

²³⁵ Ministry of Information and Communication, above n 184, at 94.

²³⁶ Decree 142/2004/ND-CP (2004) was replaced by Decree 83/2011/ND-CP (2011).

²³⁷ Decree 142/2004/ND-CP art 16.

beneficial for telecommunications operators to delay paying levies, which were normally up to hundreds billions of VND per year per operator, for several years.

In addition, there was no regulation on the application of interest for late payments of universal service levies for the period commencing on the due date to the date of payment of the whole amount.²³⁸ The longer the delay in paying universal service levies, the more operators would benefit. Some telecommunications operators ignored or delayed paying universal service levies for many years.

The MIC Report in 2011²³⁹ noted that there were four telecommunications operators²⁴⁰ who did not pay their contributions of VND 150 billion to the VTF (excluding payments made in 2010). One company (VTC) did not register in writing for contribution to the VTF as required by the MIC's regulations, and did not pay the stipulated amount of VND 10 billion.

(vii) Link between universal service levies and the real costs for the delivery of services

In summary, the allocation of levies should be linked closely to the cost of providing services so as to avoid over-levying and placing unnecessary financial burdens on operators. In Vietnam, however, there is no clear link between the costs of service provision and the determination of contributions from operators and their annual service revenues. Decision 191/2004/QD-TTg determined in advance the allocation of universal service levies. Similarly, universal service levies for the period 2006-2010, which were allocated to telecommunications operators at a percentage of service revenues,²⁴¹ were determined again in advance.²⁴²

During this period levies paid by operators to the VTF were over-collected in comparison with the costs determined under Decision 74. According to the MIC's 2011 Report,²⁴³ the estimated contributions to the VTF between 2005 and 2010 were VND

²³⁸ Ibid, art 16 s 4.

²³⁹ Ministry of Information and Communications, above n 158, at 4.

²⁴⁰ They were SPT, EVNTelecom, Hanoi Telecom and Vishipel.

²⁴¹ Decision 191/2004/QD-TTg (2004), art 6 s 2.

²⁴² Decision 74/2006/QD-TTg (2006), art 1.

²⁴³ Ministry of Information and Communications, above n 158, at 4.

7,576 billion.²⁴⁴ The levies on operators therefore exceeded the universal service funds contribution level determined in the Prime Minister's Decision by more than VND 2,500 billion (See Figure 6).

Figure 6: Allocation of universal service levies by service 2005-2010 (VND billion)²⁴⁵

Year	Total	Mobile services	International telephone & leased line services	National telephone & leased line services	Interconnection charges (additional)
2005	904.45	656.87	115.76	115.40	16.40
2006	1,130.80	901.29	121.50	112.35	-4.33
2007	926.89	826.05	73.82	27.01	-
2008	1,225.30	1,123.20	77.01	25.08	-
2009	1,452.89	1,346.93	72.09	33.86	-
2010	1,936.49	1,863.79	57.97	14.73	-
2005-2010	7,576.84	6,718.15	518.17	328.44	12.07

(5) Subsidies from the VTF

During the period 2006-2010, subsidies from the VTF were made through:²⁴⁶

1. Subsidies for telecommunications operators to maintain and provide universal services in universal service-qualified areas;
2. Subsidies for individuals and household subscribers to use universal services in universal service-qualified areas; and
3. Subsidies for providing compulsory services throughout the country.

(i) Specification of universal services

²⁴⁴ The amount collected from telecommunications operators until 31 December 2010 however was only VND 5,498 billion.

²⁴⁵ Ministry of Information and Communications, above n 184, annex 17.

²⁴⁶ PM's Decision 191/2004/QĐ-TTg, art 7.

The universal service legal framework included universal services and compulsory services. Ordinance 2002 art 49 stated:

Public utility telecommunications services include:

1. Universal services to be provided to every resident at conditions, quality and price defined by the responsible government authority.
2. Compulsory services to be provided as required by the Government for the purpose of socio-economic development and protection of security defence.

Decree 160/2004/ND-CP art 48 provided further details:

Public utility telecommunications services include universal and compulsory services, which are essential telecommunications services for society, ensured by the Government and to be provided at conditions, quality and price defined by the responsible authority's regulations.

Specific universal services were defined in Decision 74/2006/QĐ-TTg art 1 Part III:²⁴⁷

1. Universal telecommunications service
 - a) Standard telephone service²⁴⁸ (with scope, charge and quality as regulated by the MPT);
 - b) Standard Internet access service²⁴⁹ (with scope, charge and quality as regulated by the MPT).
2. Compulsory telecommunications services:
 - a) Emergency communication service: medical emergency aid, security – social security, fire-fighting;
 - b) Telecommunications services for searching, rescuing, protecting and fighting natural calamities, as regulated by competent agencies;
 - c) Fixed telephone number enquiries;
 - d) Telecommunications services serving State's emergency activities as regulated by competent agencies.

²⁴⁷ MPT's Decision 43/2006/QĐ-BBCVT (2006) produced this list of universal services.

²⁴⁸ Standard telephone service (STS) normally refers to the basic fixed telephone used to speak with people in other locations. In Australia, for example, the Telecommunications (Consumer Protection and Service Standards) Act 1999 s 6 defines the standard telephone service (STS) as being a telephone service fit for the purpose of voice telephony, or if voice telephony is impractical for a person with a disability, a form of communication that is equivalent to voice telephony.

²⁴⁹ Standard Internet access services was interpreted as service (data communications, for example) using dial-up modem with low speed less than 64 kbps as defined in the Regulation on telecommunications services in PSTN issued by DGPT's Decision 953/2000/QĐ-TCBD (2000) art 6 s1(c).

It is clear that the concept of public utility telecommunications services as typically used in Vietnam distinguishes two different types of service: universal telecommunications service (universal service) and compulsory telecommunications services.²⁵⁰ The delivery of both universal (mainly focused on residents in rural, isolated and exceptionally difficult areas)²⁵¹ and compulsory telecommunications services (for residents throughout the country)²⁵² is ensured by the Government and subsidised by the VTF. Thus, in Vietnam the term ‘universal services’ is used and covers both types of service. However, payments for activities serving the Government would not normally be understood as universal services. It should be treated as a different scheme and financed by the State budget. If funding for government purposes was excluded, the levy rate would presumably be reduced and be closer to normal levels.

For the analysis of subsidies, the definition of universal services focuses on the standard (or basic) telephone service and standard Internet access service. These services are guaranteed to be available in commercially non-viable areas and affordable to target groups of residents in rural, remote and especially difficult areas. These services were guaranteed to be provided either at an individual and household level, or communally at public telecenters.²⁵³ This definition of universal services did not designate the technology by which fixed telephone services are to be provided. Instead, both fixed wired and wireless²⁵⁴ telephone services through PSTN or IP network were regarded as universal services and subsidised by the VTF for provision in universal service-qualified areas. At the same time, the MPT listed both dial-up and broadband Internet access services as universal services.

(ii) Universal service-qualified areas

²⁵⁰ Defining the specific scope of universal services to be subsidised by universal service funds differs between countries. According to ITU, other services that could be entering universal service policies include (1) directories and directory enquiry services; (2) support services for Internet subscribers, such as help-lines and training; (3) emergency call answering facilities (dispatch of help for emergencies); and (4) special facilities to permit use by people with disabilities on par with all other facilities. See InfoDev Programme of the World Bank “ICT Regulation Toolkit: Module 4 Universal Access and Service” (2009), s [1.1.3].

²⁵¹ Decision 74/2006/QĐ-TTg (2006), art 1 s II 2 (a).

²⁵² Ibid, art 1 s II 2 (b).

²⁵³ Subsidies to telecommunications operators and to residents are discussed further in Part III (C) Section 2 (c) (5).

²⁵⁴ GPhone is a fixed telephone service using wireless technology (GSM) provided by VNPT in Vietnam to customers throughout the country within the area of network coverage of Vinaphone with GSM terminal.

Decision 191/2004/QĐ-TTg art 5 s 2 defined criteria for the determination of target areas to be provided with universal services (universal service-qualified areas). Target areas, for the period 2006-2010, to be provided with services were defined as administrative units of districts or communes. The definition of universal service-qualified areas was based on:

- (1) The telecommunications density of universal services being significantly lower than the national density;
- (2) Exceptionally difficult socio-economic conditions of a region; and
- (3) Further criteria as determined by the MIC.

Decision 74/2006/DQ-TTg art 1 s IV 1 (a) and (b) made further specifications about universal service qualified areas, namely:

a) Areas to be provided with universal services (universal service-qualified areas) are:

...

- Districts with a density of fixed telephone services less than 2.5 per 100 residents at the time of determination.

- Communes:

+ Located in districts to be provided with universal services;

+ Communes with exceptionally difficult socio-economic conditions in accordance with the Prime Minister's regulations, and not located in districts to be provided with universal services.

b) Communes, not located in districts to be provided with universal services and which do not have public telephone and Internet service points: the programme will support these for investing in public telephones and Internet service points so as to provide universal services throughout the country.

In summary, universal service-qualified areas were determined as those districts having a fixed telephone density of less than 2.5 per 100 inhabitants, and communes either located in the districts provided with universal services or having exceptionally socio-economic difficulties.²⁵⁵

²⁵⁵ Related to communes having exceptionally socio-economic difficulties, Decision 135/1998/QĐ-TTg (1998) approving a national programme for socio-economic development of remote and mountainous communes having exceptional difficulties, listed 1,715 communes having difficulty (1,000 communes having exceptionally socio-

During 2006-2010 a list of specific universal service-qualified areas was determined periodically by the MIC. The Ministry issued six decisions and circulars to determine universal service-qualified areas during that time.²⁵⁶ According to the MIC's 2011 Report, in 2010 the number of districts in Vietnam with fixed or land-line density less than 2.5 per 100, and communes with exceptional socio-economic difficulty to be subsidised from the universal service programme, were 203 districts, 904 communes (these do not belong to the aforesaid 203 districts) and 41 islands in the country as a whole.²⁵⁷ These districts and communes had a population of 20.9 million.²⁵⁸

The targeted areas to be provided with universal services were not defined on the basis of carefully calculated geographic and cost conditions. The main reason for universal service provision in these targeted areas was to subsidise the high costs of providing services to them, and because the residents could not afford the price of the services. In fact, owing to the inaccurate calculation of target areas, low price services were provided where there was really no good economic reason for a subsidised service. Major interviewees of all three groups (government departments, telecommunications operators and academia) responded that given the low service prices, many people took advantage of them until the subsidies were eventually terminated or stopped.²⁵⁹ Inappropriate definition of target areas resulted in inappropriate beneficiaries of universal service provision, and consequent ineffectiveness of the universal service programme.

In practice, universal service providers often focussed only on the more urban communes within the districts of universal service-qualified areas, rather than providing universal services in more remote areas (such as communes which did not belong to the 203 districts of universal service-qualified areas). This resulted in an imbalanced performance of universal service delivery between communes. The very low development of density of universal service in very remote communes remained, while

economic difficulties) and Decision 164/2006/QĐ-TTg (2006) approving lists of communes having exceptionally socio-economic difficulties, border communes and communes in former resistance bases to be covered by the programme on socio-economic development in communes having exceptionally socio-economic difficulties in ethnic minority and mountainous areas in the 2006-2010 period (Programme No. 135, phase II) (2006) listed 1,644 communes.

²⁵⁶ Decisions 41/2006/QĐ-BBCVT (2006), 09/2007/QĐ-BBCVT (2007) and 15/2008/QĐ-BTTTT (2008), Circulars 05/2009/TT-BTTTT (2009), 21/2009/TT-BTTTT (2009) and 19/2010/TT-BTTTT (2010).

²⁵⁷ Ministry of Information and Communications, above n 184, at 18.

²⁵⁸ Vietnam Public Utility Telecommunications Service Fund, above n 156, at 4.

²⁵⁹ Interviews with personnel from government departments, telecommunications operators and academia in Vietnam (the author, December 2011-January 2012).

some urban communes achieved 100% of the targeted objectives.²⁶⁰ Telecommunications infrastructure in areas of exceptionally socio-economic difficulty developed very slowly, and did not ensure the availability of services for residents.²⁶¹

In addition, while subsidies assisted development of 2,874,000 new telephone subscribers and support for maintaining 3,647,618 fixed telephone subscribers in the universal service-qualified areas,²⁶² there remained by the end of 2010, 32 communes throughout the country without any fixed telephone subscribers and 5 districts with a density of less than 5 per 100 residents.

(iii) Target groups to be provided with universal services

Apart from targeted areas, there have also been particular groups which have been targeted for universal services. These specific groups were outlined in Decision 191/2004/QĐ-TTg art 5 s 2. They included all those using telecommunications and Internet services at public access points subsidised by the VTF and subscribers - either individuals or households - in areas provided with public utility telecommunications services.²⁶³

The unclear definition of universal service targeted groups has been a particular obstacle to efficient and effective subsidies from universal service funds. Subscribers, being either individuals or households in universal service-qualified areas, have been entitled to subsidies. As a result, the VTF has had to make subsidies to many households using 2 or 3 fixed telephone lines in accordance with their number of family members, leading to a waste of universal service funds.²⁶⁴ This issue was indicated by the majority of interviewees from government departments and academia in Vietnam.²⁶⁵ This has been the result of the unclear determination of targeted beneficiaries - either households or individuals.

²⁶⁰ Dong Thap Province Department of Information and Communication “Report 81/BC-STTTT on the management of universal service delivery” (2010), at 1.

²⁶¹ Minister of Information and Communications, above n 158, at 6.

²⁶² Minister of Information and Communications, above n 184, at 9.

²⁶³ Vietnam Public Utility Telecommunications Service Fund, above n 156, at 3.

²⁶⁴ Dong Thap Province Department of Information and Communication, above n 260, at 4.

²⁶⁵ Interviews with personnel from government departments and academia in Vietnam (the author, December 2011-January 2012).

There have also been a number of universal service providers in the same geographic areas.²⁶⁶ These providers enjoyed subsidies from universal service funds according to the number of their subscribers, and they have typically tried to increase subscriber numbers, regardless of overlap with other providers, so as to receive greater subsidies.

Owing to the lack of capacity of responsible agencies to monitor and evaluate performance, and inadequate reporting by universal service providers, subsidies from the VTF were made to multiple operators based on the number of their subscribers. These overlapping subsidies conflict with the basic principles of minimised and efficient universal service subsidies. It has also resulted in confusion as to the number of subscribers per 100 inhabitants, or the subscribers per households in universal service-qualified areas. Consequently such data has been inaccurate and unsuitable for systematic use in budgeting and for making decisions for all the service activities of public organisations.

According to the MIC, one of the outputs from the universal service programme 2006-2010 was an increase in the fixed telephone density per 100 residents in universal service-qualified areas to 16 per hundred, reaching a total of 3,419 million subscribers within the total population in the universal service-qualified areas of 20,769,626.²⁶⁷ This figure is completely inaccurate. It was clear that there was inaccurate information because the telephone density in rural areas was significantly lower than that in urban areas. For instance, the availability of fixed telephone for urban residents was 17.13%, compared with 1.83% for rural residents.²⁶⁸ According to the ITU's ICT indicator database, the density of fixed telephone subscribers for the whole of Vietnam in 2010 was 16.36 per 100 inhabitants.²⁶⁹

In addition, confused definition of target groups (individuals or households) for the delivery of universal services resulted in confused density of fixed telephone per 100 households. For example, the MIC's Report in 2011 stated that 40% of households in universal service-qualified areas had fixed telephone service by the end of 2010.²⁷⁰ At

²⁶⁶ The shortcoming of having more than one universal service provider in a specific geographical area is discussed and solutions proposed in section 3 about the contestable bidding process.

²⁶⁷ Minister of Information and Communications, above n 184, annex 1.4.

²⁶⁸ *Ibid*, at 31.

²⁶⁹ ITU World Telecommunication/ICT Indicators Database (Fixed telephone subscriptions).

²⁷⁰ Minister of Information and Communications, above n 158, at 4.

the same time, the 2011 Report on the survey of telecommunications situation in 2010 throughout the country indicated that the density of fixed telephone per 100 households was 41.7.²⁷¹ It was clear that there was inaccurate information because the telephone density in rural areas was significantly lower than those in urban areas (see Chart 4).

(iv) Type of subsidies

With the universal service programme targeting both universal access and service, subsidies from the VTF included very complicated models to cover subsidies for both universal service providers and for end-users in rural areas. Some subsidies for operators aimed at the improved availability and accessibility of universal services through enhancing the development of telecommunications infrastructures to rural areas.²⁷² Others support the affordability of end-users in rural areas by subsidies for using universal services, including support for end-user equipment. Some subsidies were made to free end-user terminals for subscribers in universal service-qualified areas²⁷³ and loans at below-market rates for universal service providers.²⁷⁴ However, these were inappropriate and financially inefficient.

The two main groups²⁷⁵ to profit from these subsidies were universal service providers for providing services and subscribers (individuals and households) in universal service-qualified areas. The total subsidy to universal service providers for the period 2006-2010 was VND 3,812 billion; the total subsidy to individuals and household subscribers in universal service-qualified areas was VND 1,878 billion.²⁷⁶ Subsidies to individuals and households subscribers in universal service-qualified areas were deducted from residents' monthly telephone bills. Subsidies to providers were direct. Responses from some interviewees in government departments,²⁷⁷ however, showed that there was no sufficient or robust analysis of economically efficient and effective subsidies, which

²⁷¹ Ministry of Information and Communication "Report on the national survey of telecommunications, Internet and broadcasting situation in Vietnam in 2010" (Information and Communication Publishing House, Hanoi, 2011), at 51.

²⁷² PM's Decision 74/2006/QĐ-TTg art 1 Part II s 1 and 2.

²⁷³ MPT's Decision 17/2007/QĐ-BBCVT (2007); MIC's Decision 40/2008/QĐ-BTTTT (2008); MIC's Circular 23/2009/TT-BTTTT (2009).

²⁷⁴ PM's Decision 191/2004/QĐ-TTg art 7 s 1(b).

²⁷⁵ Targeted subsidies can be generally divided into two broad categories: subsidies for universal service providers (telecommunications operators) and subsidies for end-users. See Msimang, above ch 1, n 5, at 37.

²⁷⁶ Minister of Information and Communications, above n 158, at 4.

²⁷⁷ Interviews with personnel from government departments in Vietnam (the author, January 2012).

should not create an unending dependence on subsidies but should be based on the objectives of addressing the challenges of isolation and population.²⁷⁸

The amounts to be subsidised varied for different zones of the country - zones (1 to 3) being calculated on the basis of least, to those most in need of financial support to increase telephone density. Levels of subsidy for the same item were increased from zone 1 to zone 3. However, there was no specific definition of zone 1, 2 and 3 either in any universal service legal documents on levels of subsidies or on the list of universal service-qualified areas.²⁷⁹ The subsidies were revised four times during the period 2006-2010²⁸⁰ as determined by the MIC.²⁸¹ These subsidies were structured so as to automatically decrease year by year. There was however no economic analysis of the effects the subsidies might have had.

(v) Subsidies to residents in universal service-qualified areas

Subsidies to residents in universal service-qualified areas were complicated by numerous indexed subsidies with different rates in different zones within universal service-qualified areas. These various types of subsidies reflected a high degree of complication and did not have a clear link with the real cost of service delivery, define the maximum usage of service to be subsidised, or meet customer demand. This resulted in non-economic efficiency by providing large subsidies but unsustainable outcomes for the universal service programme.

In 2007, the MPT's Decision 17/2007/QD-BBCVT Part 4 detailed subsidies to residents in universal service-qualified areas through subsidies for (1) development of new fixed telephone and Internet service subscribers, and (2) maintenance of current fixed telephone and Internet service subscribers for individuals and households in universal service-qualified areas. These subsidies included subsidies from the VTF for maintaining fixed telephone and Internet service subscriptions, a one-off payment for

²⁷⁸ International Telecommunications Union, above ch 2, n 41, at [5.3.2].

²⁷⁹ Lists of universal service-qualified areas for period 2006-2010 were launched in 6 MIC Decisions and Circulars, including 41/2006/QD-BBCVT (2006), 9/2007/QD-BBCVT (2007), 15/2008/QD0BTTT (2008), 5/2009/TT-BTTTT (2009), 21/2009/TT-BTTTT (2009) and 19/2010/TT-BTTTT (2010).

²⁸⁰ Levels of universal service subsidies for the period 2005-2007 was defined in Decision 17/2007/QD-BBCVT (2007), for 2008 was launched in the Decision No. 40/2008/QD-BTTTT (2008) and for the period 2009-2010 by the Circular 23/2009/TT-BTTTT (2009).

²⁸¹ Decision 74/2006/QD-TTg (2006), art 2 s 1(d).

terminals of local residential telephone and Internet access service (such as a fixed telephone handsets or a modem), and subsidies for free HF (High-Frequency) communications receivers for sea-going fishing boats.²⁸²

The subsidies for development of new fixed telephone and Internet service subscribers covered one-off subscription and installation fees for telephone and Internet²⁸³ and free end-user equipment (such as a residential telephone set or modem) for access to services.²⁸⁴ The recipients were either individuals or households.²⁸⁵ The subsidies to providers were calculated on the number of new subscribers within given periods. In particular, Decision 17/2007/QĐ-BBCVT Part 4 s 4.3 stated that the subsidy for fixed telephone sets was to be VND 100,000, 140,000 and 200,000 in zones 1, 2 and 3 respectively, and VND 150,000, 210,000 and 300,000 for dial-up modems in zones 1, 2 and 3 respectively.²⁸⁶

Subscribers were able to purchase handsets for themselves and receive subsidies paid through service providers or deducted from their monthly service bills. After 2008 however, this subsidy for a one-off installation fee was defined as a subsidy to universal service providers and applied only for new fixed (wired) telephone subscribers in zone 3, with the level of subsidy being increased to VND 300,000 per subscriber.²⁸⁷

At the same time, the Government provided a partial subsidy for the monthly subscription fees of every current fixed telephone and Internet service subscriber in universal service-qualified areas. Fixed telephone and Internet service subscribers in these areas were to pay only the balance between the fixed subsidies from the VTF, which varied between the three zones of universal service-qualified areas, and the monthly subscription fee, plus monthly calling charges. Individual and household subscribers who used both fixed telephone and Internet services at the same time were entitled to only one subsidy for monthly subscription fees, similar to the subsidies for one-off installation and subscription fees.

²⁸² Minister of Information and Communications, above n 184, at 6.

²⁸³ Individuals or households who subscribed both fixed telephone and Internet services at the same time would be entitled to only one subsidy.

²⁸⁴ Decision 17/2007/QĐ-BBCVT (2007), part 4 s 4.1 and 4.3.

²⁸⁵ Ibid, at [4.1], [4.3.1] and [4.3.2].

²⁸⁶ Since 2008 there was subsidy for broadband modem only.

²⁸⁷ Decision 40/2008/QĐ-BTTTT (2008), annex 1 s 1.6.

The provision of subsidies for end-user equipment in universal service-qualified areas did not enhance economic efficiency. The total subsidy amount was high but resulted in duplicated subsidy and did not lead to sustainable outcomes. The total subsidy (2006-2010) for free fixed (wired and wireless) telephone sets for subscribers in universal service-qualified areas was VND 500 billion.²⁸⁸ However, a considerable number of end-users in universal service-qualified areas unsubscribed from the service after some months when subsidies for telephone sets ceased.²⁸⁹ This in part, among other reasons, contributed to a large decrease in the fixed telephone density soon after the programme finished. Interviews with participants in Vietnam showed that the wrong type of subsidies for free end-user equipment was the main cause of this issue.²⁹⁰ The MIC's Report in 2012 illustrates unsustainable outcomes of the programme 2006-2010. The fixed telephone penetration decreased sharply from 14.37 million in 2010 to 10.17 million by the end of 2011, with the density per 100 inhabitants from 17.13²⁹¹ to 11.52²⁹² respectively.

(vi) Subsidies to universal service providers for development and maintenance of service delivery in universal service-qualified areas

Subsidies to universal service providers in Vietnam were different in different zones and different categories of items. This produced complicated and sometimes duplicated. The determination of varied types of subsidies resulted in a highly complicated process of monitoring and providing subsidies to universal service providers. At the same time, levels of subsidies, which were set at fixed unit rates and revised over years, were not linked to the actual costs of maintaining and providing universal services.

Decision 191/2004/QĐ-TTg art 7 s 1 provided that universal service providers were to be entitled to subsidies for development and supply of services in universal service-qualified areas. These subsidies were in the form of loans at below-market rates or direct subsidies indexed against performance delivery.

²⁸⁸ Minister of Information and Communications, above n 184, at 88.

²⁸⁹ Manh Hung "Dân tự rời mạng ở vùng viễn thông công ích" (2010) ICTNews <www.ictnews.vn/home/Internet/77/Dan-tu-roi-mang%20o-vung-vien-thong%20cong%20ich/32294/index.ict>.

²⁹⁰ Interviews with personnel from groups of government departments and academia in Vietnam (the author, December 2011-January 2012).

²⁹¹ See Chapter Four III.C.2.(c).

²⁹² Minister of Information and Communications, above n 110, at 37.

During the period 2006-2010, direct subsidies were made for:²⁹³

- (1) maintaining fixed telephone and Internet networks for the delivery of universal services;
- (2) maintaining the system of public telecommunications service centres in universal service-qualified areas;
- (3) developing the number of fixed telephone and Internet service subscribers in universal service-qualified areas;
- (4) maintaining the satellite communications system;
- (5) maintaining the coastal HF (High Frequency) communications stations; and
- (6) supplying compulsory services.

Decision 17/2007/QD-BBCVT Annex 1 Part 1 determined that direct subsidies should be primarily for the maintenance of fixed telephone and Internet service subscribers in universal service-qualified areas (2005-2007). The total subsidy was calculated on the basis of current ('current' was estimated month by month) fixed telephone (either wired or wireless) and Internet service subscribers.²⁹⁴ Subscribers who used both fixed telephone and Internet services at the same time were entitled to only one subsidy payment.

After 2008, there were amendments to subsidies to providers for maintaining fixed telephone and Internet networks in universal service-qualified areas. Levels of these subsidies for operators to maintain fixed telephone and Internet networks varied between wired and wireless fixed telephone, and between fixed telephone and Internet (broadband) service subscribers.²⁹⁵ However, there was no apparent reason for different levels of subsidies with different technology and service subscribers.²⁹⁶

²⁹³ Decision 17/2007/QD-BBCVT (2007), Decision 40/2008/QD-BTTTT (2008) and Circular 23/2009/TT-BTTTT (2009).

²⁹⁴ Decision 17/2007/QD-BBCVT (2007), annex 1 Part 1 s 1.1.

²⁹⁵ Circular 23/2009/TT-BTTTT (2009), annex 1 part 1 s 1.1.

²⁹⁶ Decision 40/2008/QD-BTTTT (2008) and Circular 23/2009/TT-BTTTT (2009).

Subscribers who used both fixed telephone and broadband Internet²⁹⁷ services on the same telephone line were entitled to separate subsidies for each of the fixed telephone and Internet services.²⁹⁸ These subsidies were applicable for no more than one fixed telephone and one Internet service in a household. In cases where there was more than one subscriber in a household, only those telecommunications operators who had made the first subscription, (reckoned as the valid subscription contract) would be entitled to these subsidies.²⁹⁹

With regard to public telecommunications and Internet service centres in universal service-qualified areas, there were different subsidies to universal service providers for maintaining this system between public centres with or without service staff (eg card-phone booths), providing either telephone or Internet service or both. In addition, levels of subsidy for public Internet service centres, with larger numbers of computers, were higher than for public centres with lower numbers of computers. Levels of subsidy for public centres with service staff were also higher than those without service staff in the same zone, and for public centres providing Internet service and those with telephone service only.³⁰⁰

The inclusion of posts and telecommunications commune cultural houses (communal facilities) as public service centres to be subsidised from universal service funds is a distinctive feature in Vietnam.³⁰¹ The total subsidies for these were calculated by the month. The level of subsidy to these centres was the same as to a telephone or Internet public service centre.

Decision 51/2008/QD-BTTTT (with regard to subsidies from the VTF for provision of universal services period 2008-2010) set guidelines for subsidies to public telecommunications service centres (staffed or not staffed). The Decision determined who would qualify for subsidies as follows:³⁰²

²⁹⁷ Dial-up Internet subscribers were not allowed for subsidy payment since 2008, according to Decision 40/2008/QD-BTTTT (2008).

²⁹⁸ Circular 23/2009/TT-BTTTT (2009), at [1.2 (b)].

²⁹⁹ Ibid, at [1.2 (d)].

³⁰⁰ Decision 17/2007/QD-BBCT (2007), annex 1 part 2.

³⁰¹ Ibid, annex 1 part 2 s 2.1-2.4.

³⁰² Decision 51/2008/QD-BTTTT (2008), art 6.

- Public telephone service centres (with service staff) established before 2007 within universal service-qualified areas;
- Public telephone service centres (with service staff) established since 2008 in communes without public telecommunications service centres as published by the MIC and included in the list of direct contracted or tendered by telecommunications operators;
- Public Internet service centres which are public telephone service centres (with service staff) having more than 2 computers connected to the Internet (since 2009, only those with Internet access by broadband ADSL) - these all will not be calculated as public telephone service centres;
- Card-phone booths within universal service-qualified areas with fixed (wired) telephone lines.

Along with subsidies for maintaining fixed telephone, Internet networks for the delivery of universal services, and maintaining the system of public service centres in universal service-qualified areas, universal service providers were also entitled to subsidy for developing fixed telephone and Internet service subscribers in universal service-qualified areas after 2008.

In summary, current legal frameworks determined different types of subsidies to universal service providers and distinguished levels of subsidies between different zones. Although levels of subsidy were set at fixed rates and revised over the years, these subsidies were not linked to the actual costs of maintaining or providing universal services. At the same time, various types of subsidies for both universal service providers and individual subscribers in universal service-qualified areas resulted in a highly complicated process of monitoring and providing subsidies to universal service providers. These problems were compounded by an ineffective system of performance indicators related to the delivery of universal services. Some types of subsidies, such as subsidies for the delivery of compulsory services and non-refundable subsidies for telecommunications operators to develop infrastructure for providing universal services, were not implemented in practice.

(vii) Loans at below-market rates

The provision of loans at below-market rates³⁰³ was another type of subsidy from the VTF to universal service providers. This type of subsidy reflects duplication with other bank loan schemes and unfair treatment between universal service providers and other operators. At the same time, there was confused responsibility, a non-transparent process and inadequate regulation, leading to the risk of corruption in approving and providing loans.

Decision 191/2004/QĐ-TTg art 7 s 1 (b) provided that loans at below-market rates could be provided for investment in the construction, upgrade or expansion of telecommunications and Internet infrastructures, and other facilities in universal service-qualified areas.³⁰⁴ In addition, Decision 191/2004/QĐ-TTg art 10 s 2 (b) stated that the State Bank of Vietnam, jointly coordinating with the MPT, should guide the process of providing loans at below-market rates from the VTF.

However, during the period 2006-2010, no regulations were issued by the State Bank of Vietnam or by the MPT on the terms for the provision of loans at below-market rates. Instead, it was the Ministry of Finance which, in Circular 67/2006/TT-BTC on the financial management of the VTF, determined some key principles and conditions for the provision of loans at below-market rates.

The Ministry of Finance's Circular 67/2006/TT-BTC Part III s 3.1 stated that the subject for such loans must be universal service providers and for projects to develop telecommunications infrastructure so as to provide universal services. However, the Circular did not provide any details on the process nor specific required documents. Instead, it indicated only that the process and application documents, such as for capital investment involved in the projects, feasible financial plans and the ability to return the loans would be based on relevant regulations and on the VTF's regulations.³⁰⁵ This did not provide a transparent process and gave too much authority to the VTF. At the same time, Circular 67/2006/TT-BTC Part III s 3.3 defined the term of loans (up to 10 years) and provided that fixed interest below-market rates applied to the whole term of loans.

³⁰³ Loans at below-market rates from banks and credit institutions are typically provided with lower to zero interest rates and a longer term of return. The Ministry of Finance Circular 156/2009/TT-BTC defined the provision of loans at below-market rates from the Vietnam Development Bank for projects (art 6), such as for developing rural traffic infrastructures and aquaculture farmers, with zero (0%) interest rate (art 3 s 1) and return within 5 years (art 10 s 2).

³⁰⁴ Decision 191/2004/QĐ-TTg (2004), art 7 s 1.

³⁰⁵ Circular 67/2006/TT-BTC Part III s 3.2

The flexible and general term and rate without specific conditions were decided at the VTF's discretion only. This could possibly lead to unfair approval of loans.

Circular 67/2006/TT-BTC Part III s 1.2 stated that it is the MPT which identifies specific projects for loans at below-market rates from the VTF, in agreement with the Ministry of Finance. However, there was only a decision of the VTF (Decision 2/QD/VTF-HDQL) in 2008 on the provision of loans at below-market rates.

Decision 2/QD/VTF-HDQL provided a framework and process for evaluating and approving loans at below-market rates, term of loans at below-market rates (medium and long term but not longer than 10 years), interest rates of loans at below-market rates (equivalent to the Government bond rate for 5 years), and authority for approving loans at below-market rates (the Director of the VTF approves any loan up to VND 50 billion and the Board of Management approves loans of more than VND 50 billion). This decision was not legally enforceable because it was not enacted by the responsible state authority and therefore could be seen as internal guidance only. In addition, the decision did not include a process for external monitoring of loan approvals. In practice, loans at below-market rates were mostly decided by the Director of the VTF.³⁰⁶

Between 2006 and 2010, 105 projects with total loans at below-market rates of VND 517 billion were approved. By the end of 2010, the VTF had evaluated documents for 39 projects, signed contracts of credit for providing loans at below-market rates to 35 projects, and settled some 27 projects with the total of VND 125.7 billion.³⁰⁷ These loans at below-market rates were made for a term of 8 to 10 years at an annual interest rate of 8.15%,³⁰⁸ compared with the annual market interest rate of between 13.5 and 16.2% in 2008 for medium or long-term loans from commercial banks.³⁰⁹

There was no tight control over the financial management of these loans at below-market rates. The projects for which they were to be used were fairly broadly defined, although the emphasis was on funding the construction of infrastructure. Responses from

³⁰⁶ Interviews with personnel from telecommunications operators and government officers (the author, December 2011-January 2012).

³⁰⁷ Minister of Information and Communications, above n 158, at 4.

³⁰⁸ Vietnam Public Utility Telecommunications Service Fund, above n 156, annex 6.

³⁰⁹ Hoang Vu "Ngân hàng đồng loạt giảm lãi suất cho vay" *VNEconomy News* (Vietnam, 2008) <vneconomy.vn/60636P0C6/ngan-hang-dong-loat-giam-lai-suot-cho-vay.htm>.

interviewees from the group of telecommunications operators illustrate that it was not a transparent process with clear conditions for approving loans, so it was not easy for some operators to access these loans.

Loans at below-market rates were on occasion made to operators who did not qualify for them. For example, the VTF provided the Vietnam Television Technology Investment and Development Company (VTC)³¹⁰ with a loan of VND 30 billion in 2007 even though the VTC was not eligible under the conditions laid down in Circular 67. The VTC was not a universal service provider, nor did it have a project to develop telecommunications infrastructure in universal service-qualified areas. However, no department was accountable for this misappropriation except the order to refund such a loan to the VTF in December 2009.³¹¹ Lack of effective regulations on performance accountability in Vietnam makes it difficult to establish ineffective performance (or ignoring of the rules) by the involved agencies.

In summary, the provision of loans at below-market rates in Vietnam was an inefficient type of subsidy from universal service funds. This subsidy reflects unnecessary intervention and unfair treatment between operators. Furthermore, it possibly resulted in misappropriation by involved government officers and departments in approving loans, particularly in the circumstance of inadequate regulations on performance accountability and non-transparent process/information systems within the public sector.

2 Amendments to universal service legal framework and institutional arrangements since 2010; the 2011-2015 Programme

The legal framework was changed on 1 July 2010 by the Telecommunications Act 2009. There were some improvements in the universal service legal framework in the new Act. The Government now aimed to assist institutions and individuals to participate in investing in a fair and competitive environment, creating favourable conditions for

³¹⁰ Vietnam Television Technology Investment and Development Company is a 100% State-owned corporation under the direct management of the MIC since 2003, according to the PM's Decision 129/2003/QĐ-TTg.

³¹¹ Ministry of Finance, above n 165, at 15.

developing network infrastructure, and ensuring the delivery of telecommunications services to remote and border areas and islands.³¹²

The Telecommunications Act 2009 differentiated between the provision of telecommunications public utility services and the implementation of public utility tasks.³¹³ Costs for implementing telecommunications public utility tasks were to come directly from the government budget and through direct contracts with the Government.³¹⁴ Costs for providing telecommunications public utility services, including universal services and compulsory services would be covered by the VTF.³¹⁵ The Act art 20 s 2 defined which universal services were to be provided to every person in accordance with the list of universal service specified services, and the conditions, quality and tariffs³¹⁶ as determined by the Government.

The Telecommunications Act 2009 eliminated any cross-subsidy among telecommunications services.³¹⁷ It continued, however, to set the prices for telecommunications services.³¹⁸ The MIC determined the methodology for costing of telecommunications services jointly with the Ministry of Finance, determining exemptions and deductions of service charges aimed at serving universal service delivery.³¹⁹

In order to select the enterprise(s) to provide telecommunications public utility services, one of the usual methods was to be used: direct contracting, government allocation of projects,³²⁰ or competitive bidding.³²¹ These options remained the same as those in Ordinance 2002. Contestable bidding, however, had never been applied in practice,³²²

³¹² Telecommunications Act 2009, art 4 s 1-3.

³¹³ There was no formal definition of public utility tasks in legal frameworks. However, it is typically interpreted as other tasks apart from universal services but essential for public benefit which the Government will define separately, require telecommunications operators to provide but funded by the Government budget, not from universal service levies.

³¹⁴ Vietnam Government, above n 177, at 11.

³¹⁵ Telecommunications Act 2009 art 20 s 3.

³¹⁶ According to Decree 25 art 38 s 1(1), the Ministry of Information and Communications issues tariffs, tariff framework for universal services, interconnection charges.

³¹⁷ Telecommunications Act 2009, art 55 s 3.

³¹⁸ Ibid, art 54 s 3.

³¹⁹ Ibid, art 56 s 1(c).

³²⁰ The Government allocates annually operational delivery assignments to telecommunications companies to perform the universal service delivery, by administrative decision without contracts or a contestable bidding process.

³²¹ Telecommunications Act 2009, art 20 s 4.

³²² Minister of Information and Communications, above n 184, at 19.

either in selecting universal service providers or calculating real costs for providing universal services.

The Telecommunications Act 2009 determined the contribution to the VTF on the basis of a percentage of revenues of telecommunications operators,³²³ in addition to other sources.³²⁴ The Act made no mention of the proportional contribution from interconnection charges or the implementation of telecommunications universal service obligations as provided previously in Ordinance 2002.

Finally, according to the Telecommunications Act 2009, all other provisions for implementation were to be determined in due course by the Government, including those related to the legal framework for telecommunications universal services and other public utility activities.³²⁵ Other provisions, as in the Ordinance 2002, outline the responsibility of the Prime Minister for approving the plans for providing telecommunications universal services, and the responsibility of the MIC to submit these plans and manage performance.

(a) Decree 25/2011/ND-CP (2011)

In April 2011, Decree 25/2011/ND-CP was issued along with other details for the implementation of the Telecommunications Act 2009. Decree 25/2011/ND-CP art 14 s 1 listed the following principles for provision of universal services:

- (a) To develop telecommunications infrastructure, universalise telecommunications services throughout the country which have a primary focus on the remote, rural, border, island areas, exceptionally difficult areas and those where telecommunications companies are not able to do efficient business under market conditions.
- (b) To ensure equal and reasonable service accessibility for every person; and on a case by case basis that the Government have clear policies on subsidising the provision of terminals and telecommunications services to lower class and poor households,³²⁶ social-welfare households and other special social target-groups.³²⁷

³²³ Telecommunications Act 2009 only provided that contribution to VTF is made from a percentage of revenues of telecommunications operators. However, revenues from which services (mobile service) of telecommunications operators to be levied are determined by the PM's Decision 1643/QĐ-TTg in 2011 (mobile service).

³²⁴ Telecommunications Act 2009, art 22 s 2 (a).

³²⁵ Ibid, art 63.

³²⁶ According to the PM's Decision 9/2011/QĐ-TTg (2011) on the determination of poor and adjunct poor households applicable for the period 2011-2015, households with monthly income less than VND 400,000 (VND 4,800,000 per

(c) Subsidies for the deployment of telecommunications infrastructure, end-user terminals and provision of telecommunications services are to be conducted through universal service providers and through manufacturers of end-user terminals, or directly to telecommunications service customers.³²⁸

With regard to the allocation of universal service levies to telecommunications operators, Decree 25/2011/ND-CP art 14 s 3 provides that the industry levies paid by telecommunications operators to the VTF, are not to exceed 5% of revenue of telecommunications services, and this payment will be accounted for in the business costs of operators. From time to time, the Prime Minister will stipulate the list of telecommunications services that have to contribute to the VTF, and the percentage to be paid from services revenues.³²⁹ There are no further rules on revenues or universal service-qualified revenues in the Decree. Instead, these were defined in Decision 1643/QD-TTg 2011 approving the universal service programme 2011-2015.

The Telecommunications Act 2009 established the Vietnam Telecommunications Authority (VNTA) within the MIC. Decree 25 art 2(1) (b) defined the VNTA as a telecommunications regulator with main responsibility for regulating the telecommunications industry throughout the country, including managing ‘the performance of universal services’.³³⁰

The functions of the VNTA included providing advice to the Minister of Information and Communications about state administration in the telecommunications industry,³³¹ and dealing with disputes in establishing infrastructure and providing telecommunications services.³³² With regard to the administration of universal service delivery, the VNTA has function directing, providing guidance and inspecting the delivery of universal services.³³³

annum) in rural areas and less than VND 500,000 (VND 6,000,000 per annum) in urban areas are defined as poor households. Those with monthly income between VND 401,000 and VND 520,000 in rural areas and between VND 501,000 and VND 650,000 in urban areas are defined as adjunct poor households.

³²⁷ Decree 67/2007/ND-CP (2007) stipulating policies on support for people entitled to social-welfare support (amended by Decree 13/2010/ND-CP).

³²⁸ Decree 25/2011/ND-CP (2011), art 14 s 1.

³²⁹ Ibid, art 14.

³³⁰ Ibid, art 2 (1) (b).

³³¹ PM’s Decision 35/2011/QD-TTg, art 1.

³³² Ibid, art 2 s 9.

³³³ Ibid, art 2 s 11.

In summary, there was no sufficiently clear statement of implementation or monitoring roles between the VTF (Decision 191/2004/QD-TTg) and the VNTA (Decision 35/2011/QD-TTg). Up to 2011 the VTF was a single department of the MIC performing both functions of implementing and monitoring the universal service delivery in Vietnam. This reflected overlap and an inefficient monitoring mechanism.³³⁴ After its establishment in 2011, the VNTA has the main function of monitoring, but not yet specific regulations for implementation. There remained diffuse responsibility between the VNTA and the VTF due to the delayed process until March 2013 of amending Decision 191/2004/QD-TTg.

(b) The Prime Minister's Decisions 119/2011/QD-TTg (2011) on the deployment of rural information and communication services for the period 2011-2020

The 7th Conference's Resolution of the Communist Party's Central Committee X (2008) on agriculture, farm and rural dwellers, established a target of "deploying postal and telecommunications systems and enhancing the availability of information access for rural communities, especially those in mountainous, remote, isolated and island areas".³³⁵ In order to carry out this direction, the Project on the deployment of rural information and communications for the period 2011-2020 was introduced by the Government in 2011, in accordance with the Prime Minister's Decision 119/2011/QD-TTg.

Decision 119/2011/QD-TTg art 1 s I (4) set the general aim of developing rural information and communications for the period 2011-2020.³³⁶ In addition, the Government aimed to put in place policies to support development in exceptionally difficult areas, mountainous, remote, and isolated and island areas through specific taxation policies, and legislated for this.³³⁷ Moreover, Decision 119 confirmed that the development of rural information and communications must be uniform and combined with other related projects, programmes or plans so as to achieve the targeted densities at highly efficient levels and avoid financial redundancy and waste.³³⁸ In relation to the

³³⁴ See Chapter Four III.C.1.(b).

³³⁵ Resolution 26 of the 7th Conference's Resolution of the Communist Party's Central Committee X (2008).

³³⁶ PM's Decisions 119/2011/QD-TTg art 1 s I(4).

³³⁷ Ibid.

³³⁸ Ibid, art 1 s I (4).

posts and telecommunications commune culture houses, Decision 119 required providers to re-arrange and enhance the operational efficiency of the system, closing inefficient points and setting up some experimental ‘commune information and communications centres’.³³⁹

(c) Decision 1643/QĐ-TTg (2011): the universal service programme 2011-2015

The universal service programme 2006-2010 came to an end in December 2010. Outcomes of the programme had been to enhance the availability of access to and use of telecommunications and ICT services for citizens in rural, remote and economically difficult areas. According to the MIC’s evaluation, the achievement of the universal service programme 2006-2010 could be seen through an increase in some telecommunications densities (outputs) in universal service-qualified areas.³⁴⁰ This contributed to the development of telecommunications infrastructure and services in very geographically isolated and socio-economically difficult areas, gradually filling the gaps between universal service beneficiaries in different (urban and rural) communities in use of telecommunications and Internet services.³⁴¹ In particular, the telephone density in universal service-qualified areas reached 16 per 100 inhabitants, three times higher than the targeted objective. About 40% of households in the universal service-qualified areas now had their own fixed home phones, 97% of nationwide communes had public points for accessing telephone services, and every citizen was entitled to use telecommunications services free of charge. However, some objectives and outputs of the universal service programme 2006-2010 were not achieved (See Figure 7).

³³⁹ Ibid, art 1 s IV (3).

³⁴⁰ Ministry of Information and Communications, above n 158, at 3.

³⁴¹ Ibid.

Figure 7: Universal service policy objectives and outputs 2006-2010³⁴²

No.	Description	Objectives	Outputs
1	Telephone density in the universal service-qualified areas	> 5%	16%
2	Percentage of communes with public telephone service access point	100%	97%
3	Percentage of communes with public Internet service access point	70%	55%
4	Free of charges for using compulsory telecommunications services	100%	100%

In spite of some achievements in terms of outputs, Vietnam remains well behind many developing countries worldwide and its regional competitors, including in its universal service provisions.³⁴³

The Vietnamese Chamber of Commerce and Industry's Report argued that the investment rate in small and rural areas was inadequate.³⁴⁴ This resulted in a significant disparity in the ability to access and use telecommunications services between residents living in urban and rural areas (See Chart 4).

Chart 4: Disparity of telecommunications and Internet service density between the country and rural areas in 2010 (per 100 inhabitants)³⁴⁵

³⁴² Minister of Information and Communications, above n 184, at [2.6].

³⁴³ Nguyen, Pham and Gullish, above n 92, at 4.

³⁴⁴ Ibid.

³⁴⁵ Minister of Information and Communications, above n 184, at 31.

In terms of affordability of services, Vietnamese end-users pay relatively more than those in developing countries. In 2010, Vietnam was 68th out of 118 developing countries whose ICT price baskets³⁴⁶ represented more than 5% of average monthly GNI per capita. Meanwhile such price baskets represented much less than 5% in almost all developed countries and in 37 of them, less than 2%.³⁴⁷

Vietnamese people paid 10.8% of their average monthly GNI per capita for the fixed broadband sub-basket in 2011.³⁴⁸ By comparison it was less than 5% of the GNI per capita in almost half of all developing countries³⁴⁹ and 1.7% in developed countries.³⁵⁰ In addition, for the fixed-telephone sub-basket³⁵¹ residents in developed countries paid around 1% of their average monthly GNI per capita³⁵² but Vietnamese people paid 2.3%.³⁵³

The universal service programme 2011-2015 was introduced by the Prime Minister's Decision 1643/QD-TTg in 2011. The Decision described as an overall objective continuing to universalise telecommunications and Internet services to every individual and household throughout the country, and at the same time deploying broadband telecommunications infrastructure so as to meet the demand for universal services in universal service-qualified areas, and consequently closing the gaps between different regions and areas in access to telecommunications and Internet services.³⁵⁴

The six principal areas of the Decision were:

- (i) Objectives of the universal service programme 2011-2015: 100% of communes to be connected to broadband network; Internet subscriptions of households in communes or districts where penetration is less than 2% to more than 5%; and

³⁴⁶ ICT Price Basket (IPB) is a unique metric that tracks and compares the cost and affordability of information and communication technology services. IPB is measured as a percentage of countries' average gross national income (GNI) per capita. See International Telecommunications Union, above ch 2, n 37, at [3.1].

³⁴⁷ International Telecommunications Union, above ch 2, n 39, at 57-59.

³⁴⁸ International Telecommunications Union, above ch 2, n 37, at 77.

³⁴⁹ *Ibid.*, at 74.

³⁵⁰ *Ibid.*, at 73.

³⁵¹ Fixed-telephone price sub-basket is calculated for monthly subscription fee plus 30 local calls of 3 minutes each (15 peak and 15 off-peak calls). See International Telecommunications Union, above ch 2, n 39, at 53.

³⁵² International Telecommunications Union, above ch 2, n 37, at 72.

³⁵³ *Ibid.*, at 77.

³⁵⁴ PM's Decision 1643/QD-TTg (2011), art 1 s I (1).

more than 50% communes of 69 poor districts³⁵⁵ having public points for using Internet services.

(ii) Definition of universal services: local fixed telephone and Internet access at speeds equivalent to or higher than 256 kbps.

(iii) Specific target groups to be provided with universal services in universal service-qualified areas are: (1) customers using telecommunications services at public telecommunications service centres in communes within the list of exceptionally difficult communes,³⁵⁶ and also communes within the 69 poor districts, 41 off-shore islands and frontier posts; (2) fixed telephone subscribers (households) in exceptionally difficult communes; (3) Internet service subscribers (households) in communes within districts having Internet penetrations less than 2 per 100 households; (4) local fixed telephone subscribers in zone 3 of universal service-qualified areas and (5) end-users of HF (High Frequency) wireless receivers on fishing boats.

(iv) Funding resources, and allocation of universal service levies on telecommunications operators: costing for the universal service programme 2011-2015 estimated as being about VND 7,000 billion, will consist of financial sources transferred from the universal service programme 2006-2010 and contributions from telecommunications operators (industry levies) at 2% of total revenues from mobile telephone services.

(v) Subsidies for telecommunications operators focus more on maintaining only ‘new’ facilities (such as public Internet service provision centres) with service-staff (such as public telecommunications service centres). Loans at below-market rates for projects continue to be provided to operators for upgrading, enhancing and developing telecommunications infrastructure in universal service-qualified areas but from the VTF’s Charter Capital only.³⁵⁷

³⁵⁵ 69 poor districts as indicated in the Government’s Resolution 30a/2008/NQ-CP (2008) and the PM’s Decision 615/QĐ-TTg (2011).

³⁵⁶ The list of exceptionally difficult communes, numbering 1,644, was issued under the Prime Minister’s Decision 164/2006/QĐ-TTg (2006)

³⁵⁷ Decision 1643/QĐ-TTg (2011) part II s 6 and part V s 2(b).

(vi) Subsidies for residents cover for using telephone services by new fixed telephone subscribers (households) only but extended to subsidise for free computer Internet service subscriptions and user charges for households. Subsidy is continuously provided to local fixed telephone subscribers in zone 3 of universal service-qualified areas up to the end of 2013.

(vii) A new type of subsidy is provided for research and development projects for manufacturing end-user telecommunications equipment serving the delivery of universal services.

(viii) With regard to the selection of universal service providers, the subsidies for development of telecommunications infrastructures and delivery of universal services must be specified in planned projects or direct contracts for providing universal services. In addition, telecommunications operators will be selected to perform these projects or contracts through either direct contracting or competitive bidding processes, and competitive bidding processes are to be prioritised.³⁵⁸

In summary, there were some changes to the universal service legal framework and institutional arrangements after 2010. For instance, the universal service programme 2011-2015 introduced some specific amendments for the delivery of services, such as new types of subsidies and different target areas. However, the programme is characterised by the same use of high-level targets, an absence of any attempt to identify the benefits to be achieved or the likely costs of doing so, and a tendency to add some new but inappropriate benefits.

There has been no attempt to learn any lessons from the past programme and the main obstacles to effective performance of delivery since the programme 2006-2010 remain, such as the lack of specific regulations for contestable bidding and lack of a link between subsidies and the cost of delivery of universal services.

Moreover, some potential problems arise from this programme, such as new subsidies for research and development projects to manufacture end-user equipment and for free computers for new Internet subscribers in universal service-qualified areas. These

³⁵⁸ Ibid, part 1 s VI (3).

subsidies either place too much cost on industry levies or do not reflect international experience (subsidies for end-users' in-premise equipment such as free computers or telephone handsets at the household level).³⁵⁹ Other subsidies (subsidies for research and developments projects) reflect non-compliance with the Telecommunications Act 2009³⁶⁰ or commitments to the WTO³⁶¹ in terms of non-discrimination and competitive neutrality.

At the end of 2012, two years after the passage of the programme 2011-2015, Decision 1643/QĐ-TTg 2011 put the whole programme 2011-2015 on hold. The Prime Minister required the MIC to revise and submit another draft decision to replace Decision 1643/QĐ-TTg 2011.³⁶² The most likely reason for this was the need for major reforms in the universal service legal framework and in the programme 2011-2015. The programme 2011-2015 was launched without comprehensive and effective evaluation of outcomes of the programme 2006-2010.³⁶³ Accordingly, a series of legal documents that the MIC has been preparing for guiding the implementation of the universal service programme 2011-2015 are also delayed by mid-2013.³⁶⁴

IV Obstacles in the Current Legal Framework and Institutional Arrangements to Effective and Efficient Universal Service Delivery in Vietnam

This Chapter has examined the development of the universal service legal framework and the institutional structures for the performance and measurement of service delivery in Vietnam. This review has covered three main periods: 1976-1994, 1995-2001 and 2002-2011.

³⁵⁹ See New Zealand Ministry of Economic Development "Rural Broadband Initiative: Request for Proposal for Zone 4 Rural Broadband Initiative" (2010), appendix 6: Proposed Contract Principles section 5.2 and "Rural Broadband Agreement between the Ministry of Economic Development and Telecom New Zealand Limited" (2011).

³⁶⁰ Telecommunications Act 2009 art 4 s 2.

³⁶¹ WTO's General Agreement on Trade in Services (GATS): Annex on Telecommunications, at [5 (a)].

³⁶² Government's Office document 1347/TTg-KTN (7 September 2012) requiring revising and submitting the universal service programme in the PM's Decision 1643/QĐ-TTg.

³⁶³ MIC's Document 127/TB-BTTTT (5 October 2012) announced the conclusion of the Minister of Information and Communications concerning the legal framework for the universal service programme 2011-2015.

³⁶⁴ Decision 1620/QĐ-BTTTT (4 September 2012) amending the programme for preparing and enacting legal documents by the Ministry of Information and Communications in 2012, annex 2.

The current legal framework and the institutional arrangements were significantly improved in 2002, with key amendments which have attempted to ensure the delivery of essential services to every resident. Despite some progress during the programme 2006-2010, service delivery has remained demonstrably ineffective and economically inefficient, due to the inadequacy of both the legal framework and institutional arrangements.

The failures in institutional arrangements are mostly to do with the top-down model of funding administration. There is also diffuse accountability, ineffective performance information and reporting systems, non-transparent administration, lack of effective external monitoring, and lack of involvement of the public and stakeholders.

Issues relating to the legal framework centre on the inadequacy of economically cost-effective requirements with regard to funding arrangements. As a result, gains from the programme were inconsistent, often not sustained, and incurred high costs to the telecommunications industry. The programme has also resulted in a plethora of institutions, all of which are cost centres, with considerable inefficiency and general wastage of resources.

The key persistent issues - solutions for which will be proposed in Chapter Five - have been identified:

(1) In many countries throughout the world, including New Zealand, there has been a steady progression from complete government monopoly in telecommunications to a situation where Government has divested itself almost completely from the delivery of telecommunications services, including universal services. This was not yet the case in Vietnam up to 2002.

(2) The movement from a sole state-owned incumbent (VNPT) to a multi-provider competitive market, and further market reforms of regulations after 2002 resulted in some initial improvements of the sector. However, there were no specific regulations to enhance essential telecommunications service delivery to rural and isolated areas. Furthermore, the Government continued to cover all costs for service delivery through

the state-owned incumbent, utilising an internal cross-subsidy mechanism for this up to 2005.

(3) The current model of the administration and institutional arrangements for performance and measurement of universal service delivery in Vietnam since 2005 has remained a top-down one and does not reflect features of the best practice: transparency, effective monitoring and performance accountability. In addition, its funding arrangements do not aim at or give sufficient attention to economic efficiency, cost-effectiveness and competitive neutrality.

(4) The institutional arrangements reflect weak monitoring and evaluation of universal service performance, due to diffuse accountability amongst departments involved in the measurement of service delivery, overlapping and diffuse responsibilities and role-conflict, ineffective stakeholder and public involvement, a lack of transparent performance information and reporting systems, and poor systems for accountability.

(5) The diffuse, overlapping and unclear statement of accountability, responsibility and functions occurs amongst the authorities involved. This is most notable at central authority level (between the MIC and other responsible Ministries). It is repeated between central authorities (the MIC) and local authorities (provincial Departments of Information and Communications in the Provincial People's Committee). There is similar confusion between regulators/policy-makers (the MIC) and the separate institution administering the performance of service delivery (the VTF). In addition, there is poor coordination, overuse of authority, and lack of performance accountability between authorities and officials. All this is a reflection of the confusion and lack of clarity in current universal service institutional structures.

(6) Effective performance information and reporting systems, which play an important role in improving the effectiveness and efficiency of public administration and public policy, have been a big challenge to universal service institutional administration structures in Vietnam. There have been difficulties in determining financial resources, allocating levies and providing subsidies by the state authorities entrusted with the responsibilities. Any effective external monitoring process has been basically eliminated, either by the action/inaction of government authorities or, more broadly, by

lack of access to information by the public or stakeholders who pay universal service levies.

(7) There has not been a clear link between determination of financial resources and allocation of universal service levies to telecommunications operators and the real cost of service delivery. Nor has attention been given to ensuring cost-effective delivery. At the same time, the allocation of levies to telecommunications operators and determination of levy rates has often reflected discrimination in selection of operators and inappropriate determination of revenues and imposed levies. This has resulted in over-collection of levies and created unnecessary financial burdens for operators. In addition, there has been no effective regulation to ensure timely payment of levies and penalise any breach of overdue payments for levies.

(8) The process of selecting universal service providers has not reflected best practice. Without specific regulations for applying contestable bidding processes, the process of selecting universal service providers and projects to be subsidised from the VTF has been mainly carried out through direct contracts and government-allocated projects. There has been no analysis applied to potential cost reduction. The lack of transparent criteria for service and project allocation has the potential for corruption.

(9) Subsidies to two main target groups, with a complicated set of determined levels for maintaining and providing services to residents in universal service-qualified areas, did not reflect cost-based modelling and have not been linked to the real costs, nor have they reflected appropriate types of subsidies. Economically inefficient and ineffective subsidies also reflect confused and unclear determination of target groups to be entitled to subsidies in universal service-qualified areas. In addition, there have been inappropriate distinctions in subsidies between target groups in different zones and inconsistent criteria in the universal service programmes. This has resulted in ineffective and inefficient subsidies, and unsustainable outputs/outcomes.

CHAPTER FIVE

PROPOSALS FOR THE IMPROVEMENT OF UNIVERSAL SERVICE DELIVERY IN VIETNAM

I Overview

The many issues preventing effective and economically efficient delivery of universal services in Vietnam have been itemised in the concluding section of Chapter Four.

This Chapter will propose practical solutions to remedy the problems concerning universal service delivery in Vietnam. Particular attention will be paid to those key elements that underlie a best practice universal service model as illustrated in Chapter Two. The key areas that this Chapter will traverse are:

Part 1: universal service institutional arrangements;

Part 2: allocating universal service levies;

Part 3: contestable bidding process; and

Part 4: universal service subsidies.

In this Chapter, specific proposals concerning amendments to current laws and regulations will be presented. Most of these proposals could be made immediately with amendments to subordinate legislation (Decrees, Prime Minister's Decisions and Ministerial Legal Documents). Others are more long-term reforms in that they could be made by amending the Telecommunications Act 2009 during the National Assembly's next term of office (after 2016).¹ Some proposals are in the form of a re-drafting of specific articles or sections of current regulations, while others are stated as summaries of general changes to be made in legal frameworks.

¹ The National Assembly's Resolution 20/2011/QH13 (2011) determined the National Assembly programme for enacting Acts and Ordinances for the period 2011-2016 with 123 Acts and 6 Ordinances but excluded the amendment of the Telecommunications Act. Therefore, the Telecommunications Act could be proposed for amendment, only after 2016.

II Institutional Obstacles to Effective and Efficient Universal Service Performance Management in Vietnam

This part will review the institutional arrangements for universal service implementation in Vietnam. Evaluation and monitoring of universal service implementation and the underlying reasons will be examined and suggestions proposed for removal of the following obstacles: (1) diffuse accountability among departments involved in universal service policy due to unclear definition of roles and role-conflict (advisor/approver); (2) lack of sufficient public and stakeholder involvement; and (3) lack of sufficient performance information and reporting systems.

The current universal service scheme and universal service fund model in Vietnam requires a high level of administrative capacity with strong accountability mechanisms. Such a universal service model requires institutions to be organised to meet shared and consistent objectives, and then activities to be allocated and delivered so as to achieve those objectives. The model also requires an identification of the most efficient universal service providers, what amounts should be spent, and how the financial resources required should be levied on operators.

The current universal service institutional arrangements in Vietnam reflect weak monitoring and evaluation of universal service performance. The institutional arrangement framework does not encourage public involvement, and the lack of transparent performance information and reporting systems are evidence of unsatisfactory and insufficient institutions. Poor accountability is another problem.

A Principles for Improved Institutional Arrangements

This section will note some key principles about performance management within institutions. They form the basis for the specific proposals about institutional reforms in section D.

Performance management of public policies revolves around three main and related activities: Measuring performance, incorporating performance data/information in documents and procedural cycles (performance information and reporting), and using

this performance information for allocating resources and maintaining levels of performance accountability.²

Performance accountability enables governments to understand how public programmes may fail or succeed and find mechanisms that can enable programmes to perform better.³ A focus on performance accountability in the public sector reflects a growing emphasis on promoting transparency.⁴ Among numerous means by which transparency can be achieved, one important approach is using performance information systems that can demonstrate sufficiently to the public/stakeholders what an organisation is actually doing and has achieved.⁵ Performance accountability requires public agencies to provide an account of their performance outputs/outcomes either through reports being made to external, independent organisations such as an auditor or a published report to the public at large.⁶

Monitoring and evaluation involve performance measurement and performance information, which is a powerful tool to improve the way government organisations deliver public policies and programmes.⁷ Performance measurement is a precursor to effective and informed management.⁸ Performance measurement is mostly related to the generation, collection, analysis, reporting and utilisation of information about the operation of public organisations and programmes, including performance information about inputs, outputs and outcomes.⁹

Performance information plays an important role in contributing to the attainment of organisational goals,¹⁰ in the decision-making process, and contributes to systematic and in-depth evaluation of public policies and programmes.¹¹ Such evaluation of policy

² Geert Bouckaert and John Halligan *Managing Performance: International Comparisons* (Routledge, New York, 2008) at 69.

³ Ibid.

⁴ Daniel Kaufman “Myths and Realities of Governance and Corruption” (2005) Social Science Research Network, at 81 <papers.ssrn.com/sol3/papers.cfm?abstract_id=829244>.

⁵ Peters, above ch 2, n 228, at 16.

⁶ Ibid.

⁷ Marelize Gorgens and Jody Zall Kusek *Making Monitoring and Evaluation Systems Work: A Capacity Development Toolkit* (World Bank, Washington, 2009) at 1.

⁸ State Service Commission and the Treasury “Performance Measurement: Advice and examples on how to develop effective frameworks” (2008), at 7.

⁹ Thomas, above ch 2, n 247, at 1.

¹⁰ Steven Van De Walle and Wouter Van Dooren “Introduction: Using Public Sector Performance Information” in Wouter Van Dooren and Steven Van De Walle (ed) *Performance Information in the Public Sector: How It is Used* (Palgrave MacMillan, New York, 2008) 1 at 3.

¹¹ Thomas, above ch 2, n 247, at 41.

performance ensures informed decision-making about programmes based upon periodic, systematic and objective investigation into their efficiency and effectiveness in serving their objectives.¹² In addition, performance reports can support decisions to undertake a more in-depth evaluation of the operation of a programme. These evaluation findings can then ideally flow into the planning, budgeting and performance measurement systems.¹³

An ideal performance measurement system requires, among other things, a system of obtaining relevant, meaningful, balanced and valued information. It also needs to be integrated with planning and budgetary processes, and embedded in the organisation, focused on outcomes, utilising a cost-effective set of measures and using measures that are reliable, consistent, comparable and controllable.¹⁴

Performance information and reporting of public programmes and how money is spent will help to demonstrate the accountability of government officers to the public, and build public trust in government institutions.¹⁵ However, many public organisations give little thought to what the public wants to know about performance and little consideration is given to how performance should be reported to the public.¹⁶ Moreover, performance reports are circulated only within responsible government departments and the very few reports that are made available to the public are usually poorly presented for public consumption.¹⁷ This results in lack of sufficient engagement of public and major stakeholders in the performance measurement of public policies.

B The Situation in Vietnam

Diffuse accountability and role conflict in monitoring and evaluation of universal service performance are obstacles to capability and competence of involved organisations. Both the VTF and the provincial Departments for Information and Communications are

¹² Ibid.

¹³ Paul Thomas “Why is Performance-based Accountability so Popular in Theory and Difficult in Practice?” (paper presented to the World Summit on Public Governance: Improving the Performance of the Public Sector, Taipei, 1-3 May 2007), at 7.

¹⁴ Thomas, above ch 2, n 247, at 15.

¹⁵ Ho, above ch 2, n 248, at 194.

¹⁶ Ibid, at 195.

¹⁷ Ibid.

involved in monitoring the delivery of universal services within the geographical areas. However, their monitoring activities are often inefficient.

Inadequate performance of universal service provision is often presented in a positive light and benefits viewed as always outweighing failures. Furthermore, there is on-going inadequate supervision and control of the approval processes for annual universal service plans, together with decisions on the selection of universal service providers and funding allocations.

The current organisational structure of the VTF involves major role conflicts and basically eliminates the advisory functions and involvements of the MIC's advisory departments in monitoring and evaluating the performance of universal service policy. At the same time, there are no members on the VTF's Board of Management from other ministries, or from telecommunications operators or any external or outside experts.

In addition, there is inadequate evidence-based and independent analysis of the performance of universal service delivery in Vietnam, and a basic lack of oversight of the departments involved in universal service policy. Lack of essential information also makes it difficult, even impossible, to involve the public, including contributors to universal service funds, in the measurement of activities. As mentioned previously, there was no detailed regulation on provision of universal service public reports until the end of 2009.¹⁸ Some important issues relating to reporting data (eg annual reports on universal service levies of telecommunications operators to the VTF) were set out only in administrative documents of the MIC (2006) which had no legally binding force and therefore, were not seriously followed even by the universal service administrator.

The MIC's document 398/BBCVT-KHTC (2006) required that before 30 April every year, telecommunications operators should submit reports to the VTF on the accounting balance of universal service levies for the previous year, and that the VTF in turn should report in writing, certifying final information about these universal service levies. This, however, has never been done properly and there have been considerable differences in information about universal service performance released by the VTF and

¹⁸ Decision 4/2009/TT-BTTTT (2009) on the reports of universal service delivery.

telecommunications operators.¹⁹ Accordingly, the public and stakeholders have not had sufficient information about planning approval, budgeting, monitoring and evaluation.²⁰

Information relating to universal service levies, subsidy of universal service funds, and projects for loans at below-market rates from universal service funds between 2006 and 2010 was unavailable to the public until mid-2012,²¹ regardless of the regulations on public disclosure of such financial information as determined by the MIC's regulations in 2009.²²

Some current regulations on the telecommunications reporting system²³ are unable to ensure sufficient data on the performance of universal service policy. In particular, these reports were insufficient for any accurate statistical monitoring and evaluation of universal service performance. For example, fixed subscribers were counted based on the geographical areas of districts rather than on universal service-qualified areas of communes.²⁴

In turn, reports of local Departments of Information and Communications are mostly dependent on reports of telecommunications operators (eg annexes 5/SB and 5/DB).²⁵

C Some Ideas from New Zealand Institutional Arrangements for Reforms in Vietnam

Universal service institutional arrangements in New Zealand, though not perfect, demonstrate some key useful factors that could contribute to reforms of universal service institutional arrangements in Vietnam. A strong focus on performance management, and performance accountability within public agencies for the delivery of public services has been a core characteristic of New Zealand public management.²⁶ Performance management has become critical for all public agencies, including the Commerce Commission.²⁷ Performance measurement has put a strong focus on agencies acting

¹⁹ Ministry of Finance Document 160/KL-TTr (2011), at 5.

²⁰ Interviews with personnel in telecommunications operators (the author, December 2011-January 2012).

²¹ VTF only published relevant information on their website at the first time on 12 April 2012 <www.vtf.vn/vi/vtci/ttk/2012/04/4F1B657E/>.

²² Decision 1130/QĐ-BTTTT (2009) on the regulation of public disclosure of financial information of VTF.

²³ MIC's Circular 24/2009/TT-BTTTT (2009) on information reports applicable to telecommunications operators and 25/2009/TT-BTTTT on comprehensive information reports applicable to government agencies.

²⁴ Form 5/DB and Form 5/SB of MIC's Circulars 24/2009/TT-BTTTT (2009) and 25/2009/TT-BTTTT (2009).

²⁵ Circular 25/2009/TT-BTTTT (2009), s 4.

²⁶ Cook, above ch 3, n 195, at 14.

²⁷ State Service Commission and the Treasury, above n 8, at 8.

within and according to the law, and on accountability for outputs and outcomes.²⁸ In addition, the overall emphasis has been on the broader and joint responsibilities of related agencies.²⁹

The Public Finance Act 1989 and the Crown Entities Act 2004 require compliance with robust performance measurement and reporting systems for all public sector agencies in New Zealand.³⁰ Public sector agencies have been required to inform others about progress being made towards outcomes, build more robust evidence-based data upon which decisions can be made, and report performance results in a verifiable, comprehensive and simple way.³¹ Enhanced performance measurements are expected to lead to a greater integration between internal management information systems, management reporting, and external budget related and accountability documents.³²

Public and stakeholder engagement with performance measurement has been an important part of performance management in New Zealand. This not only drives the performance measurement of public sector agencies themselves but also underpins the process of delivering performance information needed by internal and external stakeholders.³³

Policy-making processes in New Zealand are open to public review. The Commerce Commission's regulatory decision-making processes, for example, are open and transparent, and stakeholders are able to provide input before a final decision is made. The opportunity for affected parties to make cross-submissions³⁴ illustrates a two-way transparent engagement in the decision-making processes of the Commerce Commission. Public and stakeholder involvement in the proceedings of the Commerce Commission reflects symmetric rights of submission and cross-submission rather than simply a process of consultation.³⁵

²⁸ Dormer and Gill, above ch 3, n 197, at 4.

²⁹ Ibid, at 5.

³⁰ State Service Commission and the Treasury, above n 27.

³¹ Ibid, at 7.

³² Gill, above ch 3, n 206, at 6.

³³ New Zealand Government, above ch 3 n 200, at 23.

³⁴ Through cross-submissions, one stakeholder (eg telecommunications operator) can submit its viewpoint on another stakeholder's submission.

³⁵ Quigley, above ch 3, n 215.

The monitoring and evaluating mechanism for universal service performance is designed and carried out by the Commerce Commission. The Commission has general responsibility for monitoring and information dissemination in the telecommunications sector and for overseeing the final outcomes of long-term benefits of telecommunications services for end-users as provided in s 9A of the Telecommunications Act 2001.³⁶ The Commission, being functionally and operationally independent of the Government, therefore has considerable scope to make its own judgments on how policy can be most efficiently implemented. In addition, the monitoring function of the Commission is undertaken on a regular basis, releasing information through quarterly reports and through an annual set of comprehensive statistics, commentary and analysis of telecommunications markets. This clear statement of responsibility within a transparent process for the Commission to perform and monitor the universal service delivery in New Zealand minimises the risk of non-compliance with the law and facilitates performance accountability.

The Commission also carries out an evaluation of Telecom's compliance with the service quality standards for universal service delivery. At the same time, inquiries, studies and reviews into any matter that relates to the long-term benefits of telecommunications service end-users (eg TSO Reviews in 2007 and 2009) may be carried out. All these reports and information are available to the public and ensure sufficient evidence-based analysis for decision-making, including those related to universal service delivery. The monitoring function is also ensured through the assessment of compliance with TSO instruments that must be completed within a determined period (60 working days) after the end of each financial year.³⁷

D Proposals for Improvement of the Universal Service Institutional Arrangements in Vietnam

Proposals for improvement of universal service institutional arrangements in Vietnam involve enhanced monitoring and performance accountability in the administration and measurement of universal service delivery. These proposals are aimed at establishing a clear statement of responsibilities and removal of duplication or conflicting roles among

³⁶ Telecommunications Act 2001, s 9A.

³⁷ Ibid, s 80.

involved state organisations. Other suggestions relate to enhancing the performance information system, transparency and stakeholder involvement, which in turn should also contribute to efficient monitoring and performance accountability of involved institutional authorities and government officers.

Firstly, there should be a clear statement of the roles and responsibilities of all departments involved with universal service performance in Vietnam. There should be an independent department to monitor and evaluate the overall universal service policy in Vietnam, and another department to make annual plans, collect levies and make subsidies. Overlapping functions in evaluating outputs of universal service delivery should be removed.

The telecommunications regulator (the VNTA) should have the function of monitoring and evaluating universal service policy and programmes, and a leading role in the strategic team for setting universal service policies, including five-year universal service programmes. The VNTA thus would have an overarching policy, planning and programmes monitoring role. The VTF should be responsible for making annual plans, collecting universal service levies, selecting universal service providers through a competitive bidding process, entering into contracts, and allocating subsidies of universal service grants to support the provision of universal services. Accordingly, the VTF would also have a function of monitoring the performance of contracts by universal service providers and grant recipients. The role of local Departments for Information and Communication in evaluating universal service performance at the local level, including information about outputs and subsidies, should be consolidated by way of reporting back to the telecommunications regulator (the VNTA).

Secondly, transparency must be initially improved among government organisations involved in universal service delivery and then promoted strongly in the telecommunications industry (stakeholders) and amongst the public. Transparency requires a clear statement of the exact functions of responsible departments. Relevant regulations need to be established by the MIC to measure and hold departments to account for their performance. This would further enhance decisions on collecting universal service levies and providing subsidies.

It is proposed that a comprehensive amendment of the MIC's Decision 51 (2008)³⁸ be made so as to require a transparent auditing mechanism for reporting by universal service providers on expenditures on universal service projects, and terminating local evaluation and certification of universal service performance (outputs of universal service delivery of universal service providers) by provincial Departments of Information and Communication. This suggestion for improvement is in line with the proposal for retrospective subsidies based on the net cost of providing universal services.³⁹

The local certification of universal service outputs by provincial Departments of Information and Communication is not effective and has led to duplication of the processes of re-evaluation and approval by the VTF. The VTF in fact has played the final role in checking and approving the outputs of universal service delivery,⁴⁰ which have already been certified by the provincial Department of Information and Communication. The duplicated process of evaluation and approval typically resulted in delayed subsidies from the VTF to universal service providers even when universal service providers' reports were certified.⁴¹ In addition, the certification by the local Department of Information and Communications has been based mainly on the reports of universal service providers⁴² even though they have not had sufficient evidence-based performance information, nor technical competence nor qualified personnel. This has resulted in delays and disagreement in certified outputs between local departments and operators. The VTF has had to work with them again to clarify and reach an agreement around data with regard to outputs. As a result, subsidies annually and for the whole universal service programme 2006-2010 were delayed and are incomplete.⁴³

Thirdly, the conflict in roles of the advisory-approving function in the structure of the VTF's Board of Management should be avoided and the stakeholder/public involvement in the performance of universal service delivery should be improved. Decision

³⁸ Decision 51/2008/QĐ-BTTTT (2008).

³⁹ See Chapter Five V.D.

⁴⁰ Decision 51/2008/QĐ-BTTTT (2008), art 4 s 3(a).

⁴¹ VNPT's document on universal service subsidies (2011).

⁴² Decision 51/2008/QĐ-BTTTT (2008), art 4 s 2(a).

⁴³ Two years after finishing the five year universal service programme 2006-2010, the subsidy of universal service funds for the whole period was not finally calculated and one of the main obstacles to this delayed determination was related to shortcomings of evaluation and certification of the local Department of Information and Communication about outputs of universal service delivery.

191/2004/QD-TTg art 8 s 1 (a) should be amended so as to remove the clause which states that the Chairman of the VTF's Board of Management must be the MIC's Leader (Minister or Vice-Minister). In addition, no member of the VTF's Board of Management should hold office as the VTF's CEO, or vice versa. The structure of the VTF's Board of Management should include members from government departments and external stakeholders (such as independent professionals).

Other amendments to Decision 191/2004/QD-TTg should require that the number of members is a number of 5 or 7, including a Chairman, and members must have substantial experience or knowledge, and significant standing in at least one of the following fields: the operation of a sector of the telecommunications industry, business or financial management, law or public administration. Members should not be a director of, or concerned in, or take part in the management of a telecommunications operator or a service provider. Finally, each member of the VTF's Board of Management should be appointed by the MIC's Minister for a fixed term of office and work on a part-time basis, except for the Chairman. The Charter on the VTF's organisation and operation issued by the MIC's Decision 7 (2005)⁴⁴ art 10 s 1 should be amended accordingly.

This proposal is also based on relevant international experience of universal service fund's boards of management in other countries, which may be suitable for and adaptable to the Vietnam situation. For example, half of the members of Pakistan's universal service fund state-owned company's board are nominees of stakeholders.⁴⁵ India's universal service fund board was designed as an allied organisation of the Department of Telecommunications (DOT) for administrative purposes only, but to otherwise make it truly autonomous in performing and measuring the delivery of universal services. The board has an administrative role but also advisory and monitoring functions, with representatives from the Ministry of Finance, DOT, the Planning Commission, industry, consumers and outside experts.⁴⁶ In Australia, the Telecommunications Universal Service Management Agency (TUSMA) was established

⁴⁴ Decision 7/2005/QD-BBCVT (2005) stipulating the Charter of VTF's organisation and operation.

⁴⁵ This could be found in Pakistan's Ministry of Information Technology's Universal Service Fund Policy (2005) <www.usf.org.pk/FCKeditor/editor/filemanager/connectors/aspx/UserFiles/USF-Policy.pdf>

⁴⁶ Indian Report of the Steering Committee on Information and Communications for the tenth five year plan (2002-2007) (Government of India, Planning Commission (2002), at [21].

on 1 July 2012 as a body corporate.⁴⁷ It is mainly responsible for entering into contracts and making grants to support the provision of public-interest telecommunications services.⁴⁸ It also has the function of monitoring the performance of contractors (eg universal service providers) to provide public-interest telecommunications services, and of grant recipients.⁴⁹ The TUSMA's members include a Chair and 4 to 6 other members.⁵⁰ A person who is a director or concerned in or taking part in the management of telecommunications operators cannot be appointed as a TUSMA member⁵¹ and a person must not hold office both as a TUSMA member and as the CEO.⁵²

Fourthly, the performance information and reporting system for universal service delivery should be specified and improved in law. In particular, it is proposed to amend and insert a new clause in the Telecommunications Act 2009 art 21 s 2 to determine the responsibility for establishing or improving the key performance information systems for universal service delivery, especially universal service budgeting preparation processes. It would read:

- e) To establish the key performance information systems (indicators) used for the performance of universal service delivery, including the budgeting preparation process, and allocation of universal service levies and subsidies.

Accordingly, Decree 25/2011/ND-CP and Decision 35/2011/QD-TTg should state that this function mainly belongs to the VNTA (in coordination with VTF). At the same time relevant regulations such as the MIC's Circulars 24 (2009)⁵³ and 25 (2009)⁵⁴ should be amended and further relevant reports (information and indicators related to the performance of universal service delivery) be publicly released.

These proposals should lead to improvement of the performance of universal service programmes in Vietnam, especially the process for budgeting, decision-making, allocating levies to telecommunications operators, and subsidy. The performance

⁴⁷ Telecommunications Universal Service Management Agency Act 2012 s 36(1).

⁴⁸ Ibid, s 31.

⁴⁹ Ibid, s 29(1).

⁵⁰ Ibid, s 37.

⁵¹ Ibid, s 38(4).

⁵² Ibid, s 38(6).

⁵³ Circular 24/2009/TT-TTg (2009) on the statistics reports of posts and telecommunications (applicable to operators)

⁵⁴ Circular 25/2009/TT-TTg (2009) on the statistics reports of posts and telecommunications (applicable to government departments involved the performance of universal service delivery).

information system will also be used as a signalling device that clarifies shortcomings of previous universal service programmes/projects and identifies steps to be taken to address problems and improve subsequent programmes' performance. Along with clear objectives, financial performance information would be useful in the budgeting process and subsidies. Government-wide systems of performance information should tightly link performance results to universal service resource allocation.

Furthermore, performance information systems should provide more relevant, meaningful, balanced and valued information than just general numbers.⁵⁵ The appropriate performance information would enable residents in universal service-qualified areas to have wider choices in taking up services. The public availability of performance information and citizens' action/choices based on this data can also serve to put the spotlight on underperforming universal service providers, thereby serving as a motivator for future action to improve performance. If the information is accurate, both individuals and groups will benefit.

In addition, in order to ensure performance information about the universal service delivery being available to the public and stakeholders, it is proposed to amend and insert into Decision 191/2004/QD-TTg a new section after s 4 (s 4a) of art 3. This will define the responsibility of the VTF to ensure sufficient information is made public, such as (1) collected universal service levies, (2) projects entitled to subsidies or loans at below-market rates from universal service funds; (3) performance results (outputs), and (4) results of subsidies from universal service funds to universal service providers and beneficiaries in universal service-qualified areas.

These reports should be publicly available on the VTF's official website no later than a fixed number of working days (30 working days, for example) after the last day when subsidies for the previous period of universal service delivery must be completed as provided by the MIC's regulations (eg art 8 of Decision 51/2008/QD-BTTTT). A similar section should be inserted in Decision 7/2005/QD-BBCVT on the organisation and operation of the VTF (art 6).

⁵⁵ How to develop performance measures and indicators (performance information systems) could be learnt from the New Zealand experience. See generally State Services Commission and the Treasury "Performance Measurement: Advice and examples on how to develop effective frameworks" (2008) <www.ssc.govt.nz/performance-measurement>.

The suggestion is modelled on the New Zealand experience with TSO information disclosure requirements (Telecommunications Act 2001 Parts 2B and 3). Information related to TSO schemes - including TSO net costs and TSO levies allocated to each telecommunications operator - are publicly available not only with the final TSO cost calculation but also with the draft of the TSO cost allocation. Engagement of the public and stakeholders, who have a material interest, is also gained through conferences held by the Commerce Commission. All these enable the public and stakeholders to make submissions or cross-submissions. In particular, the Commerce Commission must give public notice of any draft of a TSO cost allocation determination no later than a fixed number of working days after the end of the fiscal year (s 78 (c)).

Information in the draft TSO cost allocation includes TSO costs, the amount of each TSO provider's TSO-qualified revenues, the amount of each liable person's TSO-qualified revenues, the revenues that will be used for the purpose of calculating the TSO levies by each liable person, the methodology applied in making the determination, and the reasons for the determination (s 88). The Act also requires the Commerce Commission to hold conferences for discussion of such drafts, and the Commerce Commission is required to extend an invitation to any person who has a material interest (ss 89, 93B and 94I).

The final TSO cost allocation determination must include - apart from the same information as in the draft - information about the percentage of the net cost and the specified amount to be paid by each liable person (s 91(f)). The Commerce Commission must give public notice of that final determination and provide a copy of that final determination to all liable persons (s 90).⁵⁶

III Obstacles in Determination and Allocation of Universal Services Levies

Arrangements for determination and allocation of universal service levies in Vietnam are inefficient and ineffective. There are six principal reasons: (a) the calculation of levies based on a fixed percentage of service revenues, differing between different service types; (b) failure to determine the amount required to meet the costs of projects to be carried out in the coming year/years; (c) the determination of operators paying for

⁵⁶ Telecommunications Act 2001, Part 3.

universal service levies being based on specific services; (d) the high rate of levies in proportion to service revenues, along with unforeseeable market developments and no deduction of reasonable amounts from gross revenues resulting in over-collection; (e) insufficient regulation for enforcing payment of universal service levies; and (f) information about collected levies not being available to the public.

A Principles for Improved Determination and Allocation of Universal Service Levies

As noted in Chapter Two, the universal service fund model should not be anti-competitive if administered in a transparent, non-discriminatory and competitively neutral manner so as not to be more burdensome than necessary.⁵⁷ Determining which operators are liable to pay universal service levies must ensure technological and service neutrality and not discriminate between providers. It is desirable that all telecommunications and Internet access service providers (including VoIP service providers) are required to pay universal service levies.⁵⁸ Allocating universal service levies to telecommunications operators should reflect as closely as possible the actual costs of universal service delivery. In addition, levies should not be determined as a fixed percentage, but should instead be based on the costs or outputs.

Collecting levies should be based on net (after-tax) revenues, or at least based on revenues minus required interconnection payments to other telecommunications operators.⁵⁹ Deduction of some parts from gross revenues avoids the potential for double levying of some operators and of imposing a heavy burden on new entrants, who are often levied more heavily than early-entry operators and typically face heavier net interconnection outflows than do well-established operators.⁶⁰

B Universal Service Determination and Allocation in Vietnam

As discussed in Chapter Four, the selection of telecommunications operators to pay universal service levies in Vietnam does not reflect competitive neutrality. Only those telecommunications operators who provide mobile services (including local and national), national and international telephone and leased-line services were defined as

⁵⁷ WTO Regulation Reference Paper, which forms part of the WTO Agreement on Basic Telecommunications.

⁵⁸ InforDev Programme of the World Bank, above ch 2, n 8, at [5.2.2].

⁵⁹ Ibid.

⁶⁰ Ibid.

levy payers for the period 2006-2010. After 2011, only mobile services providers are contributors to universal service funds. This determination exempted providers of other services from any obligation to contribute to universal service delivery, including fixed line local service providers and ISPs.

The determination of universal service levies does not have a link with the real costs for the provision of universal services and is not based on accurate performance information analysis. Aggregate amounts to be paid by all service providers to the VTF are calculated as a fixed percentage of annual service revenues⁶¹ and are not linked to either the actual or estimated costs of providing universal services. This resulted in over-collection of levies and unnecessary financial burdens on the industry. The MIC's 2011 Report illustrates that the allocated universal service levies to telecommunications operators exceeded the universal service funds requirement determined in the Prime Minister's Decision by more than VND 2,500 billion.⁶² The over-collection of universal service levies has been caused by the high rates of levies and the failure in the forecasting of receivable financial resources from telecommunications industry levies.⁶³

Finally, there has been insufficient regulation to deal with operators who breach their obligations, such as failures or delays in paying universal service levies. Some telecommunications operators ignored or delayed paying universal service levies for many years.

C Key Ideas from New Zealand Experience for Improvements of Levy Allocation in Vietnam

The determination of telecommunications operators' liability for universal service levies (liable person) in New Zealand is based on interconnection between networks. Network operators who are interconnected are assumed to benefit from the existence of universal service. A 'liable person' is any operator whose network is interconnected with a fixed PSTN operated by Telecom, who provides a telecommunications service in New

⁶¹ See Chapter Four III.C.1.(c).

⁶² Ministry of Information and Communication, above ch 4, n 184, at 13.

⁶³ See Chapter Four III.C.1.(c).

Zealand to end-users by means of some component of a PSTN that is operated by that person.⁶⁴

In order to identify operator eligibility for the definition of ‘liable person’, the Commerce Commission decided in 2003 that these operators needed to (1) own a network that interconnected to Telecom’s fixed telephone network; and (2) provide telecommunications services to end-users in New Zealand by operating a component of a PSTN located in New Zealand.⁶⁵ Networks were ‘interconnected with a fixed PSTN operated by Telecom’ when there was a ‘direct physical’ interconnection between the originating and terminating networks in order to allow an exchange of PSTN traffic between networks.⁶⁶

With regard to the ‘provision of telecommunications services to end-users in New Zealand by operating a component of a telephone network’, the Commission determined that an Internet service provider (ISP), which is interconnected with Telecom’s fixed PSTN for the purpose of providing voice services to end-users in New Zealand by means of a component of a PSTN operated by the ISP is to be counted as a liable person.⁶⁷

This illustrates that the determination of operators to pay universal service levies in New Zealand is more equitable with regard to competitive neutrality and non-discrimination between operators in terms of technology and services, because New Zealand does not distinguish between different services. Since 2011-2012, all retail and wholesale voice and broadband service providers, mobile voice operators, and ISPs (excluding pure resellers) are liable persons.

Allocating universal service levies to telecommunications operators in New Zealand prior to the Telecommunications Amendment Act 2011 was based on the cost of universal services provided by the universal service provider (Telecom).⁶⁸ In order to ensure cost-effectiveness, the cost was defined as the unavoidable net incremental cost

⁶⁴ Telecommunications Act 2001, s 5.

⁶⁵ Commerce Commission, above ch 3, n 246, at [477].

⁶⁶ Commerce Commission, above ch 3, n 260, at [420].

⁶⁷ Ibid, at [487].

⁶⁸ Allocating universal levies based on the actual cost of universal service delivery still reflects the best practice, possibly. Due to some obstacles of econometric or mathematic methodology in determining the actual cost in practice and potentially never-ending debates, an alternative solution (eg reverse auction) could be seen as an option for regulators. However, actual costs could still be served in some stages of a reverse auction process, particularly in determining reserve price for bidding.

to an efficient service provider for providing the service to commercially non-viable customers.⁶⁹ This determination of cost was interpreted as the minimum additional cost a universal service provider would incur if it chose to serve non-viable customers. Moreover, the allocation of such universal service levies was prospective and linked with outputs (the number of commercially non-viable customers). This helped to avoid overcharging or creating unused collected levies.

The revenues eligible for determining universal service levies were interpreted as the net revenue.⁷⁰ Intra-industry revenues were deductible from revenues in calculating universal service-qualified revenues. Revenue from intra-industry sales is defined as any amount payable to other carriers for the provision of services (telecommunications services)⁷¹ or amounts payable to non-liable persons for the purchase of telecommunications services provided to the non-liable person from a liable person.⁷² Revenues received by the universal service provider (Telecom) from the provision of the universal service were not mentioned as a deductible amount from TSO-qualified revenue.

Finally, along with a new approach of TDL which replaced universal service levies, a minimum threshold of qualified revenue was used in determining the liable persons to pay for TDL. Service providers are defined as liable persons to pay for TDL if they meet the definition of “liable person” in s 5 of the Telecommunications Act 2001, traded in the preceding financial year, and met the minimum telecommunications revenues of NZD 10 million⁷³ (the minimum for becoming a liable person for TDL for the period 2010-2011 had been NZD 5 million).⁷⁴ The application of a minimum threshold of qualified revenues for paying universal service levies would be helpful to small or new entrants, which contributes to the improved competitive environment.

⁶⁹ Telecommunications Act 2001, s 5.

⁷⁰ Commerce Commission, above ch 3, n 260, at [448].

⁷¹ Commerce Commission, above ch 2, n 151, at [16].

⁷² *Ibid*, at [17].

⁷³ Commerce Commission, above ch 3, n 367, at [4].

⁷⁴ Commerce Commission, above ch 2, n 151, at [9].

D Proposals for Improvement of the Legal Framework with regard to the Allocation of Universal Service Levies in Vietnam

The determination and allocation of universal service levies for telecommunication operators in Vietnam does not ensure competitive neutrality. Likewise, the percentage of service revenues for the universal service levy is high, and is not linked with actual costs of universal service delivery. Proposals to improve the legal framework with regard to the determination and allocation of universal service levies are set out below. These proposals aim at mitigating payment of universal service levies and ensuring competitive neutrality among telecommunications operators.

1 Clear statement of key principles for determination and allocation of universal service levies

Universal service legal frameworks in Vietnam should include a clear statement of non-discrimination and competitive neutrality, mitigation of levies and the avoidance of unnecessary financial burden on telecommunications operators in determining and allocating universal service levies. These principles should be included in the highest legal document of the universal service programme, which would be a clear and stronger directive for the ministerial documents and involved entities in determining and allocating universal service levies. It is proposed to amend and insert a new clause in Decision 1643/QD-TTg (2011) art 1 Part V s 1. The clause would say:

The determination of universal service levies and financial resources for universal service programmes must ensure the principles of non-discrimination, minimise levels of universal service levies and not create unnecessary burdens on telecommunications operators.

This inclusion of a clear statement in the Prime Minister's Decision would create a primary guideline for further details in the same Decision. At the same time it would require the responsible agencies (such as the MIC and the Ministry of Finance) to abide by and reflect these principles in their guidance regulations for providing universal services. Moreover, the performance of the VTF and any involved agency must comply with and be held accountable for its performance in accordance with these regulations. This proposal may help immediately for the implementation of universal service

programme 2011-2015. However, this statement of key principles for the determination and allocation of universal service levies should ultimately be included in the Telecommunications Act, once amendment is possible after 2015. This also reflects the universal service policies of many countries where they function as a primary principle to minimise distortion in market development and competition.

2 Competitive neutrality in identifying telecommunications operators to pay universal service levies

The determination of telecommunications operators to pay universal service levies should ensure non-discrimination and competitive neutrality of technology and services. Any telecommunications operator who operates and/or interconnects to any component of a public telecommunications network so as to provide telecommunications services in Vietnam, including the transmission of voice, data, SMS, or any other content, should contribute to universal service levies. Decision 1643/QD-TTg 2011 part V s 1 (a) should be amended to read:

Every telecommunications service and Internet service provider (including digital content services providers) that provides service in Vietnam by means of any component of a public telecommunications network that is operated by such a provider, shall pay universal service levies.

This would help to ensure that there is no levy discrimination, no matter what model of technology or transmission a network provider is using.⁷⁵ The reason for requiring all service providers to contribute to universal service costs is that all providers benefit from the network effect. This proposed amendment is also in line with the Telecommunications Act 2009 art 14 s 1 (e) and s 2, which indicates that all telecommunications service providers, with or without infrastructures, must abide by universal service obligations and contribute universal service levies to the VTF, among their other responsibilities and obligations.

⁷⁵ This proposal is in line with the ITU's recommendation and international experience, and also the empirical experience of the New Zealand TSO policy (this can be seen in the Telecommunications Act 2001, and the Amendment Act 2011 s 5 and s 80).

In addition, Vietnam can learn from the experience of the New Zealand universal service delivery in determining service providers liable for paying universal service levies.⁷⁶ I suggest inserting into the Telecommunications Act 2009 art 22 a new section after s 2 (s 3), which would read:

- 3) The service providers liable to pay universal service levies are those who:
- (a) provide a telecommunications service in Vietnam, including the transmission of voice, data, SMS, or any other content but not including broadcasting; and
 - (b) operate a component of the public telecommunications network over which the telecommunications service is provided; and
 - (c) operate a component of a public telecommunications network that falls on the public side of the network demarcation point; and
 - (d) provide a telecommunications service that is publicly available, not limited to a private use.

This will help the administrator of universal service delivery in Vietnam to identify potential and liable operators for the payment of universal service levies, and ensure competitive neutrality and non-discrimination between operators with regard to technology and service.

3 Non-discrimination of operators and mitigation of levies in determining and allocating universal service levies

Several amendments to legal frameworks are proposed to ensure non-discrimination of operators, mitigation of levies and the avoidance of unnecessary financial burden in determining and allocating universal service levies in Vietnam.

The percentage of service revenues for universal service levies determined in Decision 1643 Part V s 1 (a) should be decreased to a rate between 0.7% and 1.0% of revenues, without distinction between different services. This proposal aims to ensure minimum levels of universal service levies, and not place unnecessary burdens on telecommunications operators.

⁷⁶ The full text can be found in the Telecommunications Act 2001, the Amendment Act 2006 and the Amendment Act 2011 Part 3 subpart 2.

Revenue information on which levy rates are set is inconsistent. For example, the MIC's Report in 2011 to the Prime Minister indicated that universal service levies collected in 2010 from mobile service revenues were VND 1863.79 billion (3% of universal service-qualified revenues), which implies that universal service-qualified revenues from mobile service were in the region of VND 62,300 billion. This number was not consistent with the ICT White Book of the MIC 2010 in which revenues from mobile services were reported as being much higher, at about VND 80,000 billion in 2010. However, when the estimated calculation of universal service levies for the period 2011-2015 was used, universal service-qualified revenues from mobile service were VND 51,080 billion in 2010 and 58,476 billion in 2011.⁷⁷ Revenues from mobile services in 2010 and 2011 in Vietnam in fact were about VND 118,700 billion in 2010 and VND 112,300 billion in 2011 respectively.⁷⁸ This resulted in an inaccurate estimated allocation of levy to service providers.

Meanwhile, financial resources required for 2011-2015 universal service delivery were estimated as being about VND 7,000 billion. If subtracted from the unused transferrable amount from the previous five year universal service programme (about VND 1,881 billion),⁷⁹ levies needing to be charged to telecommunications operators would be about VND 5,119 billion. Using the estimated rate of growth in mobile revenues, as BMI index⁸⁰ recommended in the MIC's Report, estimated revenues from mobile services each year of 2011-2015 would be VND 112,300 billion, VND 128,561 billion, VND 143,211 billion, VND 153,808 billion and VND 161,298 billion respectively.

In summary, the total universal service-qualified revenue from mobile services (2011-2015) would be VND 699,178 billion. If the trend of decreasing revenues from other services remains constant, then collection of universal service levies for 2011-2015 from revenues of other service providers such as ISPs and fixed line operators, whose revenues in 2011 were about VND 9,594 billion (USD 468 million) and VND 7,544

⁷⁷ Ministry of Information and Communications, above ch 4, n 184, at 154.

⁷⁸ Ministry of Information and Communications, above ch 4, n 110, at 47.

⁷⁹ See above ch 4, n 158. Total universal service levies for 2006-2010 estimated at VND 7,571 billion, and total subsidies for the period 2006-2010 estimated as VND 5,690 billion. This means the transferable amount would be around VND 1,881.668 billion.

⁸⁰ BMI (Business Monitor International) growth rates estimated for the period 2011- 2015. See Ministry of Information and Communication, above ch 4, n 158, at 161.

billion (USD 361 million) respectively,⁸¹ the percentage rate of universal service levy should be set at less than 1.0%. Therefore, the determination of the rate for universal service levies at 2% is unrealistic and results in the creation of unnecessary burdens on telecommunications operators. This percentage could be reduced to about 0.7% because there remains a large unused sum of collected universal service levies from 2006-2010 (See Figure 8).

Figure 8: Estimated universal service levies on telecommunications and ISPs for the period 2011-2015⁸²

Description	2011	2012	2013	2014	2015	Total
Estimated growth rates according to BMI (%) ⁸³	14.48	11.40	9.93	7.40	4.87	
Revenues from mobile services 2011-2015 (VND billion)	112,300	128,561	143,211	153,808	161,298	699,178
Revenues from ISPs 2011-2015 (VND billion)	9,594	10,987	12,240	13,145	13,785	59,751
Revenues from fixed line operators 2011-2015 (VND billion)	7,544	8,404	9,238	9,921	10,404	45,511
Estimated percentage rate of levy						0.64%
Estimated levies 2011-2015 (VND billion)						5,119
Collected levies transferrable from the programme 2006-2010 (VND billion)						1,881
Financial resources required for the programme 2011-2015 (VND billion)						7,000

It is proposed to amend Part VI s 5 of Decision 1643/QD-TTg to read:⁸⁴

⁸¹ Ministry of Information and Communication, above n 78, at 47.

⁸² The author estimated universal service levies on telecommunications and ISPs for the period 2011-2015 by using the universal service-qualified revenues of services from data of revenues officially launched by the MIC in 2011, which was different from data in the project enclosed with Document 2203/TTr-BTTTT (2011) submitted to the Prime Minister for the approval of the universal service programme 2011-2015.

⁸³ See above n 80.

⁸⁴ PM's Decision 1643/QD-TTg Part VI s 5 provided:

5. Revising the collection of universal service levies from telecommunications operators:
Based on the financial demand and estimated collection of universal service levies the Ministry of Information and Communications, in coordination with the Ministry of Finance, revises the percentage of service revenues for universal service levies.

The annual consideration and revision of such percentage of service revenues for universal service levies by the Ministry of Information and Communication and the Ministry of Finance should be submitted to the Prime Minister for approval, based on the current fiscal situation and developments, and collection of universal service levies within the previous year.

Firstly, this amendment will define more clearly the responsibility of the ministries involved in the delivery of universal services in annually evaluating and revising the percentage of universal service levies in line with the current situation of universal service levy collection. This would ensure sufficient collection of financial resources for universal service delivery, but not create burdens more than necessary on telecommunications operators. The lack of such clear detailed regulation in the universal service programme 2006-2010 has led to the failure of the responsible Ministries to evaluate and revise annually the rates of universal service levies; there was only one revision during these 5 years. Therefore, when revenues from mobile services increased sharply there was over-collection of universal service levies in comparison with pre-determined financial resources.

Secondly, the same rate of universal service levies (0.7%) should apply to every telecommunications operator who meets the criteria for payment of levies instead of different rates of levies for different services. The determination of services should be amended in accordance with the definition and classification of telecommunications services.⁸⁵

This amendment would help to eliminate inconsistencies between telecommunications operators and revenues of telecommunications services to be used for calculating universal service levies, and the relevant classification of telecommunications services in general. For instance, Decision 1643/QD-TTg Part V s 1(a) currently determines universal service levies at 2% of revenue from mobile telephone services. At the same time, the MIC's Circular 5/2012/TT-BTTTT art 5 (2) uses an approach of 'mobile telecommunications services' (including basic and value-added telecommunications services) and classifies, among others, telephone service, facsimile service, data

⁸⁵ The MIC's Circular 5/2012/TT-BTTTT 2012.

transmission service and Internet access service. Internet access service includes dial-up Internet access with download speeds less than 256 kbps and broadband Internet access with the download speeds higher than 256 kbps. This reflects an unclear statement of service revenues to be used for determining universal service levies as in Decision 1643/QD-TTg, whether from telephone (or calling) service of mobile telecommunications services, or including revenues from other services. This again illustrates that the determination of fixed percentages of specific service revenues for universal service levies is out of touch with current technology and service integration.

Decision 1643/QD-TTg Part V s 1 (a) should be amended to read:

Collection of universal service levies from service revenues of service providers should be 0.7% of net revenues of telecommunications services.

The traditional idea of universal service policy, in which funding for universal service delivery was subsidised by the revenues from services with higher benefits, becomes unrealistic within the integrated environment of technology and services, and within a competitive environment.⁸⁶ International experience in this area - including New Zealand⁸⁷ - shows that universal service funds are levied equally on service revenues of service providers.⁸⁸ This allocation does not distinguish between different services such as fixed, wired, wireless and mobile.

Thirdly, some amounts from revenues of telecommunications operators, such as intra-industry transactions and revenues from provision of universal services, should be excluded in calculating universal service levies. A new subsection (d) in Decision 1643/QD-TTg Part V s 1 would read:⁸⁹

⁸⁶ Xavier, above ch 2, n 4, at 48.

⁸⁷ See Chapter Three III.C.3.(d).

⁸⁸ InfoDev Programme of the World Bank, above ch 2, n 8, at [5.2.2].

⁸⁹ Decision 1643/QD-TTg Part V s 1 provided:

1. Financial resources for the universal service programme:

a) Levies from telecommunications operators: 2% from revenues of mobile service;

b) The remaining funds transferred from the universal service programme 2006-2010 in accordance with the PM's Decision 74/2006/QD-TTg;

c) VTF's Charter capital.

d) Any amount receivable from universal service funds for providing universal services in universal services-qualified areas, and intra-industry transactions, should be subtracted from net revenues for calculating universal service levies.

This amendment would ensure that amounts related to the provision of universal services and the payments from other operators would be subtracted from the revenues for calculating universal service levies. The proposal is modelled on the New Zealand universal service legal framework and its implementation. Section 93F Telecommunications Act 2001 provides that any part of revenue that is received for performing any obligation under a universal service instrument should be excluded from universal service-qualified revenues.⁹⁰ At the same time, in order to avoid a ‘double-count’ of some revenues, the intra-industry transactions should be deductible from annual revenues for calculating universal service levies.⁹¹

With regard to longer term improvements in determining universal service levies, it is suggested inserting into the Telecommunications Act 2009 art 22 a new section after s 3 (s 4) about general principles for determining universal service levies and telecommunications operators for paying universal service levies, which would read:

The collection of universal service levies from the percentage of service revenues of operators as defined in section 2 (a) of this article, including determining rates of universal service levies and operators for paying universal service levies must ensure general principles of competitive neutrality of technology, operator and service, and not place unnecessary burdens on telecommunications operators.

Fourth, it is proposed to include a minimum threshold of revenue of a service provider in paying universal service levies, as in New Zealand⁹² and Japan.⁹³ This suggestion is also the most practical approach to a minimum size limit for either annual revenue or market-share,⁹⁴ is suitable for Vietnamese conditions and objectives, and would enhance

⁹⁰ This is also to be found in the Telecommunications Amendment Act 2011 s 5 and s 80 which determines that any amount paid to liable persons by the Crown as compensation for the cost of complying with a TSO instrument will be excluded in revenues for calculating universal service levies - TDL.

⁹¹ This could be found in the annual determination of TSO levies for the period 2001-2002, at [504].

⁹² This is outlined in the Telecommunications Amendment Act 2011 s 80.

⁹³ In Japan, telecommunications service providers who interconnect with universal service providers (Eligible Telecommunications Carriers) and earn over JPY 1 billion have to pay universal service levies <www.itu.int/ITU-D/asp/CMS/Events/2010/Thailand-Broadband/Session1b_Mamoru_Udaka.pdf>.

⁹⁴ InfoDev Programme of the World Bank, above ch 2, n 8.

competition because it would help new and small operators to develop their market-share in a competitive environment. However, this would require amendments to various legal documents.⁹⁵

In the first instance, a new section (s 5) should be inserted into Decree 25/2011/ND-CP art 29, which would read:

The Ministry of Finance and the Ministry of Information and Communications jointly determine the minimum level service revenue of a service provider liable for paying universal service levies. The minimum level service revenue of a service provider being liable to pay universal service levies is the minimum net revenue attained in the previous fiscal year.

In the second instance, a new clause should be inserted into art 1 Part V s 1 of Decision 1643/QD-TTg, which would read:

Service revenues used for calculating and collecting universal service levies based on the fixed percentage of such service revenues as provided in section 1(a) are greater than or equal to the minimum level service revenue of a service provider being liable for paying universal service levies.

In addition, art 2 s 2 of the same decision requires a new clause inserted which reads:

The Ministry of Finance jointly with Ministry of Information and Communication determines the minimum level service revenue for paying universal service levies.

How to determine and what should be the minimum level service revenue for universal service levies in Vietnam could be learnt from the experiences of New Zealand and Japan. However, for a realistic proposal of the minimum level service revenue in Vietnam it should be a balanced calculation of revenues or market-share of operators with requirements of not only promoting small-sized or new operators to develop in the competitive market but also ensuring sufficient financial resources for subsidies of the universal service delivery in Vietnam.

⁹⁵ Decree 25/2011/ND-CP and PM's Decision 1643/QD-TTg.

Alternatively, art 2 s 1(e) of Decision 1643/QD-TTg relating to responsibility of the MIC in performing universal service programme could be amended as follows:

The MIC is to be the main body – in coordination with the Ministry of Finance – responsible for reporting to the Prime Minister on the annual revision of the percentage of service revenues for paying universal service levies according to the current performance of universal service delivery, and for determining the minimum level service revenue of a service provider liable for paying universal service levies.

4 Transparent performance information

It is proposed to insert in Decision 1643/QD-TTg art 2 s 1(g) a new section that would read:⁹⁶

The Ministry of Information and Communication shall publish annual reports in detail about collected universal service levies, subsidies of universal service funds and the results of universal service delivery no later than 90 working days after the end of each financial year.

This proposal would enhance transparency, accountability, and effective monitoring of the performance of agencies involved in universal service policies, and operators liable for paying universal service levies. It would also meet the WTO's requirements regarding universal service fund administration and anti-competitive practices.⁹⁷ This would establish a public information environment similar to that for universal service delivery in New Zealand, where information relating to the calculation of universal service levies must be released to the public, especially to stakeholders, for discussion, evaluation and monitoring. Prior to the Telecommunications Amendment Act 2011 the New Zealand Commerce Commission had to prepare a draft universal service cost allocation determination and give public notice of the draft, including the closing date for submissions, no later than 80 working days after the end of each financial year. No later than 20 working days after the closing date for submissions, the Commission had to

⁹⁶ Decision 1643/QD-TTg art 2 s 1 (g) provided the responsibility of the MIC “to determine the regulation on the report of universal service programmes; in coordination with relevant agencies to investigate, monitor and evaluate results of the universal service programme so as to report to the Prime Minister”.

⁹⁷ According to the WTO Regulation Reference Paper, which forms part of the WTO Agreement on Basic Telecommunications, a member of WTO has the right to define the universal service policy it wishes to maintain and such universal service policy will not be regarded as anti-competitive per se, if it is administered in a transparent, non-discriminatory and competitively neutral manner and not more burdensome than necessary for such universal services.

prepare a final universal service cost allocation, publish that final determination and give a copy of that final universal service cost allocation to all liable persons and universal service providers.⁹⁸ The Telecommunications Amendment Act 2011 continued to re-confirm requirements for public information release and public submission in relation to both draft and final universal service liability allocation determination.⁹⁹

5 More enforceable regulations with stronger penalties for breach in collecting and paying universal service levies

It is proposed to enact more enforceable regulations with stronger penalties to be imposed for any failure to pay or late payment of universal service levies in Vietnam. It is proposed to amend and insert some new clauses into Decree 25 (2011) and Decree 83 (2011) which define the application of interest for late payments¹⁰⁰ of universal service levies, application of additional solutions (such as to force the implementation of payments, or cancellation of the license to provide telecommunications services as determined in art 2 of Decree 83). In particular, a new section (s 4) with 4 subsections should be inserted into Decree 25 (2011) art 14, which would read:

- (a) Each service provider must pay to the VTF the amount of universal service levies due not later than 20 working days after the date that the determination is publicly notified or determined by the responsible agency's decision;
- (b) If any service provider liable for paying the universal service levy fails to pay the whole amount of that levy by the date specified in the decision of the responsible agency the service provider must pay interest on the unpaid amount at 0.05% per day (18.25% per year) for the period commencing on that working day to the date of payment of the whole amount.
- (c) Interest will be calculated in monthly instalments for each month, or part of each month, that the payment is due;
- (d) The amount of any unpaid levy or interest is recoverable in any court of competent jurisdiction as a debt due to the Government.

⁹⁸ The full text can be found in the Amendment Act 2006 ss 87-91.

⁹⁹ Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011 ss 84 and 87.

¹⁰⁰ Ministry of Finance's Circular 61/2007/TT-BTC (2007) Part II (B) ss 2 and 4 provided interest for late payments of due tax at 0.05% per day (equivalent to 18.25% per year) calculated on the due tax.

At the same time, it is proposed to amend and insert a new clause into art 10 (4) of Decree 83 (2011):

(a) Enforcing the refund of any wrong subsidy/payment for any breach as defined in section 2 (a) and section 3 (b) of this article;

(b) Enforcing payment of any unpaid universal service levies for any breach as defined in section 2 (d) of art 10. The offender must pay interest on the unpaid amount at the rate of 0.05% per day (18.25% per year) calculated from the date payment is due as provided in Decree 25/2011/ND-CP art 14 (4).

This proposal for improvement would ensure full and adequate universal service levy collection in Vietnam and generate sufficient financial resources for the delivery of universal services. This proposal is based on the experience of developed countries, including New Zealand and Australia.¹⁰¹

IV Lack of Contestable Bidding for Selecting the Most Economic, Cost-Effective Universal Service Provider and Projects of Universal Service Delivery

One of the principal shortcomings in the present system in Vietnam is the lack of contestable bidding for selecting the most economic, cost-effective universal service providers and projects of universal service delivery. Even though contestable bidding was included in Ordinance 2002 and the subordinate legislation for the performance of universal service programmes, it has never been applied in practice in selecting universal service providers and projects of universal service delivery.

A Contestable Bidding for Selecting Universal Service Provider and Projects

Contestable bidding has been identified as one possible method of identifying the most efficient universal service providers and minimise the universal service subsidies against the cost estimated.¹⁰² It is probably the best way to arrive at the actual subsidy amount to

¹⁰¹ The New Zealand Telecommunications Act 2001 arts 14, 94 and the Australian Telecommunications (Consumer Protection and Service Standards) (Late Payment of universal service levy) Amendment Determination 2005.

¹⁰² See Chapter Two II.D.4.(a).

be subsidised for universal service delivery.¹⁰³ There are an increasing number of countries which apply contestable bidding for universal service delivery, more recently for their rural broadband projects.¹⁰⁴

Reverse auctions¹⁰⁵ can be designed in two main forms, either sealed bid auctions or ‘open outcry’ auctions. A sealed bid auction typically requires the submission of secret bids and has a single bidding round.¹⁰⁶ By contrast, an ‘open outcry’ bidding process enables bidders to see what others are bidding¹⁰⁷ and there is public discussion about elements of the bidding proposals. Thus, an open outcry auction has a descending bid intention.¹⁰⁸

The structure of an auction needs to be designed in line with specific objectives of the auction. Some key issues are: (1) geographic areas for which projects of universal service delivery are to be auctioned; (2) setting up reserve prices; and (3) eligibility standards for auction participants.

Firstly, the regulators must define the geographical areas for which the universal service project will be auctioned. These could be some existing standard units such as administrative units (communes) established by the government or the area served by an existing central office.¹⁰⁹ Determining small geographic areas can minimise the disparateness of customers within each area, allow more precisely required compensation and mitigate problems related the performance of the contract.¹¹⁰ By contrast, defining a large area for which universal service projects are to be auctioned and requiring the universal service provider to serve an area, such as a province, can make it difficult to meet a widespread service requirement within a reasonable period of time.¹¹¹ In addition, larger geographic areas can also deter auction entry.¹¹² However,

¹⁰³ Sepulveda and Tetraul, above ch 2, n 168, at 89.

¹⁰⁴ Most recently, some of these countries are the United Kingdom, New Zealand and the United States. In the United Kingdom, for example, the third round of contestable biddings for rural broadband projects was opened in 22 March 2013. See Department for Environment, Food and Rural Affairs “Rural Development Programme for England and Broadband Delivery UK: Applicant’s Handbook - Expression of Interest Round Three” (2013).

¹⁰⁵ Different from the traditional auction, the bidding winner for the projects of universal service delivery is the bidder with the lowest requirements for subsidies.

¹⁰⁶ Trevor Roycroft “Reverse Auctions for Universal Service Funding?” (2008) Roycroft Consulting Economic and Policy Analysis, at 12 <www.roycroftconsulting.org/Roycroft_Consulting_Auction_White_Paper_2-1-08.pdf>.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid, at 13.

¹⁰⁹ Weller, above ch 2, n 170, at 663.

¹¹⁰ Ibid.

¹¹¹ Ibid.

small geographical areas can mean that the number of auctions required will make administration too complex, and the possibility of synergies across areas would increase.¹¹³

Secondly, eligibility standards for potential auction participants and selection of successful providers with a large number of potential auction participants or only a few serious bidders will impact on how the contestable bidding process is designed.¹¹⁴ Eligibility standards for determining potential auction participants (and for selection of the successful bidders) should be focused on the ability of the candidate bidders to meet service quality standards.¹¹⁵ The technical capabilities associated with the basic service offering and service quality must be clearly identified.¹¹⁶ Other capacities relating to financial viability should be considered accordingly. At the same time, the issue of single winner or multiple winners should be addressed. If there are multiple winners - more than one bidder comes up with a proposal which is equal or practically equal to another bidder - then there should be an equitable allocation of 'wins'. These should be allocated in different geographical areas and avoid any duplication of infrastructure in universal service-qualified areas.

Thirdly, the setting up of a reserve price, which is a level of subsidy that the auction participants bid on, presents a difficult issue and may reintroduce the complexity of cost modelling into the auction process.¹¹⁷ The regulator may use an existing (current price ceiling) subsidy level for a specific area and multiply by a predetermined number¹¹⁸ or use publicly available cost models¹¹⁹ as the reserve price,¹²⁰ and the bidder with the lowest requirements of subsidies below the reserve would be the winner.

B The Situation in Vietnam

Currently a system of competitive bidding in the selection of universal service providers is not employed in Vietnam. At the same time there is little or no evidence of using cost

¹¹² Rycroft, above 106, at 7.

¹¹³ Weller, above n 109, at 663.

¹¹⁴ Rycroft, above n 106, at 7.

¹¹⁵ Rycroft, above n 106, at 8.

¹¹⁶ Ibid.

¹¹⁷ Ibid, at 10.

¹¹⁸ Weller, above n 109, at 665

¹¹⁹ Rycroft, above n 106, at 10.

¹²⁰ International Telecommunications Union, above ch 2, n 55, at 39.

information or performance results to support decision-making on universal service provider selection, so as to enhance universal service policy objectives such as efficiency and effectiveness. This conclusion came from interviews with participants from the group of policy-makers.¹²¹ The bases for decision-making about the selection of universal service providers remain unknown.¹²²

Very general regulations on competitive bidding are a core cause of its absence. Although the Bidding Law 2005 and its related decrees have been in existence for some years, criteria or adequate regulation for the fair selection of universal service providers have not been carefully spelled out. The selection of universal service provider and projects of universal service delivery has normally been based on unclear criteria, such as giving “prioritisation to the telecommunications provider with existing telecommunications infrastructure in the universal service-qualified areas”.¹²³ In addition, Decree 31/2005/ND-CP on purchasing public services clarifies three purchasing methods which public organisations can choose for the delivery of public services by outsiders. These are government allocated projects,¹²⁴ direct contracting, and competitive bidding.¹²⁵ The 2005-2010 period witnessed only ‘Government allocated projects’ and ‘direct contracting’ methods being applied to the selection of universal service providers for the first five-year programme.

In addition, government regulations on selecting universal service providers¹²⁶ have not created transparent processes and criteria, nor required strict accountability from public managers, and consequently many of them have not employed cost-effective approaches or competitive bidding. Public managers can freely apply the direct contracting method for selecting universal service providers and avoid competitive bidding requirements altogether. These include publishing their requirements or inviting operators to enter into competitive bidding, and rating each tenderer according to their capacities. At the same

¹²¹ Interviews with officers in the VTF and the VNTA, and the Ministry of Planning and Investment (the author, December 2011-January 2012).

¹²² By the end of 2009, there were four telecommunications operators engaged with the VTF in the contract of order to provide telecommunications universal service.

¹²³ Ordinance on Posts and Telecommunications 2002, art 50 s 2.

¹²⁴ The Government allocates annually operational delivery assignments to telecommunications companies to perform the universal service delivery, by administrative decision without contracts or a contestable bidding process.

¹²⁵ Decree 31/2005/ND-CP (2005) on producing and providing public utility products and services and Decision 256/2006/QĐ-TTg (2006) promulgating the Regulation on tendering, ordering and assigning the implementation of producing and providing public utility products and services.

¹²⁶ Ibid.

time, given the CPV's determination of the dominant role of SOEs in providing universal services and giving these operators direct contracts to provide universal services, public managers are not in a position of real accountability.

The present process for selection of universal service providers does not satisfy the principles of equity and non-discrimination among telecommunications enterprises. Currently, only large telecommunication corporations and state-owned enterprises or those partly owned by the state, are selected. The absence of effective competition for universal service projects has resulted in disagreement between the MIC and the telecommunication operators over many aspects of the universal service programmes especially programme costs, price of universal service, and funding allocation and distribution. Unfair selection practices have also allowed the existence of direct contracting or government allocated projects, which create the potential for corruption.

C Competitive Bidding Process in New Zealand

Competitive bidding for the provision of universal service was not used in New Zealand until 2011.¹²⁷ This was an area where New Zealand universal service arrangements did not reflect the best international practice, and did not help mitigate the net costs for the universal service delivery of local fixed telephone between 2002 and 2009.¹²⁸ Although Telecom is regulated as the sole TSO service provider, within a framework which ensures cost-effective approaches, transparency and accountability, it is still difficult to avoid conflict and disagreement between the Commerce Commission, levy payers and Telecom. The main reason for this is difficulty in defining accurate prices for the cost of the TSO service. There are disputes and concerns from TSO levy payers about inaccurate prices, not only of TSO programmes but also the cost for each TSO service.

Having a single TSO provider for all telecommunications service, without any contestable proceedings, is potentially an unfair system if other operators providing alternative services cannot be TSO providers nor ask for subsidies.¹²⁹

¹²⁷ Since 2011 this has changed somewhat with regard to the deployment of rural broadband infrastructures.

¹²⁸ See Chapter Three III.C.5.(a).

¹²⁹ After the roll-out of RBI and UFB in New Zealand, if Telecom still requires compensation for local fixed TSO services it is assumed that other alternative service providers will possibly compete and reduce the TSO net cost, and

Telecommunications operators providing alternative services at lower costs than that TSO provider do not get any compensation.¹³⁰ In addition, due to the model of nominating a single TSO provider for one telecommunications service without contestable bidding, the cost for provision of TSO services is unlikely to be reduced. As indicated in Chapter Three, the net cost for provision of TSO services provided by Telecom increased over time,¹³¹ while the number of commercially non-viable customers to be served with support of TSO levies decreased. The data on the net cost calculated for TSO compensation of Telecom's local residential telephone service steadily increased from 2001, from NZD 34.72 million for the fiscal year 2001-2002 to NZD 62.8 million in 2006-2007.¹³²

While the cost for providing TSO service has increased over time and led to an increase in compensation to the TSO provider, annual investment for the rural fixed network has not developed proportionately. Telecom's average annual level for rural fixed network access infrastructure investment decreased to less than half the depreciation allowance for an equivalent efficient replacement network between 1996 and 2006.¹³³ Telecom's planned rural expenditure in 2006 was NZD 59 million, including NZD 8.5 million on its cellular network and NZD 16.5 million on broadband infrastructure.¹³⁴ Telecom invested only about NZD 34 million in rural fixed network access infrastructure, compared with the estimated TSO net cost for 2006-2007 of NZD 62.859 million.¹³⁵

the Government may have to re-consider the nomination of only Telecom as TSO fixed residential telephone service provider.

¹³⁰ TSO Review in 2007's submissions from operators (not Telecom) criticised the nomination of a single TSO provider (Telecom) while a large number of service providers were now capable of providing similar local services. In addition, there was an increasing variety of ways in which end-users in New Zealand could access telephone service and a wide range of alternative voice services: broadband, wireless access services and home phone service via the mobile network. Hence, it would be unfair if other operators were forced to subsidise Telecom, their competitor, for providing a basic voice telephone service when they had already built their own network capable of delivering a similar local service (See Vodafone New Zealand Limited "Submission to the Ministry of Economic Development on TSO Discussion Document" (2007).

¹³¹ Increasing costs over time in New Zealand was explained partly due to the consequence of the use of an economic model that included the cost of capital, which resulted in disputes between operators (Vodafone) and the Commerce Commission about the determination of TSO net cost 2004-2005. This shows that avoiding a contestable bidding process to select TSO providers may not help to lower or minimise the net cost of providing TSO service and could possibly result in years of disputes related to the determination of the TSO net cost.

¹³² Final determination for TSO Instrument for Local Residential Telephone Service for periods 2001-2002 and 2006-2007.

¹³³ Network Strategies Report: Capital investment in Telecom's rural network (2007).

¹³⁴ New Zealand Telecom Limited "Telecom to spend NZD 59 million on Rural Network" (press release, 20 June 2005).

¹³⁵ Commerce Commission, above ch 3, n 323, at 7.

Telecom's investment in rural areas was therefore equivalent to less than half the amount of local TSO net costs.¹³⁶

To deal with such issues, New Zealand has since 2011 applied contestable bidding for performance of universal broadband programmes and adjusted its regulations for the TSO service provision toward the minimisation of subsidies. The bidding process was designed as a two-stage auction.¹³⁷ Bidders publicly discussed elements of their proposals, and placed competitive pressures on other bidders and lowered industry contributions.

D Proposals for Improvement of the Legal Framework with regard to Contestable Bidding Processes in Vietnam

One of three main problems related to the subsidy of universal service funds is the lack of reverse auctions for selection of the most economic and cost-effective universal service providers. There is no statement of compulsory or absolutely prioritised contestable bidding process in selecting universal service providers and projects of universal service delivery.¹³⁸ At the same time, there is no adequate legal framework for reverse auctions in Vietnam. The existing legal framework for bidding focuses on bidding performance of construction projects, but excludes projects for provision of public services. There is no specific regulation that could be applied so as to facilitate a reverse auction for the delivery of universal services.

It is proposed to improve the contestable bidding arrangements for universal service delivery so as to minimise subsidies and levies. The current arrangements for subsidies from universal service levies in Vietnam distinguish subsidies for deployment of telecommunications infrastructure in universal service-qualified areas, from subsidies for providing (universal service provider) and using (households/individuals) universal services in universal service-qualified areas. The proposals focus on how to define the requirement to apply reverse auctions for projects for deploying infrastructure in universal service-qualified areas (development of universal access), and on

¹³⁶ Ministry of Economic Development, above ch 3, n 331, at [221].

¹³⁷ The two-stage bidding process is also applied for rural broadband projects in the United Kingdom. See Department for Environment, Food and Rural Affairs "Rural Development Programme for England and Broadband Delivery UK: Applicant's Handbook - Expression of Interest Round Three" (2013), at 12-13.

¹³⁸ See Chapter Four III.C.1.(c).(3).

improvements of specific regulation for effectively implementing reverse auctions for universal service delivery.

1 Contestable bidding must be absolutely prioritised

Reverse auctions for universal service delivery should be absolutely prioritised over direct contracting and government allocated assignments. It is proposed to amend the introduction to art 1 of the Bidding Act 2005¹³⁹ and insert a new section (s 4):

This Act requires contestable bidding to select the contractors for provision of consulting services, purchasing goods, provision of public services, and the provision of installation/construction services in relation to the following projects:

...

4) Projects for the installation, development and extension of telecommunications infrastructure in universal service-qualified areas and projects for the provision of universal services to householders/individuals in universal service-qualified areas using universal service funds.

At the same time, art 20 s 4 of the Telecommunications Act 2009 needs to be amended as follows:

4) The selection of service operators to provide universal services (including installation, development and extension of telecommunications infrastructure in universal service-qualified areas) must be conducted in the following order: contestable bidding, direct contracting and government allocated projects.

Direct contracting and government project allocation of universal service delivery are applicable only if contestable bidding cannot be done due to specific conditions as determined by the MIC in the regulation on the implementation of universal service programmes, such as having a single qualified service provider in a specific geographical universal service-qualified area.

¹³⁹ The Bidding Act 2005 art 1 provided that:

This Act requires contestable bidding (reverse auction) to select the contractors for provision of consulting services, purchasing goods, provision of public services, and the provision of installation/construction services of the following projects:

1. Projects of development investment using more than 30% government budget...
2. Projects using government budget for purchasing products for ordinary operation of state organs, political organisations...;
3. Projects using government budget for purchasing products for repairing, innovating equipment, facilities, buildings of state-own enterprises.

In addition, art 5 s 4 of Decree 31 (2005)¹⁴⁰ Annex C (including universal services in annex C in which contestable bidding and ordering are applicable for selecting service providers) should be amended to read:

Contestable bidding is compulsory and the first option for selection of all public utility service providers. Other options such as direct contracting or government allocated projects are applicable only if contestable bidding is impossible due to there being only one qualified service provider in the specific geographical area.

Accordingly, it is proposed to amend Decision 1643/QD-TTg Part VI s 3 (b) which distinguishes between projects for development and extension of telecommunications infrastructure in universal service-qualified areas. It would read:

Service providers engage in projects or contracts for development of telecommunications infrastructure and provision of universal services in universal service-qualified areas through the contestable bidding process. Other options such as direct contracting or government allocated projects are applicable only if contestable bidding is impossible.

2 Improved specific regulations to implement contestable bidding

The Government should issue a separate Decree guiding the implementation of the Bidding Act 2005 and selecting the contractor(s) for providing public services, including providing universal services. Alternatively, art 1 of Decree 85/2009/ND-CP¹⁴¹ could be amended to read that the selection of service providers for public utility services should be done and prioritised through contestable bidding. In addition, Decision 1643/QD-TTg art 2 s 3 should be amended by insertion of a clause stating that the MIC is to be the main body - in coordination with the MPI - for issuing a Joint Circular¹⁴² to guide the process on contestable bidding (reverse auction) for projects of universal service delivery.¹⁴³

This Joint Circular needs to provide a comprehensive framework for reverse auction design and processes. It should be an open, transparent and non-discriminatory tender

¹⁴⁰ Decree 31/2005/ND-CP stipulating production and provision of public utility services and goods.

¹⁴¹ Decree 85/2009/ND-CP guiding on the implementation of the Bidding Act 2005 and selection of contractors for construction project as defined in the Construction Act.

¹⁴² See above ch 4, n 74.

¹⁴³ This suggestion is in line with Decree 85/2009/ND-CP art 76 s 8 which provides that ministries may issue detailed instructions on some articles of the decree (if necessary) but not contrary to relevant articles in the decree.

process seeking the selection of the most economically advantageous offer, designed to minimise the cost of investment and the associated universal service funds, whilst still ensuring an appropriate level of service.¹⁴⁴

The Joint Circular should explicitly spell out the key objectives for introducing reverse auctions for universal service projects in Vietnam, such as (1) increasing consumer choice and benefits to customers in terms of pricing, service innovation and service quality in universal service-qualified areas; (2) improving infrastructure in universal service-qualified areas and ensuring open-access to government-subsidised (universal service-funded) infrastructure; (3) providing more equitable access to universal service subsidies and promoting non-discrimination; (4) reducing the underlying costs of delivery of universal services; and (5) encouraging collaboration and mutual leveraging off existing assets. These objectives could be used as the guiding principles to underpin the details in the Joint Circular.¹⁴⁵

The Joint Circular should clearly establish the determination of geographical units in the universal service-qualified areas. These geographical determinations would then be utilised in auctioning projects for universal service delivery, and as units for estimating the cost of universal service delivery. This geographic determination must not be the same as the definition of universal service-qualified areas as stated in Part IV s 1 of Decision 1643 (2011).¹⁴⁶

Geographic areas should be sizeable population density areas, served by telephone exchanges with a determined number of total lines. This would allow bidders to value more precisely projects, and assist the VTF with contract management. It is proposed to adopt the subscriber cluster model from the New Zealand experience to calculate the net cost of universal service delivery.¹⁴⁷ Bid invitations should include location data for exchanges and cabinets¹⁴⁸ in universal service-qualified areas.

¹⁴⁴ European Commission “State aid no. N 157/2006 - United Kingdom: South Yorkshire Digital Region Broadband Project” (2006), at 10.

¹⁴⁵ An example of this can be found in the Australian Communications Authority’s Universal Service Obligation Contestability Guidelines, 2001 and New Zealand Government’s documents for Rural Broadband Initiative 2010.

¹⁴⁶ See Chapter Four III.C.2.(c).(iii).

¹⁴⁷ A full outline of this can be found in the annual determinations for the TSO Instrument for Local Residential Telephone Service. <www.comcom.govt.nz/telecommunications/>.

¹⁴⁸ See TSO Instrument for Local Residential Telephone Service <www.comcom.govt.nz/telecommunications/>.

The Joint Circular should clarify the potential service providers eligible to participate in reverse auctions, and define the eligibility standards for auction participants without discrimination of ownership, technology or services, and ensure a reasonably large number of potential auction entrants. It is also proposed to adopt the practice recommended by the European Commission, that geographical areas to be auctioned should have a single winner and any one operator can be a bidding participant for a number of geographical areas to be auctioned.¹⁴⁹ This would avoid the situation of duplicated and overlapping investments by numerous operators in the same economically non-viable (high cost) areas. In addition, it would also enable regulators to choose the most economically efficient universal service provider in a certain number of areas, rather than a single universal service provider for all high cost areas throughout the country.

The Joint Circular should also clearly state that either single or joint bidders should be eligible to participate. The Circular, in the case of joint bidders, should include specific requirements which ensure that, should the joint bidders be the winners, this will not lead to the creation of a duopoly in universal service-qualified areas, and will instead encourage competition. Based on the New Zealand experience in performing contestable bidding for rural broadband in 2010-2011, the Joint Circular should include an article determining principles of open access requirements, including any-to-any connectivity, neutral technology, low cost to change providers and non-discrimination between service providers.¹⁵⁰

This requirement would ensure that access to universal service funded infrastructure would be available to competitors to deliver their own competing retail services. Service providers, other than universal service providers, can use it to offer services as a re-seller of wholesale end-to-end service over DSL, wholesale end-to-end wireless broadband service, or as a mobile virtual network operator, or as a roaming partner to extend their mobile network without the need to invest separately in towers. This would ensure an immediate boost to rural competition from different technologies and service providers.

¹⁴⁹ European Commission “State aid no. N 201/2006 - Greece: Broadband access development in underserved territories” (2006), at 5.

¹⁵⁰ See Chapter Three III.C.5.(c).(v).

These suggestions are based on the New Zealand¹⁵¹ and Indian¹⁵² experiences of universal service delivery.

3 Determining the reserve price for contestable bidding

It is proposed that the Joint Circular should provide that the reserve price should be determined on a maximum subsidy per subscriber connected and based on previous build-outs. At the same time, the maximum grants for the winners must be in line with the affordable financial resources of collected universal service levies, ensure minimising of grant requests, and avoid duplication of networks and infrastructure.

International experience is that a contestable bidding process has helped to significantly lower subsidies, as the lowest bidding price has often been significantly lower than the reserve price. In Columbia, for example, the average winning subsidies of the bid winners was 45% of the maximum subsidy offered.¹⁵³ The average winning subsidies in Peru were 22% of the maximum subsidies offered in 1999 and 47% in 2000.¹⁵⁴ In India, average winning subsidies were 25% and 70% of the maximum subsidy offered in 2007.¹⁵⁵ In New Zealand, although the grant awarded to the joint bidders (Telecom and Vodafone) was NZD 285 million (maximum grantable costs), the so-called ‘Community Collaboration Savings’ approach indicates that any savings in each region would possibly be used for addition to infrastructure in that region. This means that more rural infrastructure could be built if the actual construction costs are less than planned.¹⁵⁶

4 Designing contestable bidding structure and process

The Joint Circular should include a clear and comprehensive contestable bidding structure and process, namely ‘open-outcry’ auctions for projects of universal service

¹⁵¹ The full text can be found in the website of New Zealand Ministry of Economic Development, Rural Broadband Initiative: Request for Proposals for the Zone 4 Rural Broadband Initiative in 2010.

¹⁵² Similarly in India, the restriction of the number of service providers to a maximum of three under universal service schemes for subsidy of infrastructure-sharing in universal service-qualified-areas was seen as anti-competitive and discriminatory. The full text can be found in the Indian Ministry of Communications Information Technology’s Guidelines for Implementation of Universal Service Support and TRAI’s Recommendations on Infrastructure Sharing in 2007.

¹⁵³ Wallsten, above ch 2, n 172, at 4.

¹⁵⁴ Andrew Dymond and Sonja Oestmann “Rural Telecommunications Development in a Liberalising Environment: An Update on Universal Access Funds” (Intelecon Research and Consultancy, 2002), at 3.

¹⁵⁵ Wallsten, above n 153.

¹⁵⁶ This is to be seen in the Rural Broadband Agreement between the Ministry of Economic Development and Telecom New Zealand Limited (2011), Schedule 4: Payment Schedule and Process s 13.

delivery. This enables various bidders to see what others are bidding, and makes public the various elements of their proposals. And at the same time it creates a descending bid design.

The bidding process should be in two stages: an Expression of Interest (EOI) stage and a Request for Proposals (RFP) stage. The two-stage bidding process would enable the responsible agency in Vietnam (the MIC or the VTF) to gather adequate and sufficient information about the interest, intent and initial estimates of potential bidders. This would help them make more informed decisions when finalising an RFP. At the same time, potential bidders would have more time to prepare detailed proposals. This method would also provide greater flexibility for operators to take into account developments with regard to the scope and character of the universal services being auctioned. Likewise it would enable a larger number of potential bidders to express interest in participating at relatively low cost.

The Joint Circular should include the instruction that potential bidders should during the EOI stage provide the following information about their technology approach for serving in universal service-qualified areas: an indication of the prices they intend to charge at both the wholesale and retail levels;¹⁵⁷ the regions of the country (universal service-qualified areas) they are interested in bidding for; and when they would be ready to submit RFPs. After the assessment of EOIs, a RFP would be released and include the major contents, among them such detail as (1) the regions for which bids are being sought; (2) the minimum service level requirements; (3) the minimum level of open access requirements; (4) standards and interconnection requirements; and (5) the criteria upon which bids will be assessed.

The evaluation of proposal and the selection process should be divided into four stages: (1) determining the preliminary shortlist of proposals through the assessment of proposals against the 'Eligibility Criteria'; (2) evaluating proposals in the preliminary shortlist against the 'Evaluation Criteria' and identifying one or more preferred providers; (3) substantive negotiation with preferred providers on all key terms of the formal agreements; preferred providers could be requested to submit a revised offer

¹⁵⁷ European Commission "State aid no. N 201/2006 - Greece: Broadband access development in underserved territories" (2006), at 3-4.

which would remain open for acceptance by the responsible agency (the MIC or the VNTA); and (4) final selection and contract with the preferred suppliers.¹⁵⁸

V Subsidies to Universal Service Providers and Residential Subscribers in Universal Service-Qualified Areas

Other obstacles to effective and efficient performance of universal service delivery are related to subsidies to universal service providers and residential subscribers in universal service-qualified areas.¹⁵⁹ These subsidies are currently made through: (1) subsidies for projects for development of telecommunications infrastructure in universal service-qualified areas¹⁶⁰ and research and development projects for end-user equipment using for universal service delivery;¹⁶¹ (2) subsidies for residents in universal service-qualified areas to use universal services (this subsidy is paid through universal service providers and deducted from monthly telecommunications service bills of subscribers); (3) subsidies for telecommunications operators to provide universal services in universal service-qualified areas; (4) providing loans at below-market rates to projects for development of telecommunications infrastructure in universal service-qualified areas; and (5) subsidies for providing compulsory telecommunications services¹⁶² in the whole country.

¹⁵⁸ A full description of this is to be found in the New Zealand Government's Rural Broadband Initiative: Request for Proposals for the Zone 4 Rural Broadband Initiative in 2010.

¹⁵⁹ Community facilities such as schools are not targeted groups to be subsidised from universal service funds in Vietnam. Instead, there are separate programmes to support deployment of Internet access infrastructures to these groups through different resources, ODA projects or sponsored by service providers. For instance, Viettel Telecommunications Group has had a memorandum with the Ministry of Education since 2008 to roll out a programme (namely Connecting Education Network) in terms of which Viettel will provide free and permanent Internet ADSL access infrastructures for 100% of primary and secondary schools, kindergartens, community education centres, training and educational institutions; reducing up to 70% the connection costs for optical fibre connections to universities and colleges etc. In addition, broadcasting service providers may be subsidised from universal service funds for their investment in digital facilities for broadcasting programmes or channels containing essential information to remote, isolated, islands and exceptionally difficult areas (see the PM's Decision 119/QĐ-TTg (2011) approving the project for development of rural information and communications for the period 2011-2020, art 1 Part VI s 4 (b)).

¹⁶⁰ This type of non-reimbursed subsidy from universal service funds for projects for development of telecommunications infrastructure in universal service-qualified areas was not carried out during the period 2006-2010.

¹⁶¹ This type of subsidy from universal service fund was added in 2011, according to Decision 1643/QĐ-TTg.

¹⁶² Compulsory telecommunications services include telecommunications services for the purpose of rescue and disaster prevention, emergency callings, fixed telephone directory and telecommunication services for urgent activities (Decision 1643/QĐ-TTg Part III s 2).

A Underlying Principles for Improved Subsidy from Universal Service Funds

One of the most important decisions of regulators is how to provide subsidies from universal service funds efficiently and effectively. Generally the determination of subsidies should ensure the best possible benefits for universal service funds.¹⁶³ In addition, subsidies should be given the highest priority on universal access projects.¹⁶⁴ The focus on universal access projects is relatively achievable and realistic for subsidies, particularly in countries with low telecommunications density and level of usage of universal services.¹⁶⁵

The determination of precise target groups of the population (beneficiaries) and target areas plays an important role in improving efficient and effective subsidies. Universal service policy has typically been focused on relatively small areas, using census data to ascertain the number and location of households.¹⁶⁶ Definition of target groups for subsidies should be based on geographical areas divided into differently targeted areas.¹⁶⁷ Target groups and target areas should be those that are most at risk of ‘market failure’, where the telecommunications operators cannot economically provide the required services without subsidies.¹⁶⁸

Types of subsidies must be in line with the regulatory objectives of telecommunications policies, such as competitive neutrality of technology and service. Subsidy to service providers should encourage operators to enter the market but not create an unending dependency on subsidies¹⁶⁹ nor limit the technology choice of residents.¹⁷⁰ At the same time subsidies to subscribers should accurately interpret the needs and preferences of customers. This in turn helps facilitate the sustainability of the outcomes of universal service programmes.

¹⁶³ Townsend, above ch 2, n 184, at 78.

¹⁶⁴ *Ibid*, at 77.

¹⁶⁵ *Ibid*, at 73.

¹⁶⁶ Laffont and Tirole, above ch 2, n 128, at 238.

¹⁶⁷ Weller, above ch 2, n 170, at 648.

¹⁶⁸ Townsend, above n 163.

¹⁶⁹ International Telecommunications Union, above ch 2, n 55, at 35.

¹⁷⁰ Townsend, above n 163, at 74.

The calculation of subsidy levels should ideally be based on relevant costs and assumed demand.¹⁷¹ Regulators should ensure that they are not providing more in subsidies than is warranted by the actual social benefit the subscriber will receive. The regulator should determine the actual universal service cost so that they can allocate minimum levies to operators and subscribers.¹⁷² Cost-based modeling and competitive bidding are two common ways for determining level of subsidies. Using the cost-based model to identify costs at the level of specific areas is a very demanding requirement,¹⁷³ and sometimes ineffective due to the lack of the necessary cost information.¹⁷⁴ Instead, a competitive bidding process is typically designed to efficiently allocate subsidies to operators requiring the lowest subsidy.¹⁷⁵ This is particularly effective where the regulator does not have sufficient capacity to determine the cost of universal service rollout independently, or where due to information asymmetries the regulator cannot properly assess the cost of providing universal services.¹⁷⁶

B The Situation of Universal Service Subsidies in Vietnam

The two main groups supported by the universal service policy in Vietnam are universal service providers providing services in universal service-qualified areas, and subscribers (individuals or households) using universal services.¹⁷⁷ A good policy will increase the availability of service access through subsidies to telecommunications operators, and the affordability of service through subsidies to end-users in universal service-qualified areas. However, there remain the following obstacles to efficient and effective universal service subsidies to providers and to residents:

- (1) lack of contestable bidding for the selection of projects for the development and expansion of infrastructure in universal service qualified areas;¹⁷⁸
- (2) inappropriate definition of universal service-qualified areas;

¹⁷¹ International Telecommunications Union, above n 169, at 35.

¹⁷² International Telecommunications Union, above ch 2, n 55, at 38.

¹⁷³ Cost-based modelling is used for funding universal service delivery in many countries, including New Zealand and Australia.

¹⁷⁴ International Telecommunications Union, above ch 2, n 55, at 39.

¹⁷⁵ Muenste-Kunigami and Sabater, above ch 2, n 102, at 36.

¹⁷⁶ International Telecommunications Union, above n 169, at 36.

¹⁷⁷ Other groups also enjoy subsidies from universal service policy are every citizen in using compulsory (such as urgent calling) telecommunications services and specific people in using HF wireless receivers on deep-sea fishing boats. See Part I s 2 (d) and Part II s 2 (c) of Decision 1643/QĐ-TTg.

¹⁷⁸ See Chapter Five III.

- (3) confused definition of targeted groups (individuals or households; cultural, postal and telecommunications centres in rural communes);
- (4) inappropriate types of subsidy (loans at below-market rates, research and development projects, free equipment); and
- (5) no links with the real cost of providing universal services.

The definition of the areas targeted for being subsidised from universal service funds in Vietnam is not based on appropriate geographic and high-cost criteria. Instead, universal service-qualified areas are defined by the density of subscribers and the socio-economic conditions. This determination of universal service-qualified areas has resulted in subsidies not being in line with the net cost (full or partial) of providing universal services, nor efforts to minimise such a net cost. At the same time, universal service delivery has focused only on the achievement of required density¹⁷⁹ in universal service-qualified areas without any adequate consideration of the cost-effective subsidies from universal service funds.

The unclear definition of universal service targeted groups has been another obstacle to efficient and effective subsidies from universal service funds. Subscribers being either individuals or households in universal service-qualified areas have been entitled to subsidies. At the same time, there have been a number of universal service providers in the same geographic areas.¹⁸⁰ These universal service providers enjoy subsidies from universal service funds according to the number of subscribers, and they have typically tried to increase their universal service subscribers, regardless of overlap with other universal service providers, so as to receive higher subsidies. This has resulted in overlapping subsidies and conflict with the basic principles of mitigating universal service subsidy (and consequently universal service levies). This has also resulted in confusion as to the number of subscribers per 100 inhabitants or the subscribers per households in universal service-qualified areas.

¹⁷⁹ With the definition of universal service-qualified areas as those with fixed telephone subscribers less than 2.5 per 100, the objective of the universal service programme 2006-2010 required increasing the density in these universal service-qualified areas to 5 per 100.

¹⁸⁰ The shortcoming of having more than one universal service providers in a specific geographical area is discussed and solutions proposed in section 3.

Inappropriate types of subsidy such as loans at below-market rates, free end-user terminals for subscribers, and research and development projects for end-user equipment for universal service programme should be abandoned. These types of subsidies are either duplicated or unfair (loans at below-market rates), costly with no sustainable outcomes (free end-user terminals for subscribers at household level), inconsistent with commitments made by Vietnam to WTO or with the Vietnam Telecommunications Act 2009 (research and development projects). In addition, there have not been any subsidies to projects for the development and expansion of infrastructure in universal service qualified areas through contestable bidding processes, except by the way of loans at below-market rates.

C Universal Service Subsidy in New Zealand

In New Zealand subsidy to the TSO service provider has been based on the cost of providing TSO services (cost-based modelling). The cost measure was defined as “unavoidable net incremental cost to an efficient service provider for providing services required by the TSO instrument to commercially non-viable customers”.¹⁸¹ This cost is the difference between the long-run costs an efficient service provider would incur with and without the obligations imposed by the TSO instrument. Furthermore, an efficient service provider is defined as one “producing a given quantity and quality of service at the lowest possible cost”.¹⁸² Finally, the subsidy to the TSO service provider can be made only after calculating the net cost and allocating it to telecommunications operators.

The system for TSO subsidy in New Zealand was superior to that in Vietnam, as a result of the alignment between the payment to the TSO provider and the efficient cost of the TSO service. The TSO payment was simply the notional ‘loss’ incurred by universal service providers due to providing TSO services to residents in ‘high-cost areas’. From 2010, the calculation of the TSO cost for residential telephone service was done at the national level and compared with the overall provision of such TSO service.

¹⁸¹ Commerce Commission, above ch 3, n 246, at [30].

¹⁸² Ibid, at [39].

Although the legal framework did not directly mention who would be beneficiaries of the TSO scheme, the Telecommunications Act 2001 s 70(1) describes the purpose of Part 3 of the Act as facilitating the supply of certain telecommunications services to groups of end-users within New Zealand to whom those services might not otherwise have been supplied on a commercial basis, or at a price that was considered by the Minister of Communications to be affordable to those end-users.¹⁸³ Therefore, targeted groups for the TSO policy could be interpreted as end-users in high-cost areas, also referred to as ‘commercially non-viable customers’ (CNVCs),¹⁸⁴ where a TSO provider would not provide service without compensation from the TSO scheme.

A specification of geographical areas is involved in the determination of CNVCs and essential for calculating TSO costs. CNVCs were identified on the basis of a ‘cluster-of-customers’. Each cluster, in calculating the net cost of the TSO instrument, would be identified as either ‘viable’ or ‘non-viable’ and the total of the net costs of all the non-viable clusters determines the total TSO net cost.¹⁸⁵

D Proposals for Improvement of the Universal Service Legal Framework in Vietnam with regard to Subsidies

Improvements for the short-term (the period of 2011-2015) subsidies to universal service providers and to household/individual subscribers in universal service-qualified areas can be achieved by amendments of Decision 1643 (2011). This would ensure effective and efficient subsidies to the targeted beneficiaries in the more precisely defined and targeted geographical areas. Amending types of subsidies should help to lower the costs of subsidies, avoid discrimination between beneficiaries and maintain the results of the previous universal service programme 2006-2010. In particular, subsidies for universal service providers as defined in Part II Section 3 of Decision 1643 (2011) should be based on the net cost for maintaining and providing universal services in universal service-qualified areas.¹⁸⁶ The Telecommunications Act 2009 and relevant regulations in all subordinate legal documents should be also amended to require a contestable bidding

¹⁸³ The Minister of Communication however has never made such a determination.

¹⁸⁴ Telecommunications Act 2001, s 5.

¹⁸⁵ Ibid, s 50.

¹⁸⁶ Suggestion for using the net cost will be proposed in further detail in the long-term suggestions for improvements of subsidies.

process for the selection of the most economic, cost-effective universal service provider with the lowest subsidy required, for every project for developing and extending the telecommunications infrastructure in universal service-qualified areas. There follow seven principal proposals, all of which are of relatively equal importance.

1 Loans at below-market rates from universal service funds

Availability of loans at below-market rates should be removed. In the short term - as a suggested improvement during the five-year universal service programme 2011-2015 - It is proposed to issue specific regulations on the process of providing loans at below-market rates from universal service funds for projects to install, develop and extend telecommunications infrastructure in universal service-qualified areas. Firstly, art 2 s 2 of Decision 1643/QD-TTg should insert a new clause which would read that the Minister of Finance jointly with the Minister of Information and Communications issue a Joint Circular guiding the process and the mechanism for providing loans at below-market rates to universal service projects. At the same time, it is proposed to amend Decision 191/2004/QD-TTg art 7 s 1 (b) so as to avoid discrimination between universal service providers and other operators who have projects to develop or upgrade telecommunications infrastructures in universal service-qualified areas:

- b) Providing loans at below-market rates to telecommunications operators and ISPs to invest in new deployment, upgrading, extension of telecommunications infrastructures in universal service-qualified areas.

The Joint Circular¹⁸⁷ should provide a comprehensive framework for the process and mechanisms for providing loans at below-market rates to universal service projects. At the same time, it must ensure a transparent process, with criteria for selecting projects and operators, and ensuring competitive neutrality and non-discrimination between service providers. It must also state clearly that only projects to develop telecommunications infrastructure in universal service-qualified areas are eligible for loans at below-market rates from universal service funds. However, the Joint Circular should state that the cost of the implicit subsidy element that telecommunications operators receive from loans at below-market rates (such as the balance of interest rates

¹⁸⁷ See above ch 4, n 74.

between normal loans from commercial banks and loans at below-market rates from the VTF) needs to be included in the reserve price.¹⁸⁸ Alternatively, bidders should make their own arrangements for funding capital works without any loans at below-market rates from universal service funds. Otherwise, operators with loans at below-market rates from universal service funds will have an unfair advantage over operators without loans at below-market rates from the VTF, such as double dips or putting lower bid prices in any contestable bidding process.

Other essential financial issues to be covered in the Joint Circular would include defining the period of loans at below-market rates, interest rates, accountability for making decisions, specific guidance on requisite documentation, maximum level of loans at below-market rates, the period for reimbursement, and the management of loans at below-market rates.¹⁸⁹ The promulgation of such a Joint Circular would help the effective and transparent use of universal service funds as investments from the public budget, and also ensure competitive neutrality and equity between telecommunications operators. This is because the majority (80%) of the Charter's¹⁹⁰ universal service funds¹⁹¹ was made up of contributions from universal service levy payers during the period 2006-2010.¹⁹² Transparent processes for evaluating and selecting projects for awarding loans at below-market rates would help to avoid decisions which result in unfair and discriminatory subsidies or subsidies to ineligible projects or operators.

The long-term suggestion is to remove s 6 from Part II of Decision 1643/QD-TTg regarding loans at below-market rates from universal service funds for projects for development of telecommunications infrastructure in universal service-qualified areas. The application of loans at below-market rates from universal service funds had negative effects, such as providing funds to non-eligible projects and operators - due to lack of

¹⁸⁸ See Chapter Five III.D.

¹⁸⁹ General regulation of the Joint-Circular guiding the process and the mechanism for providing soft-loans from universal service funds to universal service projects could use relevant regulations from the Ministry of Finance's Circular 156/2009/TT-BTC (2009) guidance on the loans from the Vietnam Development Fund for projects to develop rural transport infrastructures.

¹⁹⁰ Charter's VTF organisation and operation issued by the MIC's Decision 7/2005/QD-BBCTV (2005).

¹⁹¹ PM's Decision 1643/QD-TTg Part V s 2(b) states loans at below-market rates were provided from the Charter's universal service funds.

¹⁹² Decision 191/2004/QD-TTg art 6 s 1 defines that the Fund's Charter Capital was VND 500 billion, of which the State budget capital is VND 200 billion (to be allocated in 2 years as from the time the Fund starts operation) while the remaining amount is added from annual contributions of telecommunication enterprises (defined in art 6 s 2) in the first three years as from the time the Fund starts operation so as to acquire sufficient charter capital. In fact, VND 400 billion of the Fund's Charter Capital was contributed from universal service levies.

transparency and sufficient regulation - while some operators and projects were eligible but could not obtain loans at below-market rates. At the same time, projects for telecommunications infrastructure in universal service-qualified areas (rural and islands) should be eligible for loans at below-market rates from State Commercial Banks and Social Development Banks, as are other projects for rural development.¹⁹³

2 Subsidies for research and development projects

It is proposed to remove this type of subsidy from universal service funds for research and development projects of end-user telecommunications equipment for the universal service delivery.¹⁹⁴ This type of subsidy does not fit well with WTO commitments about telecommunications services, or with international experience of universal service policies and is not consonant with the Telecommunications Act 2009.¹⁹⁵ The business of producing telecommunications products, including research and development projects for producing telecommunications end-user equipment, should not be regulated or subsidised in any way that results in an unfair and anti-competitive market. Producers having telecommunications equipment subsidised from universal service funds have advantages when their products are purchased and used in the market. At the same time, subsidies for research and development projects to produce specific end-user equipment for universal service programmes may possibly result in only a single product being available, and limit the choice of customers. The selection of the end-user terminals to be used by customers should be left to the customer, including those living in universal service-qualified areas, rather than decided by the Government or regulatory authorities through subsidies for producing either terminal or access equipment.

¹⁹³ According to art 4 s 2 of the State Bank's Circular 6/2009/TT-NHNN (2009) guidance on loans at below-market rates for projects in poor districts as defined by the Government's Resolution 30A/2008/NQ-CP (2008), enterprises have projects to develop their business in 61 poor districts and qualified conditions as defined in the State Bank's Decisions 1627/2001/QD-NHNN (2001), 127/2005/QD-NHNN (2005), 783/2005/QD-NHNN (2005) will be entitled to loans at below-market rates from State Commercial Banks.

¹⁹⁴ PM's Decision 1643/QD-TTg Part II s 5.

¹⁹⁵ This proposal of the Ministry of Information and Communication was opposed by some ministries, such as the Ministry of Finance. However, the Prime Minister finally decided to include this type of subsidy from universal service funds.

3 Subsidies for cultural post and telecommunications centres

A statement in the legal framework that cultural post and telecommunications centres are automatically entitled to subsidies from the VTF is unnecessary.¹⁹⁶ It is recommended to remove the clause in s 1(d) Part II of Decision 1643 (2011) which defined the cultural post and telecommunications centres as projects eligible for subsidies from universal service funds. That section states at the moment:

d) Subsidies for enhancing quality and availability to provide telecommunications services at the cultural post and telecommunications centres in communes of the Government's Programme 135 phase II¹⁹⁷ and frontier posts.

This proposal is in line with international experience and the circumstances in Vietnam, where the cultural post and telecommunications centres no longer operate under the telecommunications legal framework and are separate from telecommunications.¹⁹⁸ Instead, subsidies for development of telecommunication infrastructure and for providing universal services at cultural post and telecommunications centres should be regulated as projects for development of telecommunications infrastructure in universal service-qualified areas.

Alternatively, subsidies for the development of telecommunication infrastructure and for providing universal services at any cultural post and telecommunications centre in rural communes within universal service-qualified areas would be included in subsidies for maintaining and providing universal services as public telecommunications service centres.

¹⁹⁶ See Chapter Four III.C.1(c)(5)(vi).

¹⁹⁷ PM's Decision 135/1998/QĐ-TTg 1998 approved the national programme for socio-economic development of remote and mountainous communes having exceptional difficulties (Programme 135). In 2006, PM's Decision 164/2006/QĐ-TTg approved the lists of communes qualifying exceptionally socio-economic difficulties, border communes and communes in former resistance bases to be covered by the programme on socio-economic development in communes qualifying exceptionally socio-economic difficulties in ethnic minority and mountainous areas in the 2006-2010 period (Programme 135 phase II).

¹⁹⁸ The system of cultural post and telecommunications centres in rural communes was operated entirely by the Vietnam Post Corporation, in accordance with the PM's Decision 674/2007/QĐ-TTg approving the establishment of Vietnam Post Corporation, MIC's Decision 16/2007/QĐ-BTTTT, setting up Vietnam Post Corporation (Vietnam Post Corporation since 1 January 2008), and relevant regulation in the Postal Act 49/2010/QH12 (2010) and Decree 47/2011/ND-CP.

4 Subsidies for computers

Subsidies for end-user devices (computers) at the household levels in universal service-qualified areas do not reflect economic efficiency or ensure sustainable outcomes but create unnecessary financial burdens on operators to pay levies.¹⁹⁹ Thus, it is proposed to remove subsidies for computers for household subscribers in universal service-qualified areas because they have no necessary link to universal service.²⁰⁰ Subsidies should include only monthly subscription fees plus a maximum data allowance for Internet service users at household levels. In addition, targeted areas should be defined more precisely as communes where the Internet density is lower than 2 per 100 households. Decision 1643/QD-TTg Part II s 2 (b) should be amended and read:

Providing subsidies for Internet subscribers (households) with 100% of monthly subscription fee plus a fixed and determined data allowance for Internet subscribers (households) in communes where the Internet density is lower than 2 per 100 households.

The latter suggestion is based on the idea that the geographical areas should be smaller and more precise so as to provide subsidies directly to the more targeted and prioritised areas with a low density of subscriptions. Some communes, normally more central or urban communes, in districts with Internet subscription lower than 2 per 100 household, would have higher penetrations. The existing section states that “communes within districts with Internet density lower than 2 per 100 households” will be entitled to subsidies from universal service funds. The wide and unfocused small-size geographical areas will result in unfocused and poorly prioritised subsidies.

Concurrently, while spending on subsidies might be higher, universal service providers have preferred to provide services and develop subscriptions in the more central or urban communes rather than remote or isolated communes (higher-cost areas). As a result, communes with a lower density of Internet subscriptions may not get an expected increase, while such densities in the central or more urban communes may increase more quickly.

¹⁹⁹ See Chapter Four III.C.1(c)(5)(v).

²⁰⁰ This new type of subsidy for computers is included in Decision 1643/QD-TTg (2011) for the period 2011-2015.

The proposal for the removal of subsidies for end-user equipment is based on the practical experience of Vietnam's universal service delivery over the programme 2006-2010. Providing free telephone sets for fixed telephone subscribers in universal service-qualified areas resulted in higher and duplicated costs from universal service funds. However, the type of subsidy did not ensure the maintenance of sustainable outcomes of the universal service programme. The fixed telephone density in Vietnam, which reached to 17.13 per 100 inhabitants in 2010,²⁰¹ of which the density in rural areas was about 16 per 100 inhabitants,²⁰² dropped to 11.46 per 100 inhabitants in 2012.²⁰³ In addition, subsidising computers at the household level would be extremely expensive. Thus universal service programmes could pay for computers to be installed at public access points, rather than in households. Subsidies for local residential telephone subscribers from TSO levies in New Zealand excluded costs for any customer's premises equipment, including telephone sets.²⁰⁴ Similarly, in New Zealand, subsidies for operators to carry out the projects for rolling out the rural broadband infrastructure from 2011 through the contestable bidding process did not cover any costs for customer premises equipment.²⁰⁵

5 Subsidies for monthly subscription fee of fixed telephone

Subsidies for fixed telephone end-users reflected discrimination between subscribers of the programme 2006-2010 and those in the programme 2011-2015 in universal service-qualified areas. This distinction of subsidies between existing and new subscribers is inconsistent with policy objectives and would lead to negative consequences, such as unsustainable outcomes of the programme 2011-2015. Thus, Part II s 2 (a) of Decision 1643/QĐ-TTg should be amended with a more specific description of subsidies without distinction between current or new subscribers in universal service-qualified areas, as follows:

²⁰¹ See Chapter Four III.C.1(c)(v).

²⁰² See Chapter Four III.C.2(c).

²⁰³ International Telecommunications Union ICT Indicators Database (2013) <www.itu.int/ITU-D/ict/statistics/>.

²⁰⁴ This can be seen in annual determinations of the net cost for local residential telephone in NZ over the period 2001-2010, the compensation to TSO service providers was the net cost for providing TSO service and excluded any cost for providing free telephone sets.

²⁰⁵ Rural Broadband Initiative: Request for Proposal for Zone 4 Rural Broadband Initiative (2010) Appendix 6: Proposed Contract Principles section 5.2 and the Rural Broadband Agreement between the Ministry of Economic Development and Telecom New Zealand Limited (2011).

Providing subsidies for the monthly subscription fee for fixed telephone (100%)²⁰⁶ plus a limited (minimum) minute allowance of local fixed calls for all fixed residential telephone subscribers (household or individual) in universal service-qualified areas (communes in the Government's Programme 135 Phase II).

The current s 2 (a) in Part II of Decision 1643/QD-TTg defines the subsidy from universal service funds for charges for using universal services as applying only to 'new' fixed telephone subscribers (household).²⁰⁷ The determination that the only beneficiaries for subsidies from universal service funds are new subscribers resulted in an unnecessary and unfair distinction between existing subscribers and new ones. Both current and new residential subscribers who are located in the same universal service-qualified areas should have equal rights to enjoy subsidies from the universal service policy. In addition, the elimination of the subsidy for current fixed telephone subscribers in the universal service-qualified areas would have a negative effect on the key objective of the universal service programme 2011-2015, and not maintain the positive outcomes of the universal service programme 2006-2010. Without subsidies for using universal services, the household or individual subscribers in the same universal service-qualified areas (communes in the Government's Programme 135 Phase II)²⁰⁸ would not be able to afford to use universal services and would unsubscribe from such services.

The existing section of Decision 1643/QD-TTg is too general in its description of subsidies for subscribers 'using telephone services' in universal service-qualified areas. It can be interpreted as meaning that subsidies will include charges for national and international calls from fixed telephones, or calls from fixed telephone to mobiles. This has led to misunderstanding by subscribers in universal service-qualified areas that subsidies may cover other services such as international, mobile and national calls. As a result, many households used these services and then disputed their liability to pay for the calls. In 2011, 465 households in Bac Ha communes (Lao Cai mountainous province) were sued by a universal service provider (VNPT) but they claimed that the

²⁰⁶ In Vietnam, there are two separate components of fixed telephone service charges: (1) A fixed monthly subscription fee (VND 20,000); and (2) calling charges per minute. I suggest subsidising 100% of costs for the fixed monthly subscription fee (VND 20,000) plus minimum local fixed calling minutes. Other costs will be paid by subscribers.

²⁰⁷ The universal service programme 2011-2015 continues to provide subsidies for the target group of individual/household fixed telephone subscribers with a monthly subscription fee for new but not for existing subscribers in universal service-qualified areas.

²⁰⁸ See above n 197.

operator did not explain clearly about which telecommunications services were excluded in the subsidies of the universal service scheme.²⁰⁹

Subsidies for using universal service telephone services should be limited to monthly subscription fees, plus a minimum allowance for local fixed calling minutes. Therefore, the subsidies for all subscribers in universal service-qualified areas in Vietnam to use universal services should be more clearly defined, and such subsidies should include a monthly subscription fee²¹⁰ adding a limited or minimum number of fixed local calling minutes.

6 Subsidies for subscribers in zone 3 to use fixed telephone service

Decision 1643/QD-TTg Part II s 2 (d) provides that the fixed telephone subscribers in zone 3 of universal service-qualified areas of the universal service programme 2006-2010 would be beneficiaries of universal service funds up to the end of 2013 only. It is recommended to remove the expiry date (the end of 2013) for subsidies for using universal services of fixed telephone subscribers in zone 3, which was extended from the universal service programme 2006-2010. Decision 1643/QD-TTg Part II s 2 (d) should be amended in the same way for Part II s 2 (a), which would then read:

Providing subsidies of 100% of monthly subscription fees plus a limited (minimum) minute allowance for local fixed calls for all fixed residential telephone subscribers (household or individual) in zone 3 of universal service-qualified areas as identified in the universal service Programme 2006-2010.

The proposal for more clearly defining and more detailed types of subsidies for ‘using telephone services’ of subscribers in zone 3²¹¹ of universal service-qualified areas is to ensure equal rights between residents in zone 3 and others within universal service-qualified areas to enjoy subsidies from universal service funds. This would maintain the positive outcomes of the universal service programme 2006-2010. Subsidy for using universal services for household or individual subscribers in zone 3 of the universal

²⁰⁹ Quoc Hung and Hoang Nguyen “Phút chốc trở thành con nợ” *Online Culture Newspapers* (Vietnam, 8 August 2011) <www.baovanhoa.vn/DOISONG/print-38095.vho>.

²¹⁰ Monthly subscription fee for fixed local telephone service in Vietnam determined by the MIC as VND 20,000 over the whole country.

²¹¹ Among three categories of zones 1, 2 and 3 in universal service-qualified areas with different subsidies from universal service funds during the programme 2006-2010, only subscribers in zone 3 will be subsidised by universal service funds, but only until the end of 2013 only according to Decision 1643/QD-TTg.

service-qualified areas (programme 2006-2010) should be the same as for those households or individual subscribers residing in communes in the Government's Programme 135 Phase II as defined in s 2 (a) of Decision 1643/QD-TTg.

In addition, it is proposed to remove the expiry date of subsidy (the end of 2013). There should not be any difference between subscribers located in universal service-qualified areas in the programme 2006-2010 and those in areas (communes in the Government's Programme 135 Phase II) in Section 2 (a) of the programme 2011-2015.

The elimination of the subscribers in zone 3 of universal service-qualified areas of the last five-year universal service programme 2006-2010 as beneficiaries of universal service funds after 2013 would have a negative effect on the key objectives of the universal service programme 2011-2015 for maintaining the results from the last five year universal service programme 2006-2010. Without subsidies for using universal services, the household or individual subscribers in these areas may not be able to afford to use universal services and would soon unsubscribe from such services.

For reforms after 2015, this subsidy (together with subsidies to subscribers in other universal service-qualified areas) should be removed and combined in a single subsidy to universal service providers, which should be based on the net cost (loss) for maintaining and providing universal services to residential subscribers in universal service-qualified areas.

7 Delayed subsidies from universal service funds

It is recommended to apply a penalty interest rate on delayed payment to operators by the VTF.²¹² A new subsection (c) should be inserted into art 8 s 2 of Decision 51/2008/QD-BTTTT:

(c) Within a fixed number of working days (eg 10 working days) after the date of the approval of universal service outputs performed by a universal service provider throughout the country in the previous quarter, the VTF must provide subsidies on the total approved outputs, after subtracting any amount to be paid by the VTF to universal service provider in advance.

²¹² See Chapter Five III.D.

With regard to any amount that is not subsidised to the universal service provider before the expiration of the fixed number of working day period (eg 10-working day period), the VTF must pay to the universal service providers interest on the unpaid amount of subsidies at 0.05% per day (18.25% per year) (as at 11 working days after the date of the approval) plus 5% for the period commencing on that working day to the date of payment of the whole amount.

It is proposed to significantly reform long term subsidies of universal service funds, applicable in on-going universal service programmes after 2015. The Vietnamese Government should not continue with subsidies from universal service funds for both universal service providers and for households or individuals in universal service-qualified areas to use universal service. Instead, the legal framework should be amended and state that subsidies from universal service funds will be for universal service providers only, and based on the net cost of providing universal services in universal service qualified areas. Determining the level of subsidy must ensure ‘economic efficiency’ and minimise payments, which then helps to minimise universal service levies imposed on telecommunications operators. Furthermore, the net cost for providing universal services must be interpreted as losses incurred by universal service providers in the provision of universal services in universal service-qualified areas, where the cost of supplying services exceeds earned revenues, and must be subject to independent audit.²¹³ In particular, the Article 20 s 3 Telecommunications Act 2009 should be amended to read:

3. Subsidies for the delivery of universal services are financed by the universal service fund (the VTF) and conducted through

(a) projects for development of telecommunications infrastructure in universal service qualified areas; and

(b) projects for maintaining and providing universal services in universal service-qualified areas.

Article 20 s 4 would then read:

²¹³ The Telecommunications Act 2001 s 83 stated that TSO service provider’s calculation of the net cost submitted to the Commerce Commission must enclose a qualified auditor’s report.

4. The selection of projects for development of telecommunications infrastructure in universal service qualified areas is conducted through a contestable bidding process.

Inserting s 5 into art 20 which would read:

5. The selection of projects for maintaining and providing universal services in universal service-qualified areas is conducted in the following order:

(a) Contestable bidding;

(b) Direct contracting;

(c) Government allocated projects.

Subsidies for projects for maintaining and providing universal services in universal service-qualified areas as defined in subsections (b) and (c) are based on the net cost of maintaining and providing universal services in universal service-qualified areas.

Article 22 s 2 (a) would read:

Universal service levies will be imposed retrospectively on the service revenues of telecommunications operators.

Decision 191/2004/QD-TTg art 7 s 2 should be amended and the first paragraph, which allows the VTF to use temporarily idle capital not originating from the State budget of universal service funds (unused universal service levies) to purchase government bonds, should be removed.

Accordingly, subordinate legal documents of the Government, the Prime Minister (Decision approving the five year universal service programme) and the MIC must provide detailed and comprehensive frameworks with regard to performance, including the following main issues: the relevant regulations for contestable bidding processes for projects for the development of telecommunications infrastructure in universal service qualified areas and for projects (when it is applied) for maintaining and providing universal services in universal service-qualified areas must be improved. At the same time, specific regulations to use the net cost for determining levels of subsidies (cost-based modelling) for projects for maintaining and providing universal services must be

revised and addressed. Secondly, calculating the net cost must be defined by using a proxy cost model with an effective system of cost information. The subsidies from universal service funds must be in accord with unavoidable incremental costs for providing such universal services in universal service-qualified areas. Such unavoidable incremental costs must be defined as “additional costs, such as a universal service provider would incur if it chose to provide universal services to an extra subscriber or group of subscribers in universal service-qualified areas”.

In summary, the lack of a clear link between subsidies and the actual costs of universal service delivery, and inappropriate types of subsidy, were the primary obstacles to the efficient administration of the universal service scheme in Vietnam. Proposals for the removal of inappropriate types of subsidy would simplify administration of the scheme and lower levies. Expenditures should in principle be based on the actual costs of universal service delivery. However, a contestable bidding process²¹⁴ could be a more realistic solution due to challenges in determining the actual costs of delivering universal services in Vietnam, particularly for projects to develop telecommunications infrastructure in rural areas.

VI Conclusion

This chapter has outlined a series of proposals as solutions for improving universal service delivery in Vietnam. Four principal areas - institutional arrangements, funds allocation, contestable bidding processes and funds subsidy - have been analysed, and solutions proposed which would enhance efficiency and effectiveness in universal service delivery.

These solutions are divided into immediate and long-term proposals. They are based on international universal service fund experiences and models, and on best practice models from other jurisdictions.

The obstacles to efficient and effective performance and measurement of universal service delivery in Vietnam are largely due to a lack of clear and detailed regulatory and legal structures, and low rates of compliance with existing legal frameworks. In

²¹⁴ See Chapter Five IV.D.

particular, major issues around institutional arrangements are related to lack of transparency, confusing and overlapping accountability, and insufficient performance information and reporting systems. Proposals for improvements of the administration and institutional arrangements for performance and measurement of universal service delivery therefore focus on and aim to ensure closer similarity to the best practice indicators: transparency, effective monitoring and performance accountability. On the other hand, suggestions for improvements of funding arrangements centre on solutions to enhance economic efficiency, cost-effectiveness and competitive neutrality in determining resources, allocating levies and providing subsidies.

If the short and long-term solutions proposed here were carried out they would:

- (1) clearly spell out the roles and responsibilities of the various Ministries and organisations involved with universal service, removing conflicts of interest and allocating specific roles and functions to organisations;
- (2) create more efficient and effective pathways for universal service providers to enter into and continue in universal service delivery, with particular attention to setting up structures for contestable bidding for universal service projects and programmes and establishing competitive neutrality;
- (3) set up closer monitoring of financial management, and more robust penalties regime for non-compliance with reporting and financial requirements;
- (4) lead to the establishment of a subsidy and levies model based on actual costs of providing universal services, projects and programmes.

These would be the hoped for and measurable outcomes of these proposals for comprehensive reform of the universal service administration model in Vietnam.

CHAPTER SIX

CONCLUSION

The focus of this thesis has been on identifying obstacles to effective and economically efficient delivery of universal services in Vietnam, and to propose solutions through substantial improvements in legal and regulatory frameworks and institutional structures. The obstacles relate to some key criteria of best practice models for performance-based management (management for outcomes) of public policies and programmes, such as cost-effectiveness, transparency, performance-based accountability, enhanced public and stakeholder involvement and a competitive environment.

This thesis has examined the delivery of telecommunications universal services in Vietnam and New Zealand. It has found that in Vietnam there are many shortcomings of both legal frameworks and institutional structures for the management and measurement of universal service delivery. Failures in institutional structures mostly stem from the top-down model of funding administration due to overlapping institutional responsibilities, ineffective arrangements for external monitoring, performance information and reporting systems, and minimal involvement of stakeholders and the public. Obstacles to efficient and effective delivery of universal services are mostly related to principles of cost-effectiveness and competitive neutrality between operators in terms of allocating levies and providing subsidies. The New Zealand universal service scheme offers valuable lessons, which, with some revision, could contribute to the improvement of universal service delivery in Vietnam.

Chapter Two provided an overview of universal service fundamental concepts, including the rationales and objectives of universal service policies to enhance essential and public services to all citizens, challenges to governments in improving mechanisms for collecting and disbursing universal service funds in an environment of increasing competition amongst service providers and the multiplication of technologies for the delivery of services. The funding mechanisms should meet the primary requirements of cost-effectiveness, competitive neutrality of technology and service, non-discrimination and encouraging a competitive environment. The institutional arrangements for

management and measurement of universal service delivery needs to ensure transparency, economic efficiency, performance accountability, effective public and stakeholder involvement, and effective performance information and reporting systems.

In Chapter Three the New Zealand universal service scheme was described. The chapter paid particular attention to the legal framework and institutional arrangements since 2001, with particular regard to five important issues: (1) transparent performance information and reporting systems, (2) effective performance accountability, (3) public and stakeholder engagement; (4) economic cost-effectiveness, and (5) competitive and technological neutrality.

The New Zealand universal service model reflects features closer to the best practice: transparency, effective monitoring with public and stakeholder involvement, and effective performance accountability. Moreover, universal service funding arrangements are aimed at economic efficiency, cost-effectiveness and competitive neutrality. These features of the New Zealand experience, together with international benchmarks for efficient and effective universal service structures and delivery (Chapter Two), serve as a basis for proposing solutions for improvements of universal service legal frameworks and institutional arrangements in Vietnam (Chapter Five).

Chapter Four reviewed the evolution of the legal framework and institutional arrangements for the delivery of universal services in Vietnam. The chapter identified the key obstacles to the effective and economically efficient performance and management of universal service delivery, and described significant defects in the legal framework and institutional arrangements. The universal service institutional structures in Vietnam are overly complex, and lack transparency, and well-defined functions and powers and essential skills for modern performance management. The legal framework is inadequate, highly discretionary, and fails to strike an appropriate balance between social policy and economic efficiency.

The universal service funding mechanism, including allocating universal service levies and providing subsidies, is not linked to the real costs for the delivery of universal services. Inappropriate types and determination of subsidies reflect a lack of competitive

neutrality, discrimination between operators, excessive universal service levies, and a failure to target funding to areas of the greatest need.

Based on the earlier analysis, Chapter Five made substantial proposals for the reform and restructuring of universal service institutions and regulations in Vietnam. These proposals are divided into proposals for effective and transparent institutional arrangements, and suggestions for changes to the legal framework for economically effective, non-discriminatory and pro-competitive funding arrangements, including allocating levies, regulation of contestable bidding, and improving subsidies.

Due to the complexity of the multi-layered legal system in Vietnam described in Chapter Four, most of these proposals are in the form of amendments to Government and ministerial legal documents, which would enhance the delivery of universal service within the current and next five-year programmes. Other suggestions relate to more significant long-term reforms requiring amendments to legislation by the National Assembly. Identified reforms as set out in the thesis, if applied in Vietnam, would lead to an effective and economically efficient USO delivery model, particularly minimising levies placed on the telecommunications operators and maximising the sustainable outputs of the USO programmes.

The delivery of universal services in telecommunications, as noted throughout this thesis, is based on social and political objectives and on policies of governments, which are seeking to establish minimum-cost public good services for their citizens. The delivery of universal services, unless it is totally controlled by government agencies, takes place at the interface between government policy and markets. Ensuring a fair and competitive market place, and at the same time guaranteeing the political and social objectives of telecommunications universal service, demands a suitably regulated and monitored environment. This thesis has identified shortcomings in the institutional arrangements for universal service delivery in Vietnam, and makes proposals for improved legal, regulatory and institutional arrangements consistent with both the socio-political objectives of universal service and a competitive market.

There are major challenges to establishing and monitoring the suggested reforms. In Vietnam the contextual challenge lies in winning the willingness of the government in

the socialist economy to be much more involved in reforming the industry and the industry players, and then monitoring the reforms closely. The implementation of reforms has also to be prioritised with the realities of the government's programmes and financial expenditures. It also challenges the government to be involved with other nations and markets. Such reforms should include allowing competition from private operators, whether domestic or foreign. While the operators are wholly or largely government-owned or controlled, the incentives for minimising levies and improving efficiency are largely muted - governments is on both sides of the transaction. The political challenges are openly acknowledged, but were beyond the scope of this thesis. Addressing them is itself a challenge for the future.

It is clear that major changes are needed in the Vietnamese institutional arrangements and delivery model. Best practice models rely primarily on key aspects such as transparency, accountability, public access to information, skilled financial management and competition. When these aspects become foundational to the Vietnamese model it will be economically efficient and meet the needs of its citizens for access to modern telecommunications services.

**APPENDIX ONE: THE LIST OF INSTITUTIONS OF INTERVIEWEES
CONCERNING LEGAL FRAMEWORK FOR UNIVERSAL SERVICE
DELIVERY IN VIETNAM²¹⁵**

Nr	Name of Institution
1	Vietnam Public Utility Telecommunications Service Fund - Ministry of Information and Communications (VTF - MIC)
2	Vietnam Telecommunications Authority - Ministry of Information and Communications (VNTA - MIC)
3	Vietnam Posts and Telecommunications Group (VNPT)
4	Viettel Group (Viettel)
5	Vietnam Maritime Communication and Electronics (Vishipel)
6	Saigon Post and Telecommunications Corporation (SPT)
7	Vietnam Telecom Service Company (Vinaphone)
8	University of Economics in Ho Chi Minh city (UEH)
9	Posts and Telecommunications Institute of Technology (PTIT)
10	Ministry of Planning and Investment (MPI)

²¹⁵ In accordance with ethics protocols, the names and positions of the interviewees are not listed here. That information could be made available to examiners if necessary for examination purposes.

APPENDIX TWO: GENERAL QUESTIONS TO BE POSED TO PARTICIPANTS IN VIETNAM

Interviewees are to be asked the following questions. Based on the replies of the interviewees, further discussion may take place. The order of the questions is flexible.

A. General objectives of the legal framework for universal service obligations

- 1 What are the objectives of the legal framework for universal service obligations and how are these objectives expected to be attained? Are you aware of any evaluation of the outcomes of the universal service policy? Details?
- 2 What challenges do policy-makers face in evaluating and balancing the economic efficiency of the legal framework for universal service obligations with social objectives? How do other factors (for example, politics, history, geography or culture) affect the legal framework for universal service obligations in telecommunications?
- 3 How can the legal framework for universal service obligations be improved and made more effective/economically efficient?

B. Definition and scope of universal service obligations

- 1 What criteria should be established to determine the scope, region and targeted end-users to be provided with universal telecommunications service?
- 2 How can the approach of basic or standard telecommunications services (standard telephone service and standard Internet access service) be determined in the legal framework for universal service obligations?
- 3 Should universal service obligations be extended to include broadband services in the competitive environment of the telecommunications industry? What potential issues could arise if broadband services were included in the legal framework for universal service obligations?

C. Funding mechanism

- 1 What are the possible funding sources for the cost of provision of universal telecommunications services and how should these sources be determined and funding subsequently allocated to telecommunications operators? What is the basis for the calculation of those levies? Is the process transparent?
- 2 How can the legal framework for universal service obligations be as transparent as possible, and do not create more burdensome than necessary? How should the funding sources be effectively subsidised for telecommunications operators providing universal services to end-users living in universal service regions?
- 3 How is the net cost for the provision of universal telecommunications services calculated? Could the methodology be improved?
- 4 How does the administrator decide on projects to be funded from the universal service fund? Is that process contestable by the operators? Are there clear criteria for project selection? What proportion of the annual revenues of the fund is subsidised in each year?

D. Competition policy:

- 1 What is the impact of the legal framework for universal service obligations on competition policy in terms of social welfare and economic efficiency objectives?
- 2 Is there any conflict between the universal service policy and its implementation and the competition policy in telecommunications? What could be done to ensure that the legal framework for universal service obligations does not stifle competition?
- 3 How can the legal framework for universal service obligations be competitively neutral and non-discriminatory in terms of technology, service and service provider?

BIBLIOGRAPHY

[* NB: References to authors' names follow the New Zealand Law Style Guide. Vietnamese names are presented in the Vietnamese order].

A Legislation, Reports and Other Official Sources

1 Vietnam

(a) Legislation

Bidding Act 2005.

Collective Economic Entities Act 2003.

Decree 480/TTg (1955) re-naming Vietnam Post, Telecommunications and Radio Frequency Authority as Department General of Posts and Telecommunications and belonging to the Ministry of Transportation, Posts and Telecommunications.

Decree 121-HDBT (1987) approving the Regulation on Posts and Telecommunications.

Decree 3/CP (1992) on setting up the Department General of Posts and Telecommunications.

Decree 28/CP (1993) on the Organisation and Operation of the Department General of Posts and Telecommunications.

Decree 51/CP (1995) on the Organisation and Operation of Vietnam Posts and Telecommunications Corporation.

Decree 12/CP (1996) stipulating functions, tasks, powers and structural organisation of the Department General of Posts and Telecommunications.

Decree 56-CP (1996) on state-owned enterprises providing public-utility services and providing favourable regulations such as reduction of profit tax for contributing to the enterprise's capital.

Decree 109/1997/ND-CP (1997) on Posts and Telecommunications.

Decree 86/2002/ND-CP (2002) on the Organisation and Operation of the Ministries and Ministerial-level agencies.

Decree 90/2002/ND-CP (2002) on the Organisation and Operation of the Ministry of Posts and Telecommunications.

Decree 142/2004/ND-CP (2004) determining the sanctions for administrative violations in post, telecommunications and radio frequencies.

Decree 160/2004/ND-CP (2004) providing guidance on the implementation of the Post and Telecommunications Ordinance (2002) on telecommunications.

Decree 31/2005/ND-CP (2005) stipulating production and provision of public utility services and goods.

Decree 67/2007/ND-CP (2007) on support policies for social protection beneficiaries.

Decree 187/2007/ND-CP (2007) stipulating functions, tasks, powers and structural organisation of the Ministry of Information and Communications.

Decree 85/2009/ND-CP (2009) providing guidance on the implementation of the Bidding Act 2005.

Decree 13/2010/ND-CP (2010) amending and supplementing a number of articles in Decree 67/2007/ND-CP (2007) on support policies for social protection beneficiaries.

Decree 25/2011/ND-CP (2011) providing guidance on the implementation of Telecommunications Act 2009.

Decree 47/2011/ND-CP (2011) providing guidance on the implementation of Postal Act 2010.

Decree 50/2011/ND-CP (2011) amending and supplementing Decree 187/2007/ND-CP (2007) on setting up the Telecommunications Authority.

Decree 83/2011/ND-CP (2011) determining sanctions for administrative violations in telecommunications.

DGPT's Decision 953/2000/QĐ-TCBD (2000) on the Regulation on telecommunications services on public switched telephone networks.

Government's Resolution 24/NQ-CP (2008) on the action plan for the CPV's Resolution X on agriculture, farmers and rural areas.

Government's Resolution 30a/2008/NQ-CP (2008) on the support programme for fast and sustainable poverty reduction in 61 poor districts.

Legal Document Act 2008.

MIC's Circular 14/2008/TT-BTTTT (2008) providing guidance on the management of expenditure for evaluating and approving outputs of universal service delivery in provinces.

MIC's Decision 15/2008/QD-BTTTT (2008) amending and supplementing targeted areas to be provided with USO services.

MIC's Decision 40/2008/QD-BTTTT (2008) determining levels of USO subsidies for providing USO services for the period 2008-2010.

MIC's Decision 51/2008/QD-BTTTT (2008) evaluating outputs of USO delivery and providing USO subsidies for the period 2008-2010.

MIC's Circular 4/2009/TT-BTTTT (2009) on the reports of USO delivery.

MIC's Circular 5/2009/TT-BTTTT (2009) adding to the targeted areas to be provided with USO services up to 2010.

MIC's Circular 21/2009/TT-BTTTT (2009) adding to the targeted areas to be provided with USO services up to 2010.

MIC's Circular 23/2009/TT-BTTTT (2009) determining levels of USO subsidies for providing USO services for the period 2009-2010.

MIC's Circular 24/2009/TT-BTTTT (2009) on statistic reports applicable to information and communications entities.

MIC's Circular 25/2009/TT-TTTT (2009) on comprehensive reports of information and communications activities applicable to government departments.

MIC's Decision 1130/QD-BTTTT (2009) on the regulation of public disclosure of financial information of VTF.

MIC's Circular 13/2010/TT-BTTTT (2010) determining levels of USO subsidies for HF communications receivers for sea-going fishing boats, and for maintaining the coastal system of communication stations for rescue and anti-disaster.

MIC's Circular 19/2010/TT-BTTTT (2010) adding to the targeted areas to be provided with USO services up to 2010.

MIC's Decision 1620/QD-BTTTT (2012) amending the programme for preparing and enacting legal documents by the MIC in 2012.

Ministry of Finance's Circular 110/2005/TT-BTC (2005) providing guidance for the management and collection of USO levies.

Ministry of Finance's Circular 67/2006/TT-BTC 2006 providing guidance for the implementation of the financial management regime applicable to the Vietnam Public Utility Telecommunications Service Fund.

Ministry of Finance's Circular 156/2009/TT-BTC (2009) on the provision of loans at below-market rates from the Vietnam Development Bank.

Ministry of Finance's Circular 61/2007/TT-BTC (2007) guiding handling of tax violations.

MPT's Decision 7/2005/QD-BBCVT (2005) on the Organisation and Operation the Vietnam Public Utility Telecommunications Service Fund.

MPT's Circular 5/2006/TT-BBCVT (2006) guiding implementation of the USO Programme to the year 2010.

MPT's Decision 41/2006/QD-BBCVT (2006) determining targeted areas to be provided with USO services up to 2010.

MPT's Decision 43/2006/QD-BBCVT (2006) determining the list of USO services.

MPT's Decision 9/2007/QD-BBCVT (2007) determining targeted areas to be provided with USO services up to 2010.

MPT's Decision 16/2007/QD-BBCTT (2007) setting up Vietnam Postal Corporation.

MPT's Decision 17/2007/QD-BBCVT (2007) determining levels of USO subsidies for providing USO services.

National Assembly's Resolution 20/2011/QH13 (2011) on the programme for enacting Acts and Ordinances for the period 2011-2016.

Ordinance on Judges and People's Assessors of People's Courts 2002.

Organisation of the National Assembly Act 2001.

People's Court Act 2002.

People's Procuracy Act 2002.

PM's Decision 249/TTg (1995) on setting up Vietnam Posts and Telecommunications Corporation.

PM's Decision 135/1998/QD-TTg (1998) approving a national programme for the socio-economic development of remote and mountainous communes with exceptional difficulties.

PM's Decision 158/2001/QD-TTg (2001) approving the Strategy for Development of Vietnam Posts and Telecommunications to the year 2010 and Orientation by 2020.

PM's Decision 129/2003/QD-TTg (2003) approving the project for re-structuring state-owned enterprises of Vietnam Television to the year 2005.

PM's Decision 217/2003/QD-TTg (2003) on the management of prices of postal and telecommunications services.

PM's Decision 191/2004/QD-TTg (2004) on the setting up of the Vietnam Public Utility Telecommunications Service Fund.

PM's Decision 74/2006/QD-TTg (2006) approving the universal service programme 2006-2010.

PM's Decision 164/2006/QD-TTg (2006) approving lists of communes which have exceptionally socio-economic difficulties.

PM's Decision 256/2006/QD-TTg (2006) promulgating the Regulation on tendering, ordering and assigning the implementation of producing and providing public utility products and services.

PM's Decision 39/2007/QD-TTg (2007) on the management of postal and telecommunications charges.

PM's Decision 186/2007/QD-TTg (2007) amending Decision 191/2004/QD-TTg (2004) on setting up the Vietnam Public Utility Telecommunications Service Fund.

PM's Decision 674/QD-TTg (2007) on setting up the Vietnam Post Corporation.

PM's Decision 1755/QD-TTg (2010) approving the project for the rapid development of Vietnam as a strong country in information and communication technologies.

PM's Decision 9/2011/QD-TTg (2011) on the determination of poor and adjunct poor households applicable USO delivery for the period 2011-2015.

PM's Decision 35/2011/QD-TTg (2011) stipulating functions, tasks, powers and structural organisation of the Telecommunications Authority.

PM's Decisions 119/2011/QD-TTg (2011) on the deployment of rural information and communications services for the period 2011-2020.

PM's Decision 615/QD-TTg (2011) approving 7 districts with a high percentage of poor households in order to apply programmes and policies for investing in infrastructure in

accordance with the Government's Resolution 30a/2008/NQ-CP (2008) on the support programme for fast and sustainable poverty reduction in 61 poor districts.

PM's Decision 1643/QD-TTg (2011) approving the USO Programme 2011-2015.

PM's Decision 2151/QD-TTg (2011) merging EVN Telecom into Viettel.

Post and Telecommunications Ordinance 2002.

Postal Act 49/2010/QH12 2010.

State Bank's Decision 1627/2001/QD-NHNN (2001) determining the Regulation on the provision of loans from the financial institutions.

State Bank's Decision 127/2005/QD-NHNN (2005) amending the Regulation on the provision of loans from the financial institutions enacted by Decision 1627/2001/QD-NHNN (2001).

State Bank's Decision 783/2005/QD-NHNN (2005) amending the State Bank's Decision 127/2005/QD-NHNN (2005) art 1 s 6.

State Bank's Circular 6/2009/TT-NHNN (2009) on the provision of loans at below-market rates in poor rural districts in accordance with the Government's Resolution 30A/2008/NQ-CP (2008).

Telecommunications Act 2009.

Vietnam Constitution 1992 (amended in 2001).

(b) Reports and other official sources

CPV's Resolution of the 8th Conference of the 7th Central Executive Committee (National Politics Publishing House, 1995).

CPV's Directive 58-CT/TW (2000) on the enhancement of application and deployment of ICT serving national industrialisation and modernisation.

CPV's Resolution 8/NQ-TW (2002) on Forthcoming Principal Judiciary Tasks.

CPV's Resolution 48-NQ/TW (2005) on the Strategy for Development and Improvement of the Vietnam Legal System to the year 2010 and Orientation by 2020.

CPV's Resolution 26 of the 7th Conference's Resolution of the Communist Party's Central Committee X (2008).

Dong Thap Province Department of Information and Communication “Report 81/BC-STTTT on the management of universal service delivery” (2010).

Government Office’s Document 3723/VPCP-KHTC (2009) on the contribution of annual USO levies to the VTF’s registered (Charter) capital.

Government’s Office Document 1347/TTg-KTN (2012) requiring revising and submitting the USO Programme as determined in the PM’s Decision 1643/QD-TTg (2011).

Ministry of Finance’s Document 160/KL-TTr (2011) on the inspection of the financial management of VTF.

Ministry of Information and Communication “Project submitted to the Prime Minister for the approval of the universal service programme 2011-2015” (2011).

Ministry of Information and Communication “Report on the national survey of telecommunications, Internet and broadcasting situations in Vietnam in 2010” (Ministry of Information and Communication’s Publishing House, Hanoi, 2011).

MIC’s Document 2203/TTr-BTTTT (2011) on the universal service programme 2011-2015.

MIC’s Document 3593/BTTTT-KHTC (2011) on subsidies for fixed telephone households and individual subscribers.

Ministry of Information and Communications *Information and Data on Information and Communication Technology: Vietnam 2010* (Information and Communications Publishing House, Hanoi, 2010).

Ministry of Information and Communications *Vietnam Information and Communication Technology: White Book 2011* (Information and Communications Publishing House, Hanoi, 2011).

Ministry of Information and Communications *Vietnam Information and Communication Technology: White Book 2012* (Information and Communications Publishing House, Hanoi, 2012).

MPT’s Document 398/BBCVT-KHTC 2006.

PM’s Document 7093/DMDN (1995) on the establishment of Saigon Posts and Telecommunications Joint Stock Company.

Political Report of the CPV’s Congress VI 1986.

Vietnam Communist Party “The Strategy for Socio-Economics Development period 2001-2010” (2001) the IX National Congress.

Vietnam Communist Party *Resolution on building up the country in the transition to socialism (amendment, development in the National Congress XI, 2011)*.

Vietnam Government “Official Dispatch to the National Assembly on the Telecommunications Bill” (2009).

VTF’s Decision 2/QD/VTF-HDQ (2008) on loans at below-market rates.

2 *New Zealand*

(a) Legislation

Commerce Act 1975.

Commerce Act 1986.

Electric Telegraph Act 1865.

New Zealand Crown Entities Act 2004.

State Owned Enterprises Act 1986.

Telecommunications Act 2001.

Telecommunications Amendment Act 2006.

Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011.

(b) Reports and other official sources

Commerce Commission “2007 Telecommunications Market Monitoring Report” (2008).

Commerce Commission “A Guide to Regulatory Decision Making by the Commerce Commission for the Telecommunications Sector” (2009).

Commerce Commission “Annual Report for the year ended 30 June 2002” (2002).

Commerce Commission “Unbundled Bitstream Access Service Price Review” (2012).

Commerce Commission “Determination for TSO instrument for Local Residential Service for period between 1 July 2002 and 30 June 2003” (2005).

Commerce Commission “Determination for TSO Instrument for Local Residential Service for Period between 20 December 2001 and 30 June 2002” (2003).

Commerce Commission “Determination for TSO Instrument for Local Residential Service for Period between 1 July 2007 and 30 June 2008” (2008).

Commerce Commission “Draft TSO Cost Calculation Determination for TSO Instrument for Local Residential Telephone Service for period between 1 July 2006 and 30 June 2007” (2008).

Commerce Commission “Establishing the Qualified Revenue Framework for the Telecommunications Development Levy: Consultation Document” (2012).

Commerce Commission “Final Determination for TSO Instrument for Local Residential Service for Period between 1 July 2004 and 30 June 2005” (2008).

Commerce Commission “New Zealand Retail Prices for Fixed Line and Mobile Services: A Benchmarking Comparison” (2010).

Commerce Commission “Notification of Potential Liability for the Telecommunications Development Levy 2012” (2012).

Commerce Commission “Statement of Intent 2008-2011”.

Commerce Commission “TDL Liable Allocation Determination for the period 1 July 2010 to 30 June 2011” (2011).

Constitution of Telecom Corporation of New Zealand Limited: First Schedule: Kiwi Share and Rights of Kiwi Shareholder (1989).

Minister of Commerce “Memorandum of Understanding for the period 1 July 2002 and 30 June 2003” (2002).

Minister of Commerce “Output Agreement for the period 1 July 2004 and 30 June 2005” (2004).

Minister of Commerce “Output Agreement for the period 1 July 2009 and 30 June 2010” (2009).

Minister of Commerce and Commerce Commission “Output Agreement for the period 1 July 2006 and 30 June 2007” (2006).

Ministry of Economic Development “Background Information for the Telecommunications Amendment Bill” (2005).

Ministry of Economic Development “Background Information for the Telecommunications Amendment Bill: General” (2006).

Ministry of Economic Development “Benchmarking the Comparative Performance of New Zealand’s Telecommunications Regime” (2005).

Ministry of Economic Development “Implementation Review of the Telecommunications Act 2001” (2004).

Ministry of Economic Development “Ministerial Inquiry into Telecommunications” (2000).

Ministry of Economic Development “New Zealand Government Ultra-Fast Broadband Initiative: Overview of Initiative” (2009).

Ministry of Economic Development “New Zealand Telecommunications 1987-2001” (2001).

Ministry of Economic Development “Proposal for Comment: Rural Broadband Initiative” (2009).

Ministry of Economic Development “Proposal for Comment: TSO Reform and Funding Telecommunications Development” (2009).

Ministry of Economic Development “Regulatory Impact Statement: Reforms of the Telecommunications Service Obligations Framework and Industry Levy Arrangements” (2009).

Ministry of Economic Development “Rural Broadband Initiative Final Proposal” (2011).

Ministry of Economic Development “Rural Broadband Initiative: Request for Proposals for the Zone 4 Rural Broadband Initiative” (2010).

Ministry of Economic Development “Telecommunications Amendment Bill – Background Briefing Paper” (2006).

Ministry of Economic Development “Telecommunications Service Obligations Regulatory Framework: Discussion Document” (2007).

Ministry of Economic Development and Telecom New Zealand Limited “Rural Broadband Agreement” (2011).

Ministry of Economic Development and Vodafone New Zealand Limited “Rural Broadband Agreement” (2011).

Ministry of Finance “New Zealand Telecommunications 1987-1998” (1998).

State Service Commission and the Treasury “Performance Measurement: Advice and examples on how to develop effective frameworks” (2008).

The Crown and Sprint International New Zealand “Telecommunications Service Obligations (TSO) Deed for Telecommunications Relay Services (TRS) (September 2004).

The Crown and Telecom Corporation of New Zealand Limited “Telecommunications Service Obligations (TSO) Deed for Local Residential Telephone Service” (2001).

3 *Other jurisdictions*

Australian Report of the House of Representatives Standing Committee on Finance and Public Administration in Not Dollars Alone: Review of Financial Improvement Management Programme (Australian Government, Canberra, 1990).

Australian Telecommunications (Consumer Protection and Service Standards) Act (1999).

Australian Telecommunications (Consumer Protection and Service Standards) (Late Payment of universal service levy) Amendment Determination (2005).

Department for Environment, Food and Rural Affairs “Rural Development Programme for England and Broadband Delivery UK: Applicant’s Handbook - Expression of Interest Round Three” (2013).

European Commission “State aid no. N 157/2006 - United Kingdom: South Yorkshire Digital Region Broadband Project” (2006).

European Commission “State aid no. N 201/2006 - Greece: Broadband access development in underserved territories” (2006).

European Parliament and of the Council’s Directive 2002/22/EC (2002).

European Commission “Broadband Availability and Affordability” (2012).

Indian Ministry of Communications Information Technology’s Guidelines for Implementation of Universal Service Support and TRAI’s Recommendations on Infrastructure Sharing in 2007.

Indian Report of the Steering Committee on Information and Communications for the tenth five year plan (2002-2007) (Government of India, Planning Commission (2002).

Pakistan’s Ministry of Information Technology’s Universal Service Fund Policy (2005).

The United States Telecommunications Act (1996).

B Cases

Clear Communications v Telecom Corporation of New Zealand Limited [1992] 5 TCLR 166 (HC), [1992] 3 NZLR 429 (CA), [1993] 5 TCLR 25/93 (CA), [1993] 5 TCLR 166 (HC), [1993] 4 NZBLC 99-321 (CA), [1993] 5 TCLR 413 (CA), [1995] 1 NZLR 385.

Commerce Commission v Telecom Corporation of New Zealand Limited [2008] 8 NZBLC (HC), [2008] 12 TCLR 168 (HC), [2009] NZCA 338, [2009] 12 TCLR 457, [2009] SC76, [2010] NZSC 111, [2011] 1 NZLR 577.

Vodafone New Zealand Limited v Telecom New Zealand Limited [2008] CIV-2008-485-002194, [2008] CIV-2008-485-002195, [2008] CIV-2008-485-002341, [2009] CA 192/2008, [2010] SC 4/2010, [2010] SC 44/2010, [2010] SC 45/2010, [2010] SC 46/2010, [2011] NZSC 138.

C Books

Aaditya Mattoo, Julia Nielson and Hindegunn Kyvik Nordas (eds) *Liberalisation and Universal Access to Basic Services: Telecommunications, Water and Sanitation, Financial Services, and Electricity* (OECD and The International Bank for Reconstruction and Development, The World Bank, 2006).

Alan Bollard and Robert Buckle (eds) *Economic Liberalisation in New Zealand* (Port Nicholson Press, Wellington, 1987).

Anna Shillabeer, Terry Buss and Denise Rousseau (eds) *Evidence-Based Public Management: Practices, Issues, and Prospects* (M.E. Sharpe Inc., New York, 2011).

Anwar Shah (ed) *Performance Accountability and Combating Corruption* (The World Bank, Washington, 2007).

Arkadie Brian and Raymond Mallon *Vietnam - A Transition Tiger* (Australian National University E Press and Asia Pacific Press, Canberra, 2003).

Arturo Muent-Kunigami and Juan Navas Sabater *Options to Increase Access to Telecommunication Service in Rural and Low-Income Areas* (World Bank, Washington, 2010).

Calvin Goldman *ABA Section of Antitrust Law, Competition Laws outside the United States* (American Bar Association, Chicago, 2001).

Carl Friedrich and Edward Mason (eds) *Public Policy: A Yearbook of the Graduate School of Public Administration* (Harvard University Press, Cambridge, 1940).

Cento Veljanovski *Economic Principles of Law* (Cambridge University Press, New York, 2007).

Anastasios Gentzoglanis and Anders Henten (eds) *Regulation and the Evolution of the Global Telecommunications Industry* (Edward Elgar, Cheltenham, 2010).

Christopher Hood and David Heald (eds) *Transparency: the key to better governance* (Oxford University Press, 2006).

Clare Hall, Collin Scott and Christopher Hood *Telecommunications Regulation: Culture, chaos and interdependence inside the regulatory process* (Routledge, New York, 2000).

Cristiano Codagnone (ed) *Efficiency and Effectiveness* (European Journal of e-Practice, 2008).

Damien Gérardin, Michel Kerf *Controlling Market Power in Telecommunications: Antitrust Vs. Sector-specific Regulation* (Oxford University Press, Oxford, 2003).

Eli Noam, Seisuke Komatsuzaki and Douglas A. Conn (ed) *Telecommunications in the Pacific Basin: An Evolutionary Approach* (Oxford University Press, New York, 1994).

Eugene Kamenka (ed) *Community as a Social Ideal* (Edward Arnold Ltd, London, 1982).

Ewan Ferlie, Laurence Lynn and Christopher Pollitt (eds) *The Oxford Handbook of Public Management* (Oxford University Press, 2007).

Gavin Drewry, Carsten Greve and Thierry Tanquerel (eds) *Contracts, Performance Measurement and Accountability in the Public Sector* (IOS Press, Amsterdam, 2005).

Geert Bouckaert and John Halligan *Managing Performance: International Comparisons* (Routledge, New York, 2008).

Geert Bouckaert, Guy Peters and Koen Verhoest *The Coordination of Public Sector Organisations: Shifting Patterns of Public Management* (Palgrave Macmillan, New York, 2010).

General Statistics Office *Statistical Handbook of Vietnam* (Statistics Publishing House, Hanoi, 2006).

General Statistics Office *Statistical Handbook of Vietnam* (Statistics Publishing House, Hanoi, 2010).

History of Vietnam Post and Telecommunication (Post and Telecommunications Publish House, Hanoi, 2003).

Ian Duncan and Alan Bollard *Corporatisation and Privatisation: Lessons from New Zealand* (Oxford University Press, London, 1992).

International Bank for Reconstruction and Development *Public Expenditure Management Handbook* (World Bank, Washington, 1998).

International Telecommunications Union *Trends in Telecommunications Reform 2003: Promoting Universal Access to ICTs Practical Tools for Regulators* (ITU, Geneva, 2003).

International Telecommunications Union *Trends in Telecommunication Reform 2006: Regulating in the Broadband World* (ITU, Geneva, 2006).

International Telecommunications Union *Trends in Telecommunication Reform 2010/2011: Enabling Tomorrow's Digital World* (ITU, Geneva, 2011).

Jairo Acuna-Alfaro (ed) *Reforming Public Administration in Vietnam* (National Political Publishing House, Hanoi, 2009).

János Bertók (ed) *Public Sector Transparency and Accountability: Making It Happen* (OECD, Paris, 2002).

John Stanley Gillespie and Albert Chen (eds) *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (Routledge, New York, 2010).

John Wanna (ed) *A Passion for Policy: Essays in Public Sector Reform* (ANU E Press, The Australian National University, Canberra, 2007).

Jonathan Gruber *Public Finance and Public Policy* (4th ed, Worth Publishers, 2013).

Keith Sinclair *A History of New Zealand* (Penguin Book, Harmondsworth, 1959).

Kevin Fox *Efficiency in the Public Sector* (Kluwer Academic Publishers, Massachusetts, 2002).

Kuno Schedler and Isabella Proeller *Outcome-Oriented Public Management: A Responsibility-Based Approach to the New Public Management* (Information Age Publishing Inc, Charlotte, 2010).

Jean-Jacques Laffont and Jean Tirole *Competition in Telecommunications* (Massachusetts Institute of Technology Press, Massachusetts, 2000).

Mark Robinson (ed) *Performance Budgeting: Linking Funding and Results* (Palgrave Macmillan, 2007).

Marc Robinson and Duncan Last *A Basic Model of Performance-Based Budgeting* (International Monetary Fund, 2009).

Marelize Gorgens and Jody Zall Kusek *Making Monitoring and Evaluation Systems Work: A Capacity Development Toolkit* (World Bank, Washington, 2009).

Mark Bovens *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (Cambridge University Press, Cambridge, 1998).

Mark Harrison Moore *Creating public value: Strategic management in the government* (Harvard University Press, Cambridge, 1995).

Mark Newman Berry and Lewis T. Evans (eds) *Competition Law at the Turn of the Century: A New Zealand Perspective* (Victoria University Press, Wellington, 2003).

Mark Sidel *Law and Society in Vietnam* (Cambridge University Press, New York, 2008).

Mary Glendon, Paolo Carozza and Colin Picker *Comparative Legal Traditions in a Nutshell* (3rd ed, Thomson West Publishing, St. Paul, 2008).

Mason R N and Morris M S *Post Office Review* (Government Printer, Wellington, 1986).

Mohsen Khalil, Phillipe Dongier, Velerie D'Costa, Christine Zhen-Wei Qiang, Peter Smith, Randeep Sudan, Eric Swanson and Bjorn Wellius (eds) *Information and Communications for Development 2009: Extending Reach and Increasing Impact* (World Bank, Washington, 2009).

Nicholas Rose and Peter Miller *Governing the Present* (Polity Press, Cambridge, 2008).

OECD *Serving the Economy Better, Occasional Papers on Public Management* (OECD, Paris, 1991).

Owen Hughes *Public Management and Administration* (Palgrave Macmillan, New York, 2003).

Patricia Day and Rudolf Klein *Accountability: five public services* (Tavistock Publications Ltd, London, 1987).

Patricia Ingraham, James Thompson and Ronald D Sanders (eds) *Transforming Government: Lessons from the Reinvention Laboratories* (Jossey Bass Inc, San Francisco, 1998).

Paul Thomas *Performance Measurement, Reporting, Obstacles and Accountability: Recent Trends and Future Directions* (Australian National University E Press, Canberra, 2006).

Peter De Cruz (ed) *Comparative Law in a Changing World* (3rd ed, Routledge-Cavendish, New York, 2007).

Pham Duy Nghia *General Introduction to Law* (People's Police Publishing House, Hanoi, 2011),

Pierre Legrand and Roderick Munday (eds) *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, New York, 2003).

Poh-Ling Tan (ed) *Asian Legal System: law, society, and pluralism in East Asia* (Butterworth, Sydney, 2002).

Randall Peerenboom (ed) *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (RoutledgeCurzon, New York, 2004).

Robert Britt Horwitz *The Irony of Regulatory Reform: The Deregulation of American Telecommunications* (Oxford University Press, New York, 1989).

Robert Cooter and Thomas Ulen *Law and Economics* (6th ed, Pearson Education Inc, Boston, 2011).

Robert Crandall and Leonard Waverman *Who Pays for Universal Service? When Telephone Subsidies Become Transparent* (Brookings Institute, Washington, 2000).

Robert Behn *Rethinking Democratic Accountability* (Brookings Institution Press, Washington, 2001).

Srikanta Chatterjee and Stuart Birks (eds) *The New Zealand Economy: Issues and Policies* (4th ed, Dunmore Press, Palmertson North, 2001).

Stephanie Balme and Mark Sidel (eds) *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (Palgrave MacMillan, New York, 2007).

Telecommunication Development Bureau (ed) *Trends in Telecommunication Reform 2012: Smart Regulation for A Broadband World* (ITU, 2012).

Theresa Miedema (ed) *Trends in Telecommunication Reform 2010/2011: Enabling Tomorrow's Digital World* (International Telecommunications Union, Geneva, 2011).

Tim Kelly and Carlo Maria Rossoto (eds) *Broadband Strategies Handbook* (World Bank, Washington, 2012).

Touche Ross Management Consultants *Competition in Telecommunications Networks* (Department of Trade and Industry, Wellington, 1988).

Tom Bell and Solveig Singleton (eds) *Regulators' Revenge: The Future of Telecommunications Deregulation* (Cato Institute, Washington, 1998).

William Baumol and Gregory Sidak *Toward Competition in Local Telephony* (Massachusetts Institute of Technology Press, Massachusetts, 1994).

Wilson A C *Wire & Wireless: A History of Telecommunications in New Zealand 1890 – 1987* (Dunmore Press Limited, Palmerston North, 1994).

Wouter Van Dooren and Steven Van De Walle (eds) *Performance Information in the Public Sector: How It is Used* (Palgrave MacMillan, New York, 2008).

D Articles, Theses, Working, Research, Seminar Papers

A D Smith “The Development of Rates of Postage: A Historical and Analytical Study” (PhD, University of London, 1917).

Afonso Antonio, Schuknecht Ledger and Vito Tanzi “Public Sector Efficiency: An International Comparison” (2005) 123 Public Choice 321.

Alan Bollard “Utility Regulation in New Zealand” (speech to ACCC/PURC Training Programme on Utility Regulation, Melbourne Business School, Melbourne, 10-14 November 1997).

Alexander Kroll “Performance leadership: towards an individualist approach to explain performance information use” (paper presented to the annual Conference of the European Group for Public Administration Seminar for Doctoral Students and Junior Researchers, Malta, 1 September 2009).

Alfred Tat-Kei Ho “Reporting Public Performance Information: the Promise and Challenges of Citizen Involvement” in Wouter Van Dooren and Steven Van De Walle (ed.) *Performance Information in the Public Sector: How It Is Used* (Palgrave MacMillan, New York, 2008).

Andrew Dymond and Sonja Oestmann “Rural Telecommunications Development in a Liberalising Environment: An Update on Universal Access Funds” (Intelecon Research and Consultancy, 2002).

Anna-Luis Cook “Managing for Outcomes in the New Zealand Public Management System” (working paper 04/15, New Zealand Treasury, 2004).

Antony Srzich “The Effect of Technology Change and Regulation on the Evolution of the New Zealand Telecommunications Market” (PhD, Victoria University of Wellington, 2010).

Atkinson Anthony and Joseph Stiglitz “The Design of Tax Structure: Direct versus Indirect Taxation” (1976) 6 Journal of Public Economics 55.

Barbara Romzek “Dynamics of Public Sector Accountability in an Era of Reform” (2000) 66 (1) International Review of Administrative Sciences 21.

Barbara Romzek “Where the Buck Stops: Accountability in Reformed Public Organisations” in Patricia Ingraham, James Thompson and Ronald Sanders (ed) *Transforming Government: Lessons from the Reinvention Laboratories* (San Francisco, 1998) 197.

Bill Ryan “Learning Managing for Outcomes - the Queensland case study” (Institute of Public Administration Australia, Sydney, 2004).

Bollard A and Pickford M “New Zealand’s Light-Handed Approach to Utility Regulation” (1995) 2 (4) Agenda 411.

Bronwyn Howell “A Pendulous Progression: New Zealand’s Telecommunications Regulation 1987-2007” (paper presented to the Finnish Communications Regulatory Authority, Helsinki, 19 June 2007).

Bronwyn Howell “Fit for Purpose? Examining the Current State of Broadband Regulation in New Zealand” (paper presented to the New Zealand Institute for the Study of Competition and Regulation’s Seminar, Wellington, 6 March 2013).

Bronwyn Howell “From Competition to Regulation: New Zealand Telecommunications Sector Performance 1987-2007” (paper presented to the International Telecommunications Society European Region Conference, Rome, 2008).

Bronwyn Howell “Regulating Broadband Networks: Assessing the Global Data for Evidence-Based Policy” (paper presented to the International Economy Project, Arlington Virginia, September 2012).

Bronwyn Howell “Strategic Interaction under Asymmetric Regulation: the ‘Kiwi Share’ in New Zealand Telecommunications” (paper presented to the International Telecommunications Society European Region Conference, Rome, September 2008).

Bronwyn Howell “The End of the Means? The Pursuit of Competition in Regulated Telecommunications Markets” (paper presented to the International Telecommunications Society, Montreal, June 2008).

Bronwyn Howell “From the Pursuit of Efficiency to the Pursuit of Competition in New Zealand’s Evolving Telecommunications Market” in Anastasios Gentzoglanis and Anders Henten (eds) *Regulation and the Evolution of the Global Telecommunications Industry* (Edward Elgar, Cheltenham, 2010)

Bryan Rosendorff, James Hollyer and James Vreeland “Democracy and Transparency” (2011) 73(4) *Journal of Politics* 1191.

Bui Xuan Chung “Financial solutions for socialising the universal service delivery in Vietnam” (PhD, National Economic University, 2010).

Carl Blanchard "Telecommunications regulation in New Zealand: The Court of Appeal’s Decision in *Clear Communications v Telecom Corporation*" (1994) 18(9) *Telecommunications Policy* 725.

Carl Blanchard “Telecommunications Regulation in New Zealand: how effective is ‘light-handed’ regulation?” (1994) 18(2) *Telecommunications Policy* 154.

Carl Blanchard “Telecommunications Regulation in New Zealand: light-handed regulation and the Privy Council’s Judgment” (1995) 19(6) *Telecommunications Policy* 465.

Carl Friedrich "Public Policy and the Nature of Administrative Responsibility" in Carl J. Friedrich and Edward S. Mason (ed) *Public Policy: A Yearbook of the Graduate School of Public Administration* (Harvard University Press, Cambridge, 1940) 3.

Christine Qiang and Carlo Rossotto “Economic Impacts of Broadband” in Mohsen Khalil, Phillipe Dongier, Velerie D’Costa, Christine Qiang, Peter Smith, Randeep Sudan, Eric Swanson and Bjorn Wellius (eds) *Information and Communications for Development 2009: Extending Reach and Increasing Impact* (World Bank, Washington, 2009) 35.

Christopher Hood “Transparency in Historical Perspective’ in Christopher Hood and David Heald (ed) *Transparency: the key to better governance* (Oxford University Press, 2006).

Crandall Robert “Universal Service Policies and the Diffusion of Broadband” (paper presented to ITS Asia-Pacific Conference, Wellington, August 2010).

Cristiano Codagnone and Trond Arne Undheim “Benchmarking e-Government: Tools, Theory, and Practice” in Cristiano Codagnone (ed.) *Efficiency and Effectiveness* (European Journal of e-Practice, 2008) 4.

Dammery R “Section 46 of the Trade Practices Act: the Need for Prospective Certainty” (1999) 6 Competition and Consumer Law Journal.

David Carter “Crossing the Wires: The Interface between Law and Accounting and the Discourse Theory Potential of Telecommunications Regulation” (PhD, Victoria University of Wellington, 2008).

David Koh, Dang Duc Dam and Nguyen Thi Kim Chung ‘Government Organisation Structure and Excellent Public Service: The Case of Vietnam and Some Recommendations for Changes’ in Jairo Acuna-Alfaro (ed.) *Reforming Public Administration in Vietnam* (The National Political Publishing House, Hanoi, 2009) 252.

David Townsend “Creation and Operation of Universal Service Funds” in John Alden (ed) *Trends in Telecommunications Reform 2003: Promoting Universal Access to ICTs Practical Tools for Regulators* (International Telecommunications Union, 2003) 67.

Deirdre Curtin and Albert Jacob Meijer “Does Transparency Strengthen Legitimacy?” (2006) 11 (2) Information Polity 109.

Dennis Weller “Action for universal service obligations” (1999) 23 Telecom Policy 645.

Derek Gill “Managing for Performance in New Zealand: The Research for the Holy Grail? in KPMG International *Holy Grail or Achievable Quest – International Perspectives on Public Sector Management* (KPMG International, Canada, 2008).

Edgardo Sepulveda and McCarthy Tetrault “Minimum-subsidy auctions for public telecommunications access in rural areas” in John Alden (ed) *Trends in Telecommunications Reform 2003: Promoting Universal Access to ICTs Practical Tools for Regulations* (ITU, 2003) 85.

Eric Lie “Next Generation Networks and Universal Access: The Challenges Ahead” (paper presented at the Global Symposium for Regulators (GSR) organized by the ITU Telecommunications Development Bureau, Dubai, 5-7 February 2007).

Eric Welch and Charles Hinnant “Internet Use, Transparency and Interactivity Effects in Trust in Government” (paper presented to the 36th Hawaii International Conference on System Science, Hawaii, 2003).

Evans Lewis and Quigley Neil “Contracting, Incentives for Breach and the Impact of Competition Law” (2000) 23 (2) *World Competition* 9.

Frank Mathewson and Neil Quigley “Market Power Thresholds: Theory and Competition Cases Related to Barriers to Entry, Oligopoly and Joint Dominance” in Mark Newman Berry and Lewis Evans (ed) *Competition Law at the Turn of the Century: A New Zealand Perspective* (Victoria University Press, Wellington, 2003) 102.

Fred Schenkelaars and Imram Ahmad “Concept paper 4: Access to Information, Transparency and Accountability” (2004) *The United Nations* 7

Graham Albert Wagner “The Deregulation and Privatisation of New Zealand Telecommunications: An Economic, Political and Ideological Analysis” (PhD, University Microfilms International, 1992).

Guy Peters “Performance-Based Accountability” in Anwar Shah (ed.) *Performance Accountability and Combating Corruption* (The World Bank, Washington, 2007) 15.

Heather Hudson “Defining Universal Service Fund” (2010) 38 (1) *Intermedia* 16.

Hector Arambula “Toward a Theoretical Framework of Accountability for Performance in Public Organisations: A Review and Research Agenda” (paper presented to the EGPA Conference, Rotterdam, 1-2 September, 2008).

Herbert Dordick “New Zealand: Testing the Limits of Nonregulation” in Eli Noam, Seisuke Komatsuzaki and Douglas Conn (ed) *Telecommunications in the Pacific Basin: An Evolutionary Approach* (Oxford University Press, New York, 1994) 420.

Hundman S and Anderson R “The Use of Performance Information in External Reporting: An Empirical Study of UK Executive Agencies” (1995) 11 (11) *Financial Accountability and Management* 1.

Intelcom Research and Consultancy Limited “Universal Access and Service (UAS) and Broadband Development” (paper presented to the World Bank Workshop on Universal Access and Service (UAS) and Broadband Development, Washington, 2009).

International Telecommunications Union “Trends in Universal Access and Services Policies: Changing Policies to Accommodate Competition and Convergence” (paper presented to the 9th Global Symposium for Regulators, Lebanon, November 2009).

Jack Nagel "Social Choice in a Pluralitarian Democracy: The Politics of Market Liberalisation in New Zealand" (1998) 28 (2) *British Journal of Political Science* 223.

James Alleman, Paul Rappoport and Aniruddha Banerjee “Universal Service: A New Definition?” (2010) 34 Telecommunications Policy 86.

Jenille Fairbanks, Kenneth Plowman and Brad Rawlins “Transparency in government communication” (2007) 7 (1) Journal of Public Affairs 23.

Jeremy Pope “Dimensions of Transparency in Governance” (paper presented to the 6th Forum on Reinventing Government Towards Participatory and Transparent Governance, Seoul, 24-27 May 2005).

John Alden “Postcards from the information society: living with always-on technology- the good, the bad, and the just plain baffling” in Theresa Miedema (ed) *Trends in Telecommunication Reform 2010/2011: Enabling Tomorrow’s Digital World* (International Telecommunications Union, Geneva, 2011) 311.

John Stanley Gillespie “Concepts of Law in Vietnam: Transforming Statist Socialism” in Randall Peerenboom (ed) *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (RoutledgeCurzon, New York, 2004) 146.

John Stanley Gillespie and Albert Chen “Comparing Legal Development in China and Vietnam: An Introduction” in John Stanley Gillespie and Albert Chen (ed) *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (Routledge, New York, 2010) 1.

Joseph Farrel “Creating Local Competition” (1996) 49 (1) Federal Communications Law Journal 201.

Karen Baehler “Managing for Outcomes: Accountability and Thrust” (2003) 62 (4) Australian Journal of Public Administration 23.

Karine Perset “Leveraging Telecommunications Policies For Pro-Poor Growth Universal Access Funds With Minimum-Subsidy Auctions” (paper submitted to the POVNET Infrastructure for Poverty Reduction Task Team workshop, Organisation for Economic Co-operation and Development, Berlin, 27-29 October 2004).

Kathleen Abernathy “Preserving universal service in the age of IP” (2005) 3 Journal on Telecommunications and High Technology Law 409.

Koutroumpis Pantelis “The Economic Impact of Broadband on Growth: a Simultaneous Approach” (2009) 33 Telecommunications Policy 471.

Lewis Evans and David Boles de Boer “The Economic Efficiency of Telecommunications in a Deregulated Market: the Case of New Zealand” (working paper 8/95, Victoria University of Wellington, 1995).

Lewis Evans, Arthur Grimes, Bryce Wilkinson and David Teece “Economic Reforms in New Zealand 1984-1995: the pursuit of efficiency” (1996) 34 *Journal of Economic Literature* 1856.

Lewis Evans, Neil Quigley and Jie Zhang “An Essay on the Concept of Dynamic Efficiency and its Implications for Assessments of the Benefits from Regulation and Price Control” (New Zealand Institute for the Study of Competition and Regulation, 2000).

Louise Hill “Litigation versus Regulation: How successful is light-handed regulation” (1996) 8 *Auckland University Law Review* 1119.

Luis Murillo-Zamorano “Economic Efficiency and Frontier Techniques” (2005) 18 (1) *Journal of Economic Surveys* 33.

Lyn Steven “The Goals of The Commerce Act” in Mark Newman Berry and Lewis Evans (ed) *Competition Law at the Turn of the Century: A New Zealand Perspective* (Victoria University Press, Wellington, 2003) 84.

Madlesilo Msimang “Universal Access and Universal Service: An Overview” in John Alden (ed) *Trends in Telecommunication Reform 2003: Promoting Universal Access to ICTs – Practical Tools for Regulators* (International Telecommunications Union, 2003) 29.

Malcolm Webb and Martyn Taylor “Light-handed Regulation of Telecommunications in New Zealand: Is Generic Competition Law Sufficient?” (1999) 2 *International Journal of Communications Law and Policy* 1.

Mamoru Udaka “Japanese USO System and Broadband Deployment (paper presented to the Seminar on Broadband and Universal Service Obligation, Bangkok, 2010).

Mandla Msimang “The More Things Change, The More They Stay the Same: Strategies for Financing Universal Broadband Access” in the Telecommunication Development Bureau (ed) *Trends in Telecommunication Reform 2012: Smart Regulation for A Broadband World* (ITU, 2012) 79.

Mandlesino Msimang “Universal Access and Universal Service: An Overview” in John Alden (ed) *Trends in Telecommunication Reform 2003: Promoting Universal Access to ICTs, Practical Tools for Regulators* (ITU, Geneva, 2003).

Marc Robinson and Duncan Last “A Basic Model of Performance-Based Budgeting” (International Monetary Fund, 2009), at 2.

Marelize Gorgens and Jody Zall Kusek “Making Monitoring And Evaluation Systems Work: A Capacity Development Toolkit” (World Bank, Washington, 2009), at 1.

Mark Bovens “Public Accountability” in Ewan Ferlie, Laurence Lynn and Christopher Pollitt (ed) *The Oxford Handbook of Public Management* (Oxford University Press, 2007) 946.

Mark Bovens “Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism” (2010) 33(5) *West European Politics* 946.

Mark Bovens *Analysing and Assessing Public Accountability: A Conceptual Framework* (European Governance Paper No. C-06-01, 2006).

Mark Moore “Recognising public value: The Challenge of Measuring Performance in Government” in John Wanna (ed) *A Passion for Policy: Essays in Public Sector Reform* (ANU E Press, The Australian National University, Canberra, 2007) 91.

Mark Sidel “Vietnam: Historical Development of the Legal System” in Poh-Ling Tan (ed.) *Asian Legal System: law, society, and pluralism in East Asia* (Butterworth, Sydney, 2002) 360.

Mason N and Morris S *Post Office Review* (Government Printer, Wellington, 1986).

Maurice McTigue “Alternative to Regulation: a Study of Reform in New Zealand” (1998) 21(1) *Regulation* 34.

Max Saunders “Telecommunications Regulation in New Zealand” (1994) 18 (6) *Telecommunications Policy* 495.

Meaw-Fong Phang “Outputs and Performance Measures: A Case Study of Two New Zealand Public Sector Organisations” (Master Thesis, Canterbury University, 2006).

Nancy Sundberg “Overview of Trends in the ICT Market and in ICT regulation” in Theresa Miedema (ed) *Trends in Telecommunication Reform 2010/2011: Enabling Tomorrow's Digital World* (International Telecommunications Union, Geneva, 2011) 1.

Neil Quigley “*Governance and Regulatory Decision-Making at the Commerce Commission*” (paper presented to the Contemporary Issues in the Regulatory Theory and Practice Workshop, Wellington, March 2005).

Nguyen Hoang Long “Telecommunications Development towards Universal Services” (Master Thesis, National Economic University, 2001).

Nguyen Quoc Viet “The Role of Informal Institutions and the Delegation of Powers to Independent courts” (PhD, Universität Kassel, 2006).

Nguyen Thanh Ha, Pham Quang Thanh and Jacob Gullish “Competition Review of the Vietnamese Telecom Sector” (paper prepared to the United States Agency for International Development, 2005).

Nguyen Thi Hoi “Current Sources of Law in Vietnam” (2008) 12 Journal of Legislative Study 128.

Nguyen Thi Hoi and Pham Quang Tien “Improving institutions of the State President and the Government in Vietnam” (2011) 187-188 Journal on Legislative Study.

Nguyen Viet Long “The Universality of Internet services in Rural Areas” (PhD, Korean National University, 2010).

Tran Nhat Le “Telecommunications Universality - Evaluation of Telecommunications Universality in Vietnam” (Master Thesis, Waseda University, 2004).

Pablo Spiller and Carlo Cardilli “The Frontier of Telecommunications Deregulation: Small Countries Leading the Pack” in Tom Bell and Solveig Singleton (ed) *Regulators’ Revenge: The Future of Telecommunications Deregulation* (Cato Institute, Washington, 1998) 39.

Pallot June “Innovations in National Government Accounting and Budgeting in New Zealand” (1996) 9 Research in Governmental and Non-profit Accounting 323.

Patrick McCabe “New Zealand: The Unique Experiment in Deregulation” in Eli Noam, Seisuke Komatsuzaki and Douglas Conn (ed) *Telecommunications in the Pacific Basin: An Evolutionary Approach* (Oxford University Press, New York, 1994) 393.

Patrick Xavier “Universal Access to Telecommunications in a Competitive Environment” in Aaditya Mattoo, Julia Nielson and Hindegunn Kyvik Nordas (eds) *Liberalisation and Universal Access to Basic Services: Telecommunications, Water and Sanitation, Financial Services, and Electricity* (OECD and The International Bank for Reconstruction and Development, The World Bank, 2006) 25.

Patrick Xavier “What Rules for Universal Service in an IP-Enabled NGN Environment?” (paper presented to ITU Workshop on What Rules for IP-Enabled NGNs?, Geneva, March 2006).

Paul Thomas “*Why is Performance-based Accountability So Popular in Theory and Difficult in Practice?*” (paper presented to the World Summit on Public Governance: Improving the Performance of the Public Sector, Taipei, 1-3 May 2007).

Paul Milgrom “Procuring Universal Service: Putting Auction Theory to Work” (lecture presented to the Royal Swedish Academy of Sciences, 1996).

Paul Scott “Going it Alone: Arrangements and Understandings under the Commerce Act 1986” [2010] 16 (2) NZBL 98.

Peter Stern and David Townsend “New Models for Universal Access in Latin America” (Summary Report, Regulate/World Bank PPIAF/ECLAC Project on Universal Access in Latin America, 2006).

Pham Hong Thai “Some discussion on the Government and Ministries” (2008) 24 Science Journal of Vietnam National University 201.

Philippe Chone, Laurent Flochel and Anne Perrot “Allocating and funding universal service obligations in a competitive market” (2002) 1 International Journal of Industrial Organisation 1247.

Randall Peerenboom “Varieties of Rule of Law: An Introduction and Provisional Conclusion” in Randall Peerenboom (ed) *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asia Countries, France and the United States* (Routledge Curzon, New York, 2004) 1.

Raul Katz “The Impact of Broadband on the Economy: Research to Date and Policy Issues” in Theresa Miedema (ed) *Trends in Telecommunications Reform 2010/2011: Enabling Tomorrow's Digital World* (International Telecommunications Union, Geneva, 2011) 23.

Richard Mulgan “Accountability: An Ever-Expanding Concept” (2000) 78 (3) Public Administration 555.

Robert Cohen, Matthew Robinson, John Waller and Spyros Xenakis “The Cost of Universal Service in the U.S. and Its Impact on Competition” (paper presented to the Future of Universal Postal Service in the United States, the Brookings Institution, 18 June, 2002).

Rodney Dormer and Derek Gill “Managing for Performance in New Zealand's Public Service - A Loosely Coupled Framework” (paper presented to the Performance Management Association Conference, Performance Measurement: Theory and Practice, Dunedin, April 2009).

Ross Patterson “Light Handed Regulation in New Zealand Ten Years On” (1998) 6 Competition and Consumer Law Journal 134.

Roy Chun Lee “Telecommunications in Vietnam” (paper presented to the Symposium on APEC’s New Strategy for Structural Reform, Montana, 16 May 2011).

Santiago Herrera and Gaobo Pang “Efficiency of Public Spending in Developing Countries: An Efficiency Frontier Approach” (World Bank Policy Research Working Paper 3645, 2005).

Schechter B “Telecommunications in New Zealand: Competition, Contestability and Interconnection” (1995) University of Colorado 2.

Scott Jordan “A layered United States Universal Service Fund for an everything-over-IP world” (2009) 33 Telecommunications Policy 111.

Sean Mosby and Jerome Purre “Toward Universal Broadband Access in New Zealand” (Mikan Consulting Limited and Ministry of Economic Development, 2010).

Seiichi Kondo “Fostering Dialogue to Strengthen Good Governance” in János Bertók (ed) *Public Sector Transparency and Accountability: Making It Happened* (OECD, Paris, 2002) 7.

Seiichi Kondo “Opening Remarks for OECD/OAS forum on Ensuring Accountability and Transparency in the Public Sector” (OECD, Brazil, 5-6 December 2001).

Stanford Levin “Issues and Policies for Universal Service and Net Neutrality in a Broadband Environment” (paper presented to the First Asia-Pacific ITS Regional Conference, Wellington, August 2010).

Stanford Levin “Universal Service and Targeted Support in a Competitive Telecommunications Environment” (2010) 34 (1-2) Telecommunications Policy 92.

Steven Van De Walle and Wouter Van Dooren “Introduction: Using Public Sector Performance Information” in Wouter Van Dooren and Steven Van De Walle (eds) *Performance Information in the Public Sector: How It is Used* (Palgrave MacMillan, New York, 2008) 1.

Tran Manh Dung “Development of Universal Services in Vietnam within the International Economic Integration” (PhD, Vietnam Institute of Commercial Research, 2011).

Tristan Gilbertson “Beginning of the End of ‘Light Handed’ Telecommunications Regulation in New Zealand” (2001) 7 (1) Computer and Telecommunications Law Review 5.

Ulrike Mandl, Adriaan Dierx and Fabienne Ilzkovitz “The Effectiveness and Efficiency of Public Spending” (2008) Economic Papers 301, European Communities.

Vietnam Public Utility Telecommunications Service Fund “Evaluation of the Implementation of the universal service programme 2006-2010” (prepared for the Ministry of Information and Communications, 2010).

Yang Soon Lee, William Bratton and Wu Wei Shi “The Role of the Regulator in Broadband Development” in John Alden (eds) *Trends in Telecommunications Reform 2006: Regulating in the Broadband World* (International Telecommunications Union, 2006) 51.

Yvonne van Roy “Taking Advantage of Market Power: Should New Zealand Adopt the Approach of the High Court of Australia?” (2005) 11 NZBLQ 319.

E Internet Materials

Amir Licht “Accountability and Corporate Governance” (2002) Social Science Research Network <papers.ssrn.com/sol3/papers.cfm?abstract_id=328401>.

Andrew Dymond and Sonja Oestmann “Rural Telecommunications Development in a Liberalising environment: An Update on Universal Access Funds” (2002) Intelecon Research and Consultancy <www.inteleconresearch.com/pdf/update%20universal%20access.pdf>.

Annemieke Karel “The Development and Implications of free ISPs in New Zealand” (2003) New Zealand Institute for the Study of Competition and Regulation <www.iscr.org.nz/f209,4313/Free_ISPs_220903.pdf>.

British Broadcasting Corporation “Four in Five Regard Internet Access is a Fundamental Right: Global Poll, 2010” (2010) BBC World <news.bbc.co.uk/2/shared/bsp/hi/pdfs/08_03_10_BBC_internet_poll.pdf>.

Broadband Commission “A 2010 Leadership Imperative: The Future Built on Broadband” (2010) International Telecommunications Union <www.itu.int/dms_pub/.../S-POL-BROADBAND.01-2010-PDF-E.pdf>.

Christina Enright “Strategic Behavior of Internet Service Provider in New Zealand and the Performance of this Market” (2000) New Zealand Institute for the Study of Competition and Regulation <www.iscr.org.nz/f240.4833/4833_enright_210600.pdf>.

Commerce Commission <www.comcom.govt.nz/accountability/>.

Commerce Commission <www.comcom.govt.nz/telecommunications-service-obligations>.

Daniel Kaufman “Myths and Realities of Governance and Corruption” (2005) Social Science Research Network <papers.ssrn.com/sol3/papers.cfm?abstract_id=829244>.

Derick Brinkerhoff “Taking Account of Accountability: A conceptual Overview and Strategic Options” (2001) U.S. Agency for International Development <www1.usaid.gov/our_work/democracy_and.../ipc/wp-14.pdf>.

Elia Armstrong “Integrity, Transparency and Accountability in Public Administration: Recent Trends, Regional and International Developments and Emerging Issues” (2005) The United Nations <unpan1.un.org/intradoc/groups/public/documents/un/unpan020955.pdf>.

Federal Communications Commission “Connecting the Globe: Regulator’s Guide to Building a Global Information Community” (1999) Federal Communications Commission <transition.fcc.gov/connectglobe/sec6.html>.

Fred Schenkelaars and Imram Ahmad “Concept paper 4: Access to Information, Transparency and Accountability” (2004) The United Nations <unpan1.un.org/intradoc/groups/public/documents/un/unpan007714.pdf>.

General Statistics Office “Vietnam Economic-social report for ten years 1990-2000” (2001) <www.gso.gov.vn/default.aspx?tabid=418&ItemID=1466>.

General Statistics Office “Population and population density in 2010 by province” (2011) <www.gso.gov.vn/default_en.aspx?tabid=467&idmid=3&ItemID=11728>.

General Statistics Office “Administrative Units at 31 December 2010” (2011) <www.gso.gov.vn/default_en.aspx?tabid=466&idmid=3&ItemID=11653>.

Helmuth Cremer, Farid Gasmi, Andre Grimaud and Jean-Jacques Laffont “The Economics of Universal Service: Theory” (1998) World Bank <info.worldbank.org/etools/docs/library/64602/theory.pdf>.

Helnuth Cremer, Philippe De Donder, Francois Boldron, Denis Joram and Bernard Roy “Social Costs and Benefits of the Universal Service Obligation in the Postal Market” (2008) Institut d’Economie Industrielle <neeo.univ-tlse1.fr/671/>.

History of AT & T “One Policy, One System, Universal Service”
<www.corp.att.com/history/milestone_1908.html>.

Hoang Vu “Ngân hàng đồng loạt giảm lãi suất cho vay” *VNEconomy News* (Vietnam, 2008)
<vneconomy.vn/60636P0C6/ngan-hang-dong-loat-giam-lai-suat-cho-vay.htm>.

InfoDev Programme of the World Bank “ICT Regulation Toolkit: Module 4 Universal Access and Service” (2012) InfoDev and International Telecommunications Union
<www.ictregulationtoolkit.org/en/index.html>.

InforDev Programme of the World Bank “ICT Regulation Toolkit: Output-Based Aid (OBA) explained (2012) <www.ictregulationtoolkit.org/en/PracticeNote.3159.html>.

Intelecom Research and Consultancy Limited “Universal Access and Universal Service Funds: Insights and Experience of International Best Practice” (2005)
<www.inteleconresearch.com/pdf/050713%20-%20universal%20access%20and%20universal%20service%20funds%20v3.pdf>.

International Federation of Accounts “Governance in the Public Sector: A Governing Body Perspective” (2001) International Federation of Accounts
<www.ifac.org/sites/default/files/publications/files/study-13-governance-in-th.pdf>.

International Monetary Fund “Fiscal Transparency, Accountability, and Risk” (2012) International Monetary Fund
<www.imf.org/external/np/pp/eng/2012/080712.pdf>.

Telecommunication Development Bureau “The World in 2013: ICT Facts and Figures” (2013) International Telecommunications Union
<www.itu.int/ITU-D/ict/facts/material/ICTFactsFigures2013.pdf>.

International Telecommunication Union “Trends in Telecommunication Reform 2012: Smart Regulation for A Broadband World - Summary (2012) <www.itu.int/dms_pub/itu-d/opb/reg/D-REG-TTR.13-2012-SUM-PDF-E.pdf>.

International Telecommunications Union “Harmonisation of Policies Governing the ICT Market in the UEMOA-ECOWAS Space: Universal Access and Universal Service” (2005)
<www.itu.int/ITU-D/treg/projects/itu-ec/Ghana/modules/Compil-Guidelines_final.pdf>.

International Telecommunications Union “ICT Regulatory Trends 2010” (2010)
<www.itu.int/ITU-D/treg/publications/ICT-Reg-News-e.pdf>.

International Telecommunications Union “Key Global Telecom Indicators for the World Telecommunication Service Sector” (2013) <www.itu.int/ITU-D/ict/statistics/at_glance/KeyTelecom.html>.

International Telecommunications Union “Measuring the Information Society 2012” (2012) <www.itu.int/ITU-D/ict/publications/idi/material/2012/MIS2012_without_Annex_4.pdf>.

International Telecommunications Union “Measuring the Information Society 2011” (2011) <www.itu.int/net/pressoffice/backgrounders/general/pdf/5.pdf>.

International Telecommunications Union “Recent Regulatory Trends from Around the Globe” (2012) <www.itu.int/ITU-D/arb/COE/2012/DisputeResolution/Presentations/doc2.pdf>.

International Telecommunications Union “SADC Toolkit on Universal Access Funding and Universal Service Fund Implementation” (2011) <www.itu.int/ITU-D/projects/ITU_EC_ACP/hipssa/Activities/SA/CRASA/Toolkit%20Final%20Report.pdf>.

International Telecommunications Union “Trends in telecommunication Reform 2008: Six Degrees of Sharing: Summary” (2008) <www.itu.int/ITU-D/treg/publications/Trends08_exec_A5-e.pdf>.

ITU World Telecommunications Indicators Database (2004) <www.itu.int/ITU-D/ict/>.

ITU World Telecommunications/ICT Indicators Database <www.itu.int/ITU-D/ict/statistics/>.

Jenny Keown “Vodafone wins TSO Appeal” (New Zealand, 8 April 2010) <www.stuff.co.nz/timaru-herald/business/3561080/Vodafone-wins-TSO-appeal>.

Krishna Jayakar and Harmeet Sawhney “Universal access in the information economy: Tracking policy innovation abroad” (2007) Technical Report, Benton Foundation <www.benton.org/node/5598>.

Lewis Evans, Neil Quigley and Jie Zhang “An Essay on the Concept of Dynamic Efficiency and its Implications for Assessments of the Benefits From Regulation and Price Control” (2000) New Zealand Institute for the Study of Competition and Regulation <www.iscr.org.nz/n237.html>.

Lisa Leidig “An Assessment of Universal Service Funding in Canada” (2000) Ovum Ltd <[www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/ovum.pdf/\\$FILE/ovum.pdf](http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/ovum.pdf/$FILE/ovum.pdf)>.

Manh Hung “Dân tự rời mạng ở vùng viễn thông công ích” (2010) ICTNews <www.ictnews.vn/home/Internet/77/Dan-tu-roi-mang%C2%A0o-vung-vien-thong%C2%A0cong%C2%A0ich/32294/index.ict>.

Marc Robinson “Performance-Based Budgeting” (2007) Regional Centers for Learning on Evaluation and Results <www.theclearinitiative.org/PDFs/CLEAR_PB_Manual.pdf>.

Michael Carter and Julian Wright “Bargaining over Interconnection: The Clear-Telecom Dispute” (1998) Social Science Research Network <papers.ssrn.com/sol3/papers.cfm?abstract_id=41223>.

Ministry of Information and Communications (2011) <mic.gov.vn/uploads/20100318/DNhatangmang.xls>.

Nguyen Trong Ty “Some viewpoints of judicial reforms” (2005) Hanoi Bar Association <luatsuhanoi.vn/index.php?page=productView&viewParent=301&id=520>.

Nguyen Xuan Tung *Đẩy mạnh xây dựng Nhà nước pháp quyền XHCN Việt Nam dưới ánh sáng đại hội Đảng lần thứ XI* (2011) Ministry of Justice <moj.gov.vn/ct/tintuc/lists/nghin%20cu%20trao%20i/view_detail.aspx?ItemID=4376>.

OECD Broadband Penetration <www.oecd.org/statistics/>.

Pat Barrett “Some Current Issues in Accountability” (2001) Australian National Audit Office <www.anao.gov.au/uploads/documents/PAPER.doc>.

Patrick Xavier “Rethinking universal service for a next generation network environment” (2006) OECD Telecommunications and Information Services Policy <www.oecd.org/sti/broadbandandtelecom/36503873.pdf>.

Quoc Hung and Hoang Nguyen “Phút chốc trở thành con nợ” *Online Culture Newspapers* (Vietnam, 8 August 2011) <www.baovanhoa.vn/DOISONG/print-38095.vho>.

Rod Oram and Richard Braddell “0867 Scheme Protection from Traffic” *The New Zealand Herald* (New Zealand, 8 April 2000) <www.nzherald.co.nz/technology/news/article.cfm?c_id=5&objectid=131204>.

Schechter B “Telecommunications in New Zealand: Competition, Contestability and Interconnection” (1995) University of Colorado <pb.freeshell.org/nz.pdf>.

Scott Wallsten “Reverse Auction and Universal Telecommunications Service: Lessons from Global Experience” (2008) Social Science Research Network <papers.ssrn.com/sol3/papers.cfm?abstract_id=1136836>.

Scott Wallsten “Using Competitive Bidding to Reform the Universal Service High Cost Fund” (2009) Technology Policy Institute

www.techpolicyinstitute.org/files/using%20competitive%20bidding%20to%20reform%20the%20universal%20service%20high%20cost%20fund1.pdf.

Sofie Maddens “Trends in Universal Access and Service Policies: Changing Policies to Accommodate Competition and Convergence” (2009) International Telecommunications Union www.itu.int/ITU-D/treg/Events/Seminars/GSR/GSR09/doc/USPolicy_ITUEC.pdf.

State Service Commission “New Zealand’s State Sector Reform: A Decade of Change” (1998) www.ssc.govt.nz/decade-of-change.

State Services Commission and the Treasury “Performance Measurement: Advice and examples on how to develop effective frameworks” (2008) www.ssc.govt.nz/performance-measurement.

Statistics New Zealand www.tradingeconomics.com/new-zealand/gdp-growth-annual.

Statistics New Zealand www.tradingeconomics.com/new-zealand/rural-population-percent-of-total-population-wb-data.html.

Suresh Shende and Tony Bennett “Concept paper 2: Transparency and Accountability in Public Financial Administration” (2004) The United Nations unpan1.un.org/intradoc/groups/public/documents/un/unpan020955.pdf.

Trevor Roycroft “Reverse Auctions for Universal Service Funding?” (2008) Roycroft Consulting Economic and Policy Analysis www.roycroftconsulting.org/Roycroft_Consulting_Auction_White_Paper_2-1-08.pdf.

Ulrike Mandl, Adriaan Dierx and Fabienne Ilzkovitz “The Effectiveness and Efficiency of Public Spending” (2008) Economic Papers 301, European Communities ec.europa.eu/economy_finance/publications/publication11902_en.pdf.

World Bank “A Review of the Use of Output-Based Aid Approaches” (2009) www.worldbank.org/ida/papers/IDA15_Replenishment/Mid_Term/OBA_IDA15MTR.pdf.

F Press Releases

Commerce Commission “Commerce Commission considers Court of Appeal 0867 decision” (press release, 4 August 2009).

International Telecommunications Union “The World in 2013: ICT Facts and Figures” (press release, 27 February 2013).

New Zealand National Party’s Government “Step Change – Better Broadband for New Zealand” (press release, 22 April 2008).

New Zealand Telecom Limited “Telecom moves to protect phone customers” (press release, 3 April 2000).

New Zealand Telecom Limited “Telecom to spend NZD 59 million on Rural Network” (press release, 20 June 2005).

Steven Joyce “Government announces targets for rural broadband” (press release, 2009).

Steven Joyce “Government releases coverage and funding plan for rural telecommunications” (press release, 2009).

Steven Joyce “Rural Telecommunications Plans Finalised” (press release, 2010).

Supreme Court of New Zealand “Media Release: Press Summary” (press release, 2011).

G *Miscellaneous*

“RBI tender awarded to Telecom and Vodafone; Kordia calls decision a ‘tragedy for rural New Zealand’ Telegeography (New Zealand, 7 February 2011).

“Telecom, Vodafone bid one of five” *Stuff.co.nz* (New Zealand, 12 November 2010).

CallPluss’s *TSO Submission on Telecommunications Service Obligation Discussion Document* (2007).

Charles River Associates “Submission the Commerce Select Committee on the Telecommunications Bill 2001”.

Clare Curren “*Labour calls on the Government to re-tender rural broadband scheme*” (1 April 2011).

Clear Communications Limited “Submission to the Commerce Select Committee on the Telecommunications Bill 2001”.

Constitution of Telecom Corporation of New Zealand Limited: First Schedule: Kiwi Share and Rights of Kiwi Shareholder (1989).

Federated Farmers of New Zealand “Submission to MED on: The Rural Broadband Initiative” (2009).

General Meeting SPT's Report 2006.

Hamish Fletcher "Rural Broadband Build 'Will be Open'" *nzherald.co.nz* (New Zealand, 8 February 2011).

InfoDev Program of the World Bank *Telecommunications Regulation Handbook* (Washington, 2000).

Intelecom Research and Consultancy Limited "Summary of a Country Survey on Universal Access & Service and Broadband" (2011).

Network Strategies Report: Capital investment in Telecom's rural network (2007).

NZCL's *Response to the Ministry of Economic Development: Discussion Paper on telecommunications Service Obligations regulatory Framework* (2007).

OECD "Annual Report on Competition Policy Developments in New Zealand 2011" (2012).

OECD "Serving the Economy Better, Occasional Papers on Public Management" (1991).

Office of the Minister of Communications "Submission to the Implementation Review of the Telecommunications Act 2001" (2005).

Ross Pattesson "Government interference doomed" *Stuff* (New Zealand, 10 December 2012).

Smartlinx 3 Limited "Comment on Telecommunications Service Obligations Regulation Framework Discussion Document" (2007).

Submissions of 2Degrees, TeamTalk, Woosh, WorldxChange, TUANZ, Northpower Limited, New Zealand Regional Fibre Group.

Telecom Corporation of New Zealand Limited "Telecom's Comments on telecommunications Service Obligations Regulatory Framework Discussion Document" (2007).

Telecommunications Regulatory Association of Southern Africa "Policy Guidelines on Universal Access/Service for Telecommunications Services in SADC" (2002).

TelstraClear "Submission on the Rural Broadband Initiative, TSO Reform and Funding of Telecommunications Development" (2009).

Truong Chinh *Introduction to the Political Report* (The Sixth National Congress of Vietnamese Communist Party, 1986).

United Network Limited “Submission to the Commerce Select Committee on the Telecommunications Bill 2001”.

VNPT’s Decision 267/1998/HDQT-BC (1998) (Amended in 2000).

Vodafone “Submission on RBI: Proposal for Comment” (2009).

Vodafone New Zealand Limited “Submission to the Ministry of Economic Development on Telecommunications Service Obligation Discussion Document” (2007).

Vodafone New Zealand Limited “Submission to the Ministry of Economic Development on the TSO Reform and Funding Telecommunications Development” (2009).

Woosh “Submissions to the Ministry of Economic Development on Telecommunications Service Obligation Discussion Document” (2007).

WTO Regulation Reference Paper: Agreement on Basic Telecommunications.

WTO General Agreement on Trade in Services (GATS): Annex on Telecommunications.