Telecommunications in Transitioning towards General Competition: A Comparative Study on Interconnection in the U.S., the EU and Thailand

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Abstract

Telecommunications industry is generally known for its specific set of regulations in dealing with its own critical issues, particularly of competition in the context of natural monopoly and asymmetric regulation. Interconnection is the major condition which is intensely regulated. Nonetheless, telecommunications regulations are transitioning towards general competition meaning that the specific conditions are fading out; specific rules are becoming unnecessary. The regulation of interconnection is now in question. The United States and the European Union have provided the most advanced examples which have been developing for more than a century. However, each country has its own conditions and specific requirements. The United States possesses very strong systems interplaying between antitrust and telecommunication laws. The European Union has developed its framework in dealing with integration of its internal market. In case of Thailand, its situation is well-positioned for general competition because asymmetric regulations are not necessary for the industry. Operators need not to have specific condition to deal with the incumbent. Actually, they all have competed in the level playing field for quite a while. Conditions for interconnection are less required.

Keywords: Telecommunications, Regulation, Interconnection, Competition, Thailand
1. Introduction

It is a general understanding that a specific industry may require a specific set of regulations to deal with its own critical issues. This aspect has generally been accepted and applied especially in the industry with a concern of natural monopoly. The telecommunication industry has been regarded as an industry of natural monopoly. It requires sector-specific rules to regulate its particular conditions which include a number of well-known issues of interconnection, allocation of scarce resources, licensing, and universal services.

The transition of sector-specific towards general competition regime has been raised since the characteristics of industry being changed and natural monopoly seemed not to be existed. Despite the controversy of transitioning, many researches suggest that sector-specific rules are still necessary for the industry in some extents. The US and EU have been applying the idea of transitioning but maintaining some degrees of sector-specific regulations. While there has been a significant shift in the US, the Telecommunication Act of 1996 is playing a major role of sector-specific rules. Also, the EU has introduced a new framework for electronic communications services, which is considered as sector-specific regulations, in early 2000.

This study is aimed at illustrating the movement in transitioning of interconnection regulation. The study will be divided by jurisdictions into three parts: the U.S., the EU, and Thailand. Each jurisdiction will be described its regulation governing telecommunications industry as it has developed from its own conditions. In addition, this article will illustrate movements of interconnection as the transitioning prospect.

2. The United States

At the beginning, the U.S. telecommunications industry was subjected to the general competition.\(^1\) Sector-specific law then evolved according to its own conditions, especially for AT&T’s business behaviors, acknowledgement of natural monopoly, and the specific conditions of interconnection. The industry structure has then

\(^1\) Bunaramrueang, Piyabutr, “Telecommunication Regulations Transitioning towards General Competition: Comparative Study of the U.S., the EU and Thailand”, University of California Berkeley: Boalt Hall School of Law, LL.M. Dissertation, April 2007, p. 8
gradually reformed; the need of preconditioning, as for AT&T, has changed, and needed to be redefined. It seems commonly accepted that U.S. telecommunications is transitioning from sector-specific to general scheme, especially when it comes to telecommunications mergers today.\(^2\) The U.S. telecommunication regulation is still the most advanced regulatory model evolving from its most advanced industry. Its unique industrial characteristics are an important ground for other industrial regulations. This part will illustrate characteristics of its regulations in order to give basic information for subsequent discussing on transitioning movement of interconnection.

### 2.1 Characteristics of Law Governing U.S. Telecommunications Industry

In the U.S., the umbrella law governing telecommunications is the Communications Act of 1934 (47 U.S.C. § 1 et seq.) which has been amended numerous times by Cable Communications Policy Act of 1984, the Cable Television Consumer Protection and Competition Act of 1992, the Telecommunications Act of 1996, and etc.\(^3\) Despite a number of previously enacted statutes on telecommunications including the Wireless Ship Act of 1910\(^4\), the Mann-Elkins Act of 1910, the Radio Act of 1912\(^5\), the Radio Act of 1927\(^6\), The Communications Act of 1934 accomplished an important organizational task by establishing the Federal Communications Commission (FCC), and centralizing the communications jurisdiction.\(^7\) Therefore, FCC has responsible for regulating communications industry including wire and wireless. It should also be noted that the Communications Act of 1934 defined the jurisdiction of the FCC only for the interstate and foreign commerce\(^8\), and left intrastate activities for the state regulators. In addition, the National Telecommunications and Information Administration (NTIA) of the Department of Commerce plays, in parallel with FCC, two important roles of

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\(^4\) The Act was aimed to require only that radio equipment and operators be presented on all ships leaving U.S. ports with fifty or more persons on board.

\(^5\) The Act was aimed to prohibit the use of wireless for radio communication without a license issued by the Secretary of Commerce and Labor.

\(^6\) The Act was aimed to prohibit the use of wireless for radio communication without a license issued by the Federal Radio Commission.

\(^7\) Benjamin, supra note 3, p. 5.

\(^8\) 47 U.S.C. § 1
spectrum management for federal government use and of responsibility for determining presidential policy on telecommunication issues.  

The Telecommunications Act of 1996 has imposed and reformed in many fundamental issues of the industry which create sector-specific rules including duties of incumbent, interconnection and unbundling, and universal services.  

- **Incumbent and New Entrants:** The Telecommunication Act of 1996 has provided preemption over state and local laws on barrier of entry and interconnection. It is designed to facilitate and increase local telephone competition by forcing existing Local Exchange Carriers (LEC) to cooperate with potential competitive entrants.  

- **Interconnection and Unbundling:** As interconnection becomes an economic necessity, The Telecommunication Act of 1996 requires incumbent LECs to provide interconnection to any requesting telecommunications carrier at any technically feasible point. The interconnection must be at least equal in quality to that provided by the incumbent LECs to itself or its affiliates, and must be provided on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. The 1996 Act also requires incumbent LECs to provide requesting telecommunications carriers nondiscriminatory access to network elements on an unbundled basis at any technically feasible point. Unbundling provisions thus move the market towards conditions under which regulation becomes necessary.  

- **Universal Service:** The Telecommunications Act of 1996 has reformed the funding and definition of universal service by defining that Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. Moreover, the Act also established the Federal-State Joint Board to be in charge with the task of recommending to the FCC what should be included within the federal universal service standard.

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10 47 U.S.C. § 253
11 Shelanski, *supra* note 2, p.27.
12 47 U.S.C. § 251
13 Shelanski, *supra* note 2, p.28.
14 47 U.S.C. § 254(c)(1)
15 47 U.S.C. § 254(a)(1)
2.2 Transitioning Prospect on Interconnection from Sector-specific to General Competition

Regulatory reform raises important considerations on the scope of regulation needed in the sector being opened up to greater competition.\textsuperscript{16} Interconnection is still the most required precondition in telecommunications competition preceding other issues such as universal services, price-cap, merger, etc. To date, the U.S. telecommunications has seen a series of regulatory controversy on interconnection since the “Kingsbury Commitment” until recently in the “Trinko” case.\textsuperscript{17} While there are interconnection regulations as a sector-specific regulation, there has also been a developing doctrine: “essential facilities”, in general competition context since 1912\textsuperscript{18}, particularly dealing with the interconnection issue in two major cases\textsuperscript{19}, and then appears to be an exception to the general antitrust rule.

The essential facilities doctrine: consists of four elements: (1) control of the essential facility by a monopolist; (2) a competitor’s inability to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. This was reflected in MCI Communications Corp. v. AT&T (1983) in ruling for opening up local markets to the competition in the long distance market.\textsuperscript{20} The doctrine could be seen in the same reasoning of interconnection under the general competition concept of “refusal to deal”.\textsuperscript{21} While the Telecommunications Act of 1996 imposes interconnection duty on carriers, the essential facilities doctrine requires proof that a competitor needs access to compete and the business justifications defense appears to be limited.\textsuperscript{22} In addition, the 1996 Act has seems to puts an end to antitrust supervision of the telecommunications industry and places


\textsuperscript{17} Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP, 539 U.S. 980 (U.S. 2003)

\textsuperscript{18} United States v. Terminal R.R. Ass’n of St. Louis, 224 U.S. 383 (1912)

\textsuperscript{19} MCI Communications Corp. v. AT&T and Verizon Communications., Inc. v. Law Offices of Curtis V. Trinko, LLP

\textsuperscript{20} MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132 (7th Cir.1983)


\textsuperscript{22} There are 2 main reasons disfavoring the essential facilities doctrine, as put by Professor Howard A. Shelanski, Antitrust Class Spring 2007, Boalt Hall Law School:
- The doctrine provides very plausibility in punishing investors and innovators
- The doctrine turns court to regulators of a specific industry, which is not difficult and out of scope of courts.
jurisdiction of the markets under the FCC; however, Section 601(b)(1) of the Act contains an antitrust-specific saving clause that provides:

“…nothing in this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws”.

In this viewpoint, the essential facilities doctrine could be a progressive transition for the interconnection regulation as its characteristics conform more closely to that of general competition concept. Although the doctrine has been well established from the lower courts, the Supreme Court declined to recognize the doctrine in the Trinko case. The Court stated that:

“the 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access”.25

Then Trinko is likely lead to preemption of the antitrust laws. Although this had brought again a swing-back of sector-specific regulation, the virtual report of the death of the doctrine may be an exaggeration. Despite the controversial reasoning on the ruling of the Trinko case, the lower courts continue to apply the doctrine. Then the standard of the doctrine could be developed further, perhaps narrower application, to fit with the requirement of general competition.

In sum, the U.S. telecommunications are transitioning to general competition according to the development of its market. Interconnection regulation is the major existing sector-specific regulation, which is always required to ensure the competition by imposing duty to interconnection on carriers. However, there is also the essential facilities doctrine which could probably help transitioning the interconnection in the foreseeable future. Therefore U.S. telecommunication is in the very well position of

23 Rubin, Jonathan L., supra note 21, p.58.
24 It is an objective to encourage competitors to build facilities or circumvent rather than free-ride. The doctrine is actually no greater than the only reason of no valid business justification as seen in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985). Shelanski, supra note 22.
26 See, for thorough critics, supra note 21, p. 58-73.
28 See, for example, Nobody In Particular Presents, Inc. v. Clear Channel Communications, Inc., U.S. Dist. LEXIS 5665 (D. Colo. 2004)
Generally, sector-specific regulations referred to as *ex ante* regulations create market distortions which is biased against an error of business doing consumer harm. General competition law referred to as *ex post* regulations is likely to bias toward another error of ensuring business to operate. However, the general competition scheme generally takes the major role, and usually been preferred in business viewpoint. Hence, the major argument is that *ex ante* regulations imposed by the regulator may not be well-defined since government officials generally lack sufficient information and incentive to make decisions.\(^{30}\) Therefore, the market-based regulations are seemed to be the final destination of the industry. The U.S. telecommunications is a good example of this transitioning policy.

### 3. The European Union

The transitioning from sector-specific regulation to general competition has been the dominant policy model of every market including the European Union.\(^ {31}\) Although the EU aimed eventually to open its market for full competition, it has adopted a new sector-specific framework including telecommunication and medias to redefine the market definition with a new term of “electronic communications”\(^ {32}\) in March 2002, which came into force in July 2003. It should be noted that this is a compromising position during the transitional period. Noticeably, EU Directives have emphasized a necessity of *ex ante* regulatory obligations\(^ {33}\), especially in some circumstances where there is not effective competition, and competition law remedies are not sufficient to address the problem.\(^ {34}\) However, the focus of the new framework is to set out those relations and procedures among the EU and Member State’s organizations. Unlike the

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31 Directive 2002/21/EC, Recital (1)

32 Directive 2002/21/EC, Article 2(c), “electronic communications service” means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;


U.S., the EU approach deals with its own factors focusing mainly on harmonizing the EU single framework and technological neutrality. This part will provide basic information of EU Regulatory Framework of Electronic Communications in order for subsequent discussing on transitioning movement of interconnection.

3.1 Characteristics of Law Governing EU Telecommunications Industry

Under the old regulatory framework, National Regulatory Authority (NRA) imposed \textit{ex ante} obligations on operators with market share exceeding 25\% of relevant market.\footnote{Directive 97/33/EC, Article 4(3)} Under the new framework, NRAs would impose \textit{ex ante} obligations only if there is a dominant player according to the new definition of “significant market power” (SMP)\footnote{Directive 2002/21/EC, Article 14, 16} which has been built upon general concepts of competition law, referred to as “light regulation”, as applied to normally functioning competition.\footnote{Europe’s Information Society, “Electronic Communications New Regulatory Framework – Principles”, eCommunications Regulation - IS Policy Fact Sheet, <http://europa.eu.int/information_society/doc/factsheets/013-regulatory_framework.pdf>, (September 2005)} Therefore, the EU new regulatory framework is based on the regulatory approach focusing on two fundamental procedures. The first is to identify market definition,\footnote{As the provision of the Framework Directive, the market definition is a procedure to define the boundary of “relevant markets” which is a ground of “market analysis”. This is the first regulatory feature of the new framework in which the EU adopted in accordance with the principles of competition law. Moreover, the provision also provided necessary considerations taken into account for applying the market definition including “market recommendation and guidelines”, “national circumstances,” and “geographic territory”. The market recommendation and guidelines shall be regularly adopted by the Commission to identify relevant product and service markets within the electronic communications sector, in accordance with the principles of competition law. Systematically, the provision also set the initial list of relevant product and service markets. However, it is questionable of what extent is the legal binding of the recommendation, especially in regards to how each NRA would define its national market definition., see Directive 2002/21/EC, Article 15(1), 15(3), Annex I, see also Commission Recommendation 2003/311/EC – The recommendation of 11 February 2003, and Loetz, Sascha., and Andreas Neumann, “The Scope of Sector-specific Regulation in the European Regulatory Framework for Electronic Communications”, German Law Journal, Vol. 04, No. 12, p.1317-1321} and the second is an analysis to identify significant market power (SMP) on which \textit{ex ante} regulations may be imposed.\footnote{The next regulatory feature of the framework is a procedure of market analysis in order to find out that: (1) there are undertakings with “significant market power” on the respective relevant markets, where appropriate, in collaboration with the national competition authorities, (2) Whether a relevant market is effectively competitive,” (3) the NRA is required to determine whether to impose, maintain, amend or withdraw appropriate obligations on undertakings in accordance with the competition effectiveness., see Buigues, \textit{supra} note 30, p.12, Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03), Directive 2002/21/EC, Article 16(1), 16(2), 16(3), 16(4)}
Remarkably, the EU new regulatory framework establishes a procedural system that integrates the Community level into administrative procedure at the Member State level.\(^{41}\) The EU’s new regulatory framework consists of six directives and one important decision:

1) **Framework Directive (Directive 2002/21/EC):** outlines the general principles, objectives, and procedures which aimed to consolidate the EU single market for electronic communications\(^{42}\);

2) **Authorization Directive (Directive 2002/20/EC):** replaces individual licenses by general authorizations to provide communications services, especially for conditions which may be attached to a general authorization\(^{43}\);

3) **Access Directive (Directive 2002/19/EC):** sets out rules for a multi-carrier marketplace, ensuring access to networks & services, interoperability, and especially for obligations on operators and market review procedures\(^{44}\);

4) **Universal Service Directive (Directive 2002/22/EC):** guarantees basic rights for consumers and minimum levels of availability and affordability, in the light of specific national conditions and minimizing market distortions\(^{45}\);

5) **Privacy Directive (Directive 2002/58/EC):** covers protection of privacy and personal data communicated over public networks;

6) **Directive on Competition (Commission Directive 2002/77/EC):** consolidates previous liberalization directives;

7) **Radio Spectrum Decision (Decision No. 676/2002/EC):** sets the principles and coordination procedures essential for the development of a coherent EU radio spectrum policy.

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\(^{41}\) The so-called Article 7 procedures require NRAs to notify the regulatory measures they intend to take to the European Commission and the other NRAs, prior to their adoption. When an NRA notifies proposed measures under the Article 7 procedures, the Commission has one month in which to assess the measures (“phase one” procedure). In case that the Commission considers the proposed measures would create a barrier to the single market or if it has serious doubts as to their compatibility with Community law, it can conduct a more detailed investigation lasting a further two months (“phase two” procedure). The commission may withdraw the draft measures together with a detailed and objective analysis, and specific proposals for amending the draft measure (“veto decision”). See Loetz, *supra* note 39, p. 1332.


\(^{43}\) Directive 2002/20/EC, Annex A, B, C

\(^{44}\) Directive 2002/19/EC, Chapter III

\(^{45}\) Directive 2002/22/EC, Article 3.
The EU’s new regulatory framework has introduced a new system of collaboration among the national regulatory authorities, the Commission and a number of committees and policy groups including Cocom, ERG, RSC, and RSPG. A consistent approach is developed throughout the EU single market with flexibility to deal with national markets and conditions. However, the EU competition rules are not precluded by these sector-specific rules. They are applicable to all undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the common market. The case of Deutsche Telekom’s margin squeeze in 2003 was a ruling example of EU general competition in its telecommunications industries.

3.2 Transitioning prospect on Interconnection from Sector-specific to General Competition

The EU new framework determines the scope of sector-specific regulation only according to the necessity for sector-specific regulation. To develop in the short term, EU finds its way to support new market entrants gaining access to the networks of incumbent operators and to provide the benefits to end users where it is effectively competitive. The EU new regulatory framework sets out a harmonized and technology neutral regime for the regulation of communications companies across the EU, which will provide industry with greater certainty and a transparent more uniform approach across the member states. This new scheme sets out a technology neutral framework, and avoids discrimination between different technologies that might be converged to compete in the same field. In order for introducing new and innovative services and technologies, the administrative constraints should be relaxed. Then

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46 Directive 2002/21/EC, Article 22, Communications Committee (Cocom): exercises regulatory and advisory functions on implementation of the directives in assistance to the EU Commission.
47 Commission Decision 2002/627/EC, European Regulators Group (ERG): facilitates consistent application of the framework throughout member states, and encouraging cooperation and coordination between national regulatory authorities and the Commission.
48 Decision No. 676/2002/EC, Radio Spectrum Committee (RSC): assists the Commission in the development and adoption of technical implementing measures aimed at ensuring harmonized conditions for the availability and efficient use of radio spectrum, as well as the availability of information related to the use of radio spectrum.
49 Commission Decision 2002/622/EC, Recital (2), Radio Spectrum Policy Group (RSPG): a consultative group formed by Member States to assist and advise the Commission on radio spectrum policy issues in order to take into account the views of Member States, Community institutions, etc. which may relate to the use of radio spectrum.
50 Treaty establishing the European Community, Article 81-89
51 OJL 263 (14 October 2003), Commission Decision of 21 May 2003 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-1/37.451, 37.578, 37.579 — Deutsche Telekom AG)
52 Directive 2002/21/EC, Recital (18), (31), Article 8(1)
market success will depend on choices of business and investment. This market-based approach seems more preferable than the government-led approach, and closer to general competition.

An important objective underlying for technological neutrality is to promote European standards for interactive digital television. They emphasized this proposition mainly in Access Directive and Universal Service Directive in order to maintain the obligations formerly laid down in the previous provision of fully digital electronic communications networks used for the distribution of television services and open to the public to be capable of distributing wide-screen television services and programs, so that users are able to receive such programs in the format in which they were transmitted. The new framework also provided a decisive provision of “conditional access system” to ensure the technological neutrality subjected to market analysis and review. The provision focuses on considerations that denial of access or unreasonable terms and conditions having an effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest. This could be considered in the similar reasoning of “essential facilities” with more procedural approach.

In addition, Authorization Directive imposes a supplementary scheme of “general authorization” to support the technological neutrality. General authorizations allow any undertaking to build networks and offer services, subject only to general conditions that are more readily changed and adapted than the previous system of individual licenses. NRAs can only limit the number of operators in a market when there are scarce resources at stake, notably radio spectrum or numbering ranges. Moreover, there has been a fundamental shift of spectrum management to a situation where it needs a coherent policy approach, driven by social and economic objectives,

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53 Directive 2002/21/EC, Recital (18), (31)
54 Directive 2002/19/EC, Recital (4), (10), (14), Article 2(a), 4(2), 5(1)(b), 6(1), 6(3)(b)(i), Annex I
55 Directive 2002/22/EC, Recital (32), (33), Article 24, Annex VI
56 Directive 95/47/EC
57 Directive 2002/19/EC, Recital (8)
58 Directive 2002/19/EC, Article 6
59 Directive 2002/19/EC, Article 12
60 Additionally, “essential facilities” often referred to as the definition of “abuse” provided in article 82 of the Treaty establishing European Union as the ECJ used.
61 Directive 2002/20/EC, Article 3(1)
62 Directive 2002/20/EC, Article 3(3)
in order for transitioning to digital television.\textsuperscript{63} Universal Service Directive also provided that Member States shall ensure the interoperability of the consumer digital television equipment.\textsuperscript{64} Also, the secondary trading of spectrum has been initiated and be expected to lead to more flexibility in accessing radio spectrum. With respect to spectrum, this will depart from technology constraints and develop a regulatory approach which allowing operators to sell unwanted radio frequency to each other, thus reducing the risk to operators of buying the right to use radio frequency and further encouraging new operators to enter the market.\textsuperscript{65}

In sum, the EU telecommunications have made a significant transitioning step to electronic communications in order to cope with technological advancement. It is also an aim to transition to general competition, but dealing with internal market harmonization simultaneously. In a prospect of interconnection, the new framework will impose obligations only when necessary procedures to analyze the market have been completed, with a result that will lead to ineffective competition. There is no further substantive provision on the issue. It is focused on procedures and collaborations between its organizations. Its transitioning seems not to be unfolded to general competition in very soon. Rather, the EU electronic communications will prepare Member States and organizations in line with market-based approach, and be able to further transition to general competition of EU internal market.

4. Thailand

Specifically in the sector of telecommunications, Thailand enjoys the continually growth in the number of cellular mobile phone subscribers and internet users. With a very high growth of both subscribers and service coverage in 2001-2003, operators moved very quickly to reap the greatest rewards\textsuperscript{66} even when the regulatory


\textsuperscript{64} Directive 2002/22/EC, Article 24.


environment is still unclear. Following will describe Thailand’s characteristics in telecommunication industry in order to subsequently conclude that there is an opportunity for frog-leaping towards general competition with a light-handed approach.

4.1 Characteristics of Law Governing Thailand’s Telecommunications Industry

There are a number of provisions addressing in regard of telecommunications. The utmost provision is in the 1997 Constitution\(^7\) which provides in Section 40 that:

> “Transmission frequencies for radio or television broadcasting and radio telecommunication are national communication resources for public interest.
> There shall be an independent regulatory body having the duty to distribute the frequencies under paragraph one and supervise radio or television broadcasting and telecommunication businesses as provided by law.
> In carrying out the act under paragraph two, regard shall be had to utmost public benefit at national and local levels in education, culture, State security, and other public interests including fair and free competition.”

This has reformed the legal structures and entities which reflected from the commitment to the WTO. Then 2 new communications laws have been enacted in order to reform the telecommunications market in compliance with the principles set out by WTO. The first is the Act on the Organizations to Assign Radio Frequency and to Regulate the Broadcasting and Telecommunication Services of 2000.\(^6\) The other is the Telecommunication Business Act of 2001.\(^6\) There is also the Trade Competition Act of 1999 governing on general trade competition.\(^7\)

By the 2000 Act on the Organizations, the convergence trend is recognized to be a definite pursuit of telecommunications industry; however, Thai framers decided to introduce 2 separate commissions in regulating telecommunications and broadcasting

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\(^6\) Constitution of the Kingdom of Thailand B.E. 2540; however, at the time of this writing, there was a coup in Thailand on September 19\(^\text{th}\), 2006. The junta has enacted the Interim Constitution B.E. 2549 (2006); it is hopeful that the ongoing process in hearing and drafting the new constitution will be accomplished without serious troubles. Then Thai people could finally determine their own choices.


\(^6\) The Telecommunication Business Act B.E. 2544 (2001)

\(^7\) The main objective of this act is to deal with anti-competitive practices including abuses of market dominance, merger and acquisition, collusions, and other unfair trade practices. The 1999 Act has been enacted in replacing the Price Fixing and Anti-Monopoly Act of 1979 and establishing the Trade Competition Commission (TCC).
industries: National Telecommunication Commission (NTC) and National Broadcasting Commission (NBC). They set a mutual panel of both commissions in managing the whole national frequency bands collectively. Hereafter we will focus on NTC and its related issues of interconnection.

The 2001 Telecommunication Business Act was the second significant shift of the telecommunication reform. It addresses essential issues of telecommunications industry including Licensing, Access and interconnection, Standard of Telecommunications Network and Equipments, Rights of Licensee, Rights of User, Contract for the Supply of Telecommunications Service, Fee and Tariff in Telecommunications Service, Regulatory Enforcement, and especially Transitory Provision. Section 25 71 of the 2001 Act addresses the duty of access and interconnection which is one of major reforms that dramatically changed the business factors of industry. 72 The 2001 Act has defined a general framework of access and interconnection that it is the duty of every operator who own telecommunication network to allow others to access or interconnect to its own network. At least two considerations should be addressed.

First, there is no different obligation between incumbent and others. 73 It could be noted that this provision impose the obligation of access and interconnection in general. The practical arrangements on interconnection will vary in details and depend on capability of each operator. Although the provision language is broad, it leaves

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71 “The licensee who owns telecommunications network shall have the duty to allow other licensees to interconnect with his or her telecommunications network in accordance with the criteria and procedures prescribed by the Commission.

The licensee who owns telecommunications network shall allow other licensees to access his or her network in accordance with the criteria and procedures prescribed by the Commission.

Refusal of the access to telecommunications network can be made only in the following cases:

(1) the existing network is insufficient for the access by other licensees;
(2) the access to telecommunications network results in technical problem that may cause interference or obstruction telecommunications;
(3) Other cases as prescribed in notification of the Commission.

The licensee who owns telecommunications network and refuses the access to his or her own network under paragraph three shall have the duty to prove his or her ground for such refusal…”

72 In the past, access and interconnection were made by the authorities: TOT and CAT. Charges were determined according to their concession agreements which are different from concession to concession. Again, authorities and concessionaires had agreed in a way that best benefit for them in term of revenue sharing. It was actually not a system of interconnection; they usually relied on numbering fees.

73 This is different from the 1996 U.S. telecommunication Act that only incumbent LECs will be mandated.
room for parties to exercise their own wills to achieve collective goal of access and interconnection. New entrants will not find themselves too difficult in doing business. It seems that they could provide access and interconnection either directly or indirectly to reach other operators.

Second, there are unclear provisions in regard of defenses for refusal to provide access, not for interconnection: (1) inadequacy of network, (2) serious technical problem may occur, and (3) other prescribed cases. It seems arguable to make a defense. Inadequacy of a network might not be an absolute position; every network normally enhances its coverage and capacity. Reasonable period of delay time should be acceptable. Interference and obstruction of telecommunication are also very broad. They require much more definition which is likely to be argued. No other case is clearly prescribed thus far. 74

4.2 Transitioning prospect on Interconnection from Sector-specific to General Competition

In the past, it was generally known that, all telecommunication concession mandated operators to interconnect via TOT. Therefore, there has never been a specific regulation on interconnection between operators. It was centralized. The recent reform was the first time of the level playing field for competition by opening for others to find their ways including interconnections. Thailand’s market have now seen much possibility opening to higher level of competition, which we call herein “general competition”. Two views are raised to support this view as following.

4.2.1 Asymmetric regulations of interconnection are not required

Before the market reform, interconnection was not a major problem due to those concessions in effect to mandate every operator interconnecting with TOT as national telecommunications trunk exchange. Operators have found no difficulty in interconnecting with only TOT. However, should problems occur, they have to solve them themselves and sometime offer some benefit to TOT in return that they will be able to enhance interconnection capacity with TOT. Moreover, interconnection charges by TOT were discrete arrangements due to different concessions of different

74 NTC have announced its notification on matters of access and interconnection. The notification provides that every operator needs to announce its interconnection offer in order to let every operator to meet and negotiate their own arrangement if they find difficulties. In case that the negotiation was failed, NTC would order an interim arrangement. See NTC Notification on matters of access and interconnection, article 5 and 32
authorities. AIS was paying the lowest sum of interconnection charges\textsuperscript{75} because it was an direct concessionaire of TOT. This was not a very big deal because during the concession period, the competition was not that intense. The traffic usage was stable and predictable.

Shortly after the market reform, three questions have raised (1) will this mandatory be still in effect with regard to the 2001 Telecommunication Business Act, (2) what is the solution today that operators have found themselves needing to enhance their interconnection capacity while centralized interconnections through TOT become insufficient, (3) discretion of access charges and revenue share set out by concessions become unreasonable burden to operators in the reformed market.\textsuperscript{76} Moreover, because Thailand’s telecommunication market has been reformed in 2001, there is no regulator until late 2004. Operators did compete in the unclear regulatory environment for a period.

Interconnection become a major problem in 2005.\textsuperscript{77} It was a bottleneck between mobile phone operators; users cannot make inter-network calls as proper. Because of a mandatory clause of concessions, they have been required to interconnect directly and indirectly via exchanges of TOT which cannot responses to the very high demand growth. As a former state-owned enterprise in wired line business, TOT has not taken actions promptly. NTC have waited and seen the problem without taking any action, not even an analysis report to propose a solution. Almost a year later, NTC’s resolution has been announced to appoint a consulting team in resolving the problem.

\textsuperscript{75} It was a system of interconnection charges plus revenue shares: AIS have been paying only revenue sharing of 15-35\% to TOT, DTAC and True Move have been paying 200 baht per subscriber plus 18\% of prepaid cellphone revenue to TOT, and 12-30\% of revenue to CAT, True have been paying only revenue of 16-21\% to TOT, and TT&T have been paying only 43.1-44.5\% revenue to TOT, see Tangkitvanich, Somkiet, Taratorn Ratanananumisorn, "Report on Telecommunication Interconnection", Thailand Research Fund – Project on Telecommunications Reform of Thailand, (March 2003), p. 32, then the government have tried to transform the concessions to licensing system by transform revenue share into a kind of excise taxes: 2\% for fixed line services and 10\% for mobile phone services, see Royal Decree on Excise Tax Rates B.E. 2527 (1984), 4th amended B.E. 2546 (2003), Now the excise tax for fixed line services and mobile phone services have been amended to 0\%, see Thairath, “Turning point of Thai Telecommunications”, <http://www.thairath.co.th/news.php?section=economic02 &content=35000>

\textsuperscript{76} Prachachat, “True Move Profit over night after interconnection in forced”, <http://www.ntc.or.th/index.php?option=com_content&task=view&id=2870&Itemid=27>

\textsuperscript{77} Manager Online, “AIS invoked difficulty in enhancing interconnection capacity to TOT”, (June 17\textsuperscript{th}, 2005), <http://www.manager.co.th/cyberbiz/viewNews.aspx?newsid=9480000080829&Comment Page=1&>
of inter-network calls. Restrictions of interconnection between mobile operators have been resolved by bypassing TOT’s exchanges. It could be noted that the largest operator have taken actions very slow in insufficient amount.

From this viewpoint, the regulator and operators have seen the necessity of interconnection, even while they have not been required to interconnect. They seek to interconnect each other without necessary role of TOT as the incumbent. The asymmetric regulation imposing on the incumbent is not needed today. Interconnection obligation as in the 2001 Telecommunication Business Act should be interpreted as general and symmetric regulations.

### 4.2.2 Positive environment in transitioning toward general competition

In regard to market environment of the industry, telecommunication operators of both wired and wireless including other media in the convergence world are strong enough in open competition. Although the telecom industry has, in many respects, just recovered from the serious financial crisis experienced by the country in 1997, every operator have found their own partners to rebuild themselves. AIS has been taken by Temasek Holdings. DTAC has been taken by Telenor. True and its affiliates have been brought back into CP group: the one of largest holding group of Thailand. TT&T have found its partner: NTT DoCoMo, for its 3G nationwide project. A concern would be that TOT and CAT would compete very well in the industry.

Today operators don’t have very much concern in market dominance of the incumbent. The level playing field has been set up and ready for a higher level of competition. Because it had ever been none of regulator of both general and telecommunication markets, operators have been marketing its business mostly in their own efforts. The market has seen the vacuum of regulation for quite a while. Interestingly, regulatory inefficiency has been a key factor for low prices and highest

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80 www.temasekholdings.com.sg 
81 www.telenor.com 
82 www.cpthailand.com 
growth of the industry. This could be an opportunity for NTC to promote competition by using the light-handed approach.

5. Conclusion
This article is an attempt to emphasize the proposition of law evolvement in reflecting of its society and its own factors. U.S. telecommunications is historically unique in its path, especially of its competition experiences throughout the century. Interconnection regulation is the examples development of U.S. sector-specific regulations in resolving their problems of particular situation from the level playing field at the beginning. Today there are asymmetric regulation to deal with the incumbent, and the development of general competition scheme. The doctrine of “essential facilities” is the well-established doctrine in the reasoning of refusal to deal that could be developed the interconnection issues in line with general competition. In comparison to the EU, the new framework keep continuing the process of harmonization, but imposes high level of interplay among EU organizations in order to seek the greater objective of consistency across Member States via consultation between regulators and the Commission. Therefore, the new framework adopts an approach more in line with the principles of general competition law to lighten substantive regulation and strengthen procedural regulation, as competition increases and technologies converge, that ex ante obligations need to be imposed only where competition is ineffective. Both U.S. and EU are likely to impose to give access to essential facilities with clear applications in regard to general competition law in order to facilitate end-users rather than particular competitors. This prospect of transitioning towards general competition is thereby obvious.

Thailand’s prospect has been in very well position of transitioning towards general competition. Thai telecommunications is not necessary to deal with the problem of the incumbent and asymmetric regulations. It has been truly opened right after the reform and privatization. Competition level has been very high even in the vacuum period of regulation. It is seemed that operators have been competing in open competition for quite a while. Significantly, they all are still in market place. No one got beaten out. Operators have proved their readiness to the higher level competition. Unlike the U.S. and EU, it is not conventional circumstance of Thailand that operators seek to interconnect among them other than the incumbent. Well-developed principles of
asymmetric regulations or ex ante obligations are seemed unnecessary and inappropriate to the situation. Today Thailand needs not to impose those asymmetric regulations to persuade new entrants. Principles like essential facilities are not required for Thailand’s situation. It seems that Thailand have found its shortcut toward general competition.

6. Selected References


________________________. “Basic Telecommunication Trade in Services in the Framework of WTO and the Implementation of Additional Commitments


