



## **Licensing Options for Internet Service Providers**

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Some countries require Internet Service Providers (“ISPs”) to obtain government- issued licenses before commencing operations. Other countries impose less burdensome regulatory requirements, permitting ISP operations pursuant to general authorizations. A third category of countries imposes neither licensing nor general authorization requirements on ISPs. What are the differences among these approaches? What are the benefits and disadvantages of adopting licensing or authorization requirements for ISPs? In the event a government opts to impose a licensing or general authorization requirement on ISPs, what are the “best practices” for how the licensing or authorization rules and procedures should be structured?

### **I. What Regulatory Methods Can Be Applied to the Operations of ISPs?**

Regulators generally can choose from among three different approaches to regulation of communications operators and services:

- open entry (i.e., no licensing or authorization requirements);
- general authorizations; and
- individual operator licenses.

#### **A. Open Entry / No Licensing or Authorization Requirements**

Under an “open entry” regulatory approach, the affected communications service is fully liberalized and regulators impose no licensing process or qualification requirements. This approach may prove useful where an activity is technically within the definition of a service that is subject to regulation (e.g., offering a communications service to the public), but where there is no justification for imposing a licensing or authorization requirement.<sup>1</sup> This is not to say that unlicensed operations are unregulated; they are still subject, for example, to laws governing businesses in general. Further, operational requirements can be imposed through legislation or a general regulation or order. The open entry approach means that no license or authorization is needed to commence business. This open entry approach has been adopted in some countries for ISP operations and for the provision of “value-added services.”

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<sup>1</sup> In a market-based system, regulations frequently are used to promote desirable conduct that the regulator doubts would occur in the market in the absence of regulation. Alternatively, regulations may be used to deter undesirable conduct that the regulator believes the marketplace may promote or allow in the absence of government prohibitions. In many cases, however, the marketplace will function in a beneficial manner and will not create undesired results, so active regulation of a particular activity is not necessary.

The U.S., for example, does not license or authorize ISPs.<sup>2</sup> Instead, e-mail, data and Internet services are treated as “information services,” and ISPs are permitted to operate unfettered in a competitive and free market, subject only, with a few limited exceptions, to general business laws.<sup>3</sup> The decision not to license Internet service providers or regulate these services has played an important role in the expansion of the Internet in the U.S. Likewise, under the approach favored by the European Union, ISPs and other information services should require no license or prior authorization to operate.

However, not all countries have adopted a completely non-regulatory approach towards ISPs or related information services. A number of countries follow a “general authorization” scheme and others require ISPs to obtain a license or other form of approval prior to commencing operations. These two regulatory systems are briefly described below.

## **B. General Authorizations**

General authorizations are used to permit an entity to provide a service without obtaining a prior explicit grant or approval by the national regulatory authority. The terms of the general authorization can be established in advance through either a class license, a rule or regulation, or general legislation. Any entity that complies with the defined terms and conditions of the authorization<sup>4</sup> is permitted to provide the service without any further decision or licensing action by the regulator.<sup>5</sup>

This method of authorizing service providers is useful where the issuance of individual licenses is not justified, but where there are significant regulatory objectives that can be achieved by establishing broad, general conditions. The European Union permits a general authorization scheme for ISPs and all other electronic communications services.

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<sup>2</sup>Although the U.S. regulates “telecommunications services” when such services are provided by common carriers, it has opted not to regulate the provision of “information services,” such as Internet access, that are provided over these telecommunications facilities. The U.S. has determined that the public interest does not require the regulation of these information services.

<sup>3</sup> The Federal Communications Commission (“FCC”), the federal agency which regulates the provision of most communications services in the U.S., also has declined to impose regulations that would guarantee ISP access to the increasingly important cable platform. To date, the FCC has declined to intervene in some of the infrastructure access questions that have been raised by information service providers and has instead opted to let these issues be resolved by the marketplace.

<sup>4</sup> The conditions imposed in these authorizations frequently relate to consumer protection and essential technical requirements. See the discussion in Section III regarding permissible authorization procedures.

<sup>5</sup> Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, Official Journal 24.4.2002, p. L 108/21 (“Authorisation Directive”), available online at: [http://europa.eu.int/information\\_society/topics/telecoms/regulatory/new\\_rf/index\\_en.htm](http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm) [Note - works in MS Internet Explorer only, not Netscape Navigator.]

### **C. Individual Operator Licenses**

Individual licenses are granted by a national regulatory authority to permit an entity to provide a communications service or to operate specific facilities. Licenses may be subject to conditions established under general law (i.e., conditions that are applied to all operators). In some cases, additional obligations also are included as a specific condition of the individual license. Licenses, therefore, frequently subject an entity's operations to regulatory obligations that are far more extensive than those required in a general authorization.

In contrast to entities operating pursuant to general authorizations, service providers that are subject to a licensing regime are not entitled to commence their service operations until the regulatory authority has granted explicit permission and issued a license. Individual licensing mechanisms, therefore, are most appropriate where the regulator seeks to control the structure or functioning of a market and the entry of service providers into a particular market. This situation could occur, for example, where the regulator seeks to maximize the use of a scarce resource (i.e., radio spectrum), perhaps by permitting only a limited number or type of providers to offer the service. For these reasons, licenses are usually awarded pursuant to a competitive selection process.

In light of the heavy involvement and oversight demanded of the regulator under this licensing scheme and the significant regulatory burdens placed on service providers, it is not surprising that the European Union has concluded that the use of an individual licensing mechanism is not justified for ISPs.<sup>6</sup> Individually, many countries have determined that ISPs should be permitted to operate under a lesser regulatory burden than that imposed by an individual licensing scheme.<sup>7</sup> Some countries, however, have opted to impose a licensing requirement on ISPs.<sup>8</sup>

## **II. What Are the Pros and Cons of Adopting a Licensing or Prior Authorization Requirement for ISPs?**

The decision to adopt an individual licensing mechanism for ISPs effectively establishes a nation's regulatory authority as the country's "gatekeeper" to the Internet market. If the regulator adopts requirements for ISPs that are unduly burdensome, restrictive or opaque, these procedures may slow or prevent the entrance of ISPs into a nation's market. The licensing

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<sup>6</sup> Under current EU law, the provision of voice telephony can be licensed. There is a proposal pending, however, that would limit licensing even in the field of telephone services only to situations that involve rights to use scarce radio frequencies and numbers.

<sup>7</sup> For example, a website maintained by the International Trade Administration of the U.S. Department of Commerce ("ITA") indicates that, as of November 1999, France, Sweden, Finland and Canada did not require ISPs to obtain licenses. Belgium and Austria did not require ISPs to obtain a license, however, both required ISPs to submit a declaration form to the relevant national regulatory authority before initiating operations. Italy required ISPs to obtain a general authorization.

<sup>8</sup> The ITA website indicates that, as of late 1999, Venezuela and Argentina required ISPs to obtain value added service licenses. Greece, Turkey and Portugal also reportedly required individual licensing of ISPs.

process thus can become a means for regulators to restrict, intentionally or not, the market access of ISPs, which will keep costs high and limit the overall growth of the country's communications and information services. To avoid such results, the U.S. and the European Union advocate that countries not adopt licensing requirements.

Although this deregulatory approach has many advantages, it may not be appropriate in every market. To the contrary, there may be legitimate reasons for countries to require individual licenses where the telecommunications market is not fully competitive or where the business regulatory and consumer protection framework has not yet been established. In some markets, therefore, it may be beneficial to provide ISPs with some type of licensing mechanism.

In some countries, regulators detail, in the license itself, the rights as well as the obligations of communications service providers. In some instances the license constitutes an actual contract between the regulator and the operator.<sup>9</sup> Consumer protection conditions (those related, e.g., to price regulation; billing practices; consumer complaint mechanisms; dispute resolution; limitations on liability for service defaults; and mandatory services due to consumers, such as directory services, operator assistance and emergency services) and conditions related to interconnection are frequently described in telecommunications licenses that are issued to carriers in such countries. In Mexico, for example, quality of service standards and targets for the telecommunications carrier are explicitly included in the carrier's license. Similarly, the license may specify rights to which the operator is entitled.

This licensing practice differs from that found in countries, such as the U.S. and Canada, where there has not been a tradition of issuing licenses for certain telecommunications or information services. In the U.S. and Canada, regulatory terms and conditions have traditionally been imposed on service providers through decisions, orders or tariff approval processes of a government regulatory authority rather than through the terms of an individual license. In Canada, for example, quality of service standards, targets and other matters are not included in a telecommunications license and would instead be specified in ancillary decisions and orders of the regulator.

The use of licenses that detail the specific rights and obligations of service providers may be desirable, however, in countries that lack clear or consistent regulatory policies or frameworks, or that have economic or governance problems. Countries that lack an established regulatory framework yet seek to facilitate growth of and investment in communications or information service providers may choose to issue licenses in order to provide sufficient regulatory certainty to these service providers.

By specifying the rights and obligations of an ISP, a license may provide the relevant stakeholders - including the ISP, its investors, the government, and even consumers - with a clear understanding of what the ISP is, and is not, permitted or required to do during the term of its

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<sup>9</sup> This approach is used where licenses are granted by way of traditional "concessions." Licenses in this format generally describe the rights and obligations of both the regulator and the operator in detail and are signed by both parties. See Telecommunications Regulation Handbook – Licensing Telecommunications Services (Module 2), ed. Hank Intven (2000) at 2-9, <http://www.infodev.org/projects/314regulationhandbook/>.

license. This clear definition of a communications provider's rights is often critical to enable the business to raise the financing needed to fund its operations and otherwise to operate its business.<sup>10</sup>

In the event that a licensing mechanism is adopted in an effort to protect ISP rights, regulators must ensure that any general authorization or individual licensing system is structured to provide for the lightest possible regulation of ISPs.

### **III. Best Practices for Licensing and Authorizations**

Although licensing methods vary widely among countries, there are some common features that are considered to be among the best licensing practices. The following description draws largely upon practices advocated in the Licensing Directive adopted by the European Union in 1997, the General Agreement on Trade in Services (GATS) and the 1997 Agreement on Basic Telecommunications of the World Trade Organization (WTO). While the EU Licensing Directive is designed to govern procedures for authorizing telecommunications networks, many of its general principles also would be applicable to any licensing scheme adopted for ISPs.

The recommended elements of an ISP licensing or authorization scheme are briefly listed below. These elements generally seek to ensure that any licensing or authorization requirements are open, non-discriminatory and transparent, and do not constitute unnecessary barriers to competition and innovation.

#### **A. Best Practices for General Authorizations**

##### **-- Conditions for Authorization**

- Any conditions imposed on ISP authorizations should be non-discriminatory, proportionate and transparent, and should be justified in relation to the service concerned. Under EU law, the specific types of conditions that may be attached to general authorizations are very limited, but include:<sup>11</sup>
  - information to be provided under a notification requirement;

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<sup>10</sup> The potential importance of this licensing mechanism is demonstrated in a Web site post by the International Trade Administration of the U.S. Department of Commerce ("DOC"), dated August of 1999. This website indicates that ISPs in Botswana requested that the Botswana Telecommunications Authority (BTA), the country's independent regulatory body, create a licensing mechanism in order to give the ISPs legal standing in negotiations with the Botswana Telecommunications Corporation (BTC), the country's monopoly line telephony provider. The BTA was reportedly considering the request although it wanted to avoid a regulatory situation where it would be required to scrutinize companies that sought to provide Internet services. The DOC speculated that the likely outcome would be a license on demand system where the BTA provided licenses to ISPs without a review process. Since this Web site has not been updated since late 1999, there is no further information regarding action by the BTA on this request.

<sup>11</sup> These conditions are drawn from the Annex to the EU Authorisation Directive. Many of the conditions are applicable to telecommunications providers rather than ISPs and therefore have not been listed here. See also the 1997 EU Licensing Directive, now repealed, <http://europa.eu.int/ISPO/infosoc/telecompolicy/en/dir97-13en.htm>.

- conditions relating to the protection of users and subscribers, namely privacy protection and consumer protection;
- conditions relating to the interconnection of networks, the interoperability of services and universal service obligations;
- restrictions in relation to the transmission of illegal content; and
- measures relating to the enabling of legal interception by competent national authorities.

-- **Notification**

- Service providers may be required to notify the regulator before providing the intended service. Under EU law, the amount of information that can be demanded is limited to what is necessary for identification of the service provider, and the service provider cannot be required to wait for any period of time before starting to provide the services covered by the general authorization.

-- **Right of Review, Remediation and Appeal**

- If the regulator finds that a service provider does not comply with the conditions of a general authorization, it may inform the service provider that it is not entitled to use the general authorization and/or impose on the service provider proportionate measures to ensure compliance. The service provider shall have an opportunity to state its views on the application of any such conditions and to remedy any breaches within a defined period of time. If the service provider is able to correct the breaches or deficiencies within a specified period of time, the regulator shall annul or modify its initial decision and state the reasons for this decision. If the service provider is unable to correct the deficiencies, the regulator shall, within a defined period of time (e.g., two months of its initial decision) confirm its decision and state the reasons for its decision. This subsequent decision shall be communicated to the service provider within a defined period of time (e.g., one week). A procedure also should be established to permit the regulated entity to appeal the regulator's decisions to an independent institution.

**B. Best Practices Applicable to Licenses**

-- **Public Availability of Licensing Criteria<sup>12</sup>**

- Where a license is required of ISPs, the following should be published and made publicly available:
  - all licensing criteria;<sup>13</sup>

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<sup>12</sup> See Appendix A, Annex to the Fourth Protocol to the GATS Agreement, the "Agreement on Basic Telecommunications" negotiated under the auspices of the World Trade Organization (WTO) in February 1997, which came into effect on January 1, 1998. These procedures also should be applied to any criteria associated with an authorization or licensing process.

<sup>13</sup> The regulator must publish any notification, registration or licensing requirements that must be met before any ISP is permitted to do business.

- the period of time normally required to reach a decision concerning an application; and
  - the terms and conditions of individual licenses.
- The reasons for the denial of any license must be made known to the applicant upon request.

-- **Licensing Conditions**

- Any license conditions must be objectively justified, proportionate, non-discriminatory and transparent. See, for example, the allowable conditions for general authorizations described above. Regulators generally should keep license conditions and filing requirements to a minimum. It would be unduly burdensome, for example, to require ISPs to submit excessive amounts of business information to the regulator, such as: business plans; extensive technical filings; showings of experience; bank statements; or information detailing the source of funding.<sup>14</sup>

-- **Granting and Revoking Licenses**

- All licenses should be granted through open, non-discriminatory and transparent procedures. Furthermore, all applicants should be subject to the same procedures, unless there is an objective reason for differentiation.
- Any entity that fulfills the conditions adopted and published by the regulatory authority shall be entitled to receive an individual license. When a licensee fails to comply with a condition attached to the license, the regulatory authority may withdraw, amend, or suspend the individual license or impose, in a proportionate manner, specific measures aimed at ensuring compliance. The regulatory authority shall, at the same time, give the entity a reasonable opportunity to state its view on the application of the conditions and, except in the case of repeated breaches by the entity, the entity shall have an opportunity, within a defined period of time, to remedy the breach. If the breach is remedied, the regulatory authority shall, within a defined period of time, annul or modify its decision and state the reason for its decision. If the breach is not remedied, the regulatory authority shall, within a defined period of time after its initial intervention, confirm its decision and state the reasons for its actions. The decision shall be communicated to the entity within a defined period of time (i.e., one week).

-- **Time Limits**

- The regulator should adopt and adhere to reasonable time limits for acting upon license requests.

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<sup>14</sup> Some of this information may be relevant to regulators when they are reviewing requests to provide broadcast, wireless, voice telephony or other services that use scarce resources or otherwise affect the provision of essential communications services. These showings are arguably of lesser importance, however, for information service providers, such as ISPs. Regulators should request such materials only when they have an actual need.

-- **No Artificial Barriers to Entry**

- The regulator should impose no artificial limits on the number of operators or service providers in the market. For example, since there is no network scarcity on a wireline network (compared with, for example, radio frequencies), there is no reason to restrict the number of ISP providers.

-- **Appeal**

- A procedure also should be initiated to permit an entity to appeal any decision by the regulatory authority to an independent institution.

**C. Best Practices Applicable to Both Licenses and Authorizations**

-- **Public Consultation**

- To ensure fairness and transparency in the licensing or authorization process, the regulator should consult with industry, the public and other stakeholders.

-- **Fees**

- The fees associated with obtaining a license or authorization should not impose unnecessary costs on ISPs, and should not otherwise create a barrier to market entry. Therefore, to the extent that a regulator imposes fees on the issuance of a license or general authorization, the fees should seek to cover only the administrative costs incurred in the issuance, management, control and enforcement of the applicable licensing or authorization scheme.<sup>15</sup>
- In addition, charges must be imposed in a non-discriminatory manner so that one operator is not charged more than another without some objective basis for so doing. Any fees also shall be published in an accessible and appropriately detailed manner.

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<sup>15</sup> See Article 12 of the EU Authorisation Directive.