

SYMPOSIUM

INTERNATIONAL

TELECOMMUNICATIONS LAW IN

THE POST-DEREGULATORY

LANDSCAPE

FOREWORD

Joan G. Wexler

It is my great pleasure this morning to welcome you to Brooklyn Law School's International Telecommunications Conference. Our symposium is hosted by the law school's Center for the Study of International Business Law and the *Brooklyn Journal of International Law*.

In 1984, Ma Bell broke up. Judge Harold Green's Modified Final Judgment decision truly provided the critical "Big Bang" moment that marked the birth of a new telecommunications universe. And I can certainly offer my own perspective on some of these developments as a telephone consumer. Unlike many of our students, I can remember when there was only one telephone company. I can also remember when you could get telephones in any color you wanted — as long as that color was black. (I might also add that telephones tended to work.)

Now life is more interesting — but more complicated. Not only do we face a dazzling array of choices of telecommunications equipment and telephone providers, but in addition we also can decide among Internet service providers and wireless companies. We may even be working on setting up a broadband home network system.

As a law school dean, I also have another perspective. More and more of my job involves choosing telecommunications options for the administration, faculty and students. The law school faces hard choices in making sure that we can all communicate with each other in the most efficient fashion.

At today's conference, we will examine the relationship between the American revolution in telecommunications and international developments. In particular, we will hear about the impact of the Internet, which is now challenging legal models in existing telecom regulation.

The Internet is an international telecommunications medium by definition. Moreover, the internationalization of media companies is now threatening any regulatory scheme that is based at the national level. As an example, the Federal Communications Commission ("FCC") regulates telecommunications in the United States alone, but companies such as AOL-Time Warner and Bertelsmann do business everywhere on the globe. How can a national system of regulation respond to the new international legal challenges?

Today's symposium seeks to explain how traditional areas of the telecommunications regulation are responding to this new international legal landscape. I am delighted to welcome the distinguished scholars who are joining us today. On a personal note, I want to mention that my law school classmate Reed Hundt, former Chairman of the FCC, will be providing today's keynote address. It will be wonderful to see Reed here at Brooklyn Law School.

I also want to thank Professor Paul Schwartz for organizing today's conference. Paul is a prodigious scholar in the telecommunications field and a valued member of our community. I also appreciate the work of Diane Nardone and Michelle Scotto to make sure that today's conference runs smoothly.

As a final note, I should mention that although I realize you may not have focused on the telecommunications choices of law school deans, I would appreciate any advice you could give me. Many thanks again for joining us here today.

PANEL I: TELECOMMUNICATIONS DEVELOPMENTS IN THE EUROPEAN UNION

PRINCIPAL PAPERS

THE POST-DEREGULATORY LANDSCAPE IN INTERNATIONAL TELECOMMUNICATIONS LAW: A UNIQUE EUROPEAN UNION APPROACH?

*Herbert Burkert**

I. INTRODUCTION

This Article has two purposes: the first is to provide an overview of the developments in telecommunications sector specific regulation before and after the so called “Telecommunications Review 1999” (“1999 Communications Review”) of the European Union (“EU” or “European”), with an emphasis on the “new regulatory package” that has evolved from this review. After a brief overview of the “constitutional” basis for EU activities in the field of telecom regulation and the regulatory toolbox available in Part II, a presentation of the key elements of EU telecom law until the 1999 Communications Review will follow in Part III, as well as a description of the main issues of that Review and the consequences as expressed in (the current state of) the new regulatory package. It should be noted that

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this post-deregulatory landscape in the EU has not fully emerged yet. One element of the original package has already been put into operation: Regulation 2887/2000 of the European Parliament ("Parliament") and of the Council of the European Union ("Council") of 18 December 2000 on Unbundled Access to the Local Loop.¹ The finalization of the remaining elements of the package is envisaged for Spring 2002. The Member States will be obliged to transform the package into national law by 2003. Due to this situation, this Article, when reporting on the full package, will focus principally on the stage of *all* proposals as first presented by the European Commission ("Commission") in 2000. Where appropriate, however, reference will be made to changes which occurred after the Commission reconsidered its proposals following the First Reading in the Parliament. While this approach does not fully reflect the state of affairs at the time of writing, this Article will at least provide the reader with a timeline which can be used at a later stage to make a full comparison of the original package with the final outcome.

The second purpose of this Article is to invite — with the benefit of hindsight, a benefit that should never be left unexploited — another view on these developments: Statements of the main political actors on past regulatory activities tend to convey the impression that regardless of any past changes, each of the previous stages had always been under control and an inherent logic had always been at work at every step in the process. Part IV begs to differ from such logification by selecting two issues for closer scrutiny: the "European Regulatory Authority" that hovers through these regulatory changes like the "ghost of Christmas yet to come"² and the revival of the "public service" concept. It is suggested that rather than being the consequential outcome of a market-logical sequence of deregulation and re-regulation — some of the changes appear to be the result of an unpredicted interplay of forces outside telecommunications regulation, forces which will continue to thwart econocratic regulatory intentions.

1. Parliament and Council Regulation 2887/2000 of 18 December 2000 on Unbundled Access to the Local Loop, 2000 O.J. (L 336) 4 [hereinafter Parliament and Council Regulation 2887/2000].

2. See CHARLES DICKENS, A CHRISTMAS CAROL (1st ed., Barron's 1985) (1843).

Whether the results — and the results of this regulatory endeavor are not yet evident — will be *very much* different from the results once intended is not the point at issue here. The Article seeks only to provide examples demonstrating that, for the purpose of comparing regulatory policies in the EU, the historical, institutional, political and cultural factors in the regulatory environment in the EU are so important that a very general level of abstraction is needed to make comparison with other regulatory regimes meaningful. There is sufficient institutional economics and political science analysis available to offer appropriate explanations of such “path dependency” and “institutional constraints.” However, this Article also tries to convey that such influences should not solely be seen as hindrance, constraints or obstacles to the virtuous path of regulation, but as potent and delicious flavors of regulatory culture.³

The new regulatory package will be the focus of our attention in tracing the influence of these “soft” framework conditions. Clearly, for a complete understanding of the regulatory environment, both competition law *and* sector specific regulation must be considered together. Further, recent developments in competition law have to be taken into account, particularly because of their influence on the specific sector regulation.⁴ Due attention will be given to these influences. While there is still a debate as to whether competition law will eventually replace sector specific regulation in telecommunications, there is a basic understanding that sector specific regulation for the time being is still necessary and the new regulatory package is material proof of this belief.

3. On such a “constraints” and “path” oriented comparison between the U.S. and EU approaches, albeit restricted to the area of rate rebalancing, see Barbara A. Cherry & Johannes M. Bauer, Institutional Arrangements and Rate Rebalancing: Empirical Evidence from the United States and Europe, Paper Presented at the Thirteenth Biennial Conference of the International Telecommunications Society (July 2-5, 2000), *available at* http://www.its2000.org.ar/conference/cherry_bauer.pdf.

4. See Commission Working Document on Proposed New Regulatory Framework for Electronic Communications Networks and Services: Draft Guidelines on Market Analysis and the Calculation of Significant Market Power under Article 14 of the Proposed Directive on a Common Regulatory Framework for Electronic Communications Networks and Services, COM(01)175 final [hereinafter Commission Working Document on Proposed New Regulatory Framework].

Since the early beginnings, not only EU telecommunications law, but EU law, EU institutions and even the terminology of the EU as such have been (and continue to be) subject to constant change. Therefore, the following terminological clarifications may be useful:

(1) "EU" in this Article identifies what in correct terminology is the "European Community" ("EC" or "Community"), i.e., the first pillar of the three pillar structure of the EU introduced with the Treaty on European Union ("TEU") — Maastricht Treaty — in force since November 1, 1993.⁵ The other two pillars are the common foreign and security policy and the cooperation in the fields of justice and home affairs.

(2) The primary legal source for EU telecommunication law is the Treaty Establishing the European Community ("EC Treaty").⁶ This treaty was last amended by the Treaty of Amsterdam, which came into force on May 1, 1999.⁷ Among other things, the Treaty of Amsterdam changed the numbering of the EC Treaty. To avoid confusion, this Article will refer to the EC Treaty using the post-Amsterdam numbering system, even in cases of pre-Amsterdam applications.

II. THE LEGAL FRAMEWORK OF EU ACTIVITIES

A. *The Constitutional Framework for Telecommunications*

The EU institutions draw their regulatory and policy making power from the treaties as their primary source of legitimacy. The EC Treaty provides several references to telecommunications: (1) Articles 154 to 156, introduced in the Maastricht Treaty as Article 129(b)-(d), explicitly refer to telecommunications *policy* goals under the heading of "Trans-European Networks;"⁸ and

5. TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 191) 1 (1992).

6. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997) [hereinafter EC TREATY].

7. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997) [hereinafter TREATY OF AMSTERDAM]. The Treaty of Amsterdam also contained changes of the TEU.

8. The text of Article 154 states:

1. To help achieve the objectives referred to in Articles 14 and 158 and to enable citizens of the Union, economic operators and regional

and local communities to derive full benefit from the setting-up of an area without internal frontiers, the Community shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures.

2. Within the framework of a system of open and competitive markets, action by the Community shall aim at promoting the interconnection and interoperability of national networks as well as access to such networks. It shall take account in particular of the need to link island, landlocked and peripheral regions with the central regions of the Community.

EC TREATY art. 154. Article 155 states:

In order to achieve the objectives referred to in Article 154, the Community:

-- shall establish a series of guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-European networks; these guidelines shall identify projects of common interest;

-- shall implement any measures that may prove necessary to ensure the interoperability of the networks, in particular in the field of technical standardisation;

-- may support projects of common interest supported by Member States, which are identified in the framework of the guidelines referred to in the first indent, particularly through feasibility studies, loan guarantees or interest-rate subsidies; the Community may also contribute, through the Cohesion Fund set up pursuant to Article 161, to the financing of specific projects in Member States in the area of transport infrastructure.

The Community's activities shall take into account the potential economic viability of the projects.

2. Member States shall, in liaison with the Commission, coordinate among themselves the policies pursued at national level which may have a significant impact on the achievement of the objectives referred to in Article 154. The Commission may, in close cooperation with the Member State, take any useful initiative to promote such coordination.

3. The Community may decide to cooperate with third countries to promote projects of mutual interest and to ensure the interoperability of networks.

Id. art. 155. Article 156 states:

The guidelines and other measures referred to in Article 155(1) shall be adopted by the Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions.

Guidelines and projects of common interest which relate to the territory of a Member State shall require the approval of the Member State concerned.

(2) Article 157 seconds these objectives on a more general level.⁹

The main regulatory instruments, however, have been the articles referring to: (1) liberalization — Article 86 (ex Article 90);¹⁰ (2) harmonization — Article 95 (ex Article 100a);¹¹ and

Id. art. 156.

9. The text of Article 157 is:

1. The Community and the Member States shall ensure that the conditions necessary for the competitiveness of the Community's industry exist.

For that purpose, in accordance with a system of open and competitive markets, their action shall be aimed at:

- speeding up the adjustment of industry to structural changes;
- encouraging an environment favourable to initiative and to the development of undertakings throughout the Community, particularly small and medium-sized undertakings;
- encouraging an environment favourable to cooperation between undertakings;
- fostering better exploitation of the industrial potential of policies of innovation, research and technological development.

2. The Member States shall consult each other in liaison with the Commission and, where necessary, shall coordinate their action. The Commission may take any useful initiative to promote such coordination.

3. The Community shall contribute to the achievement of the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of this Treaty. The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament and the Economic and Social Committee, may decide on specific measures in support of action taken in the Member States to achieve the objectives set out in paragraph 1.

This Title shall not provide a basis for the introduction by the Community of any measure which could lead to a distortion of competition.

Id. art. 157.

10. Article 86 states:

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in

fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

Id. art. 86.

11. Article 95 states:

1. By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

4. If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

5. Moreover, without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market. In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been

(3) the arsenal of competition regulation — Articles 81-89 (ex Articles 85 - 94).¹²

approved. When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.

9. By way of derogation from the procedure laid down in Articles 226 and 227, the Commission and any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.

10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 30, provisional measures subject to a Community control procedure.

Id. art. 95.

12. Article 81 states:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

-- any agreement or category of agreements between undertakings;

-- any decision or category of decisions by associations of undertakings;

-- any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

EC TREATY art. 81. Article 82 states:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Id. art. 82. Article 83 states:

1. The appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82 shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

(a) to ensure compliance with the prohibitions laid down in Article 81(1) and in Article 82 by making provision for fines and periodic penalty payments;

(b) to lay down detailed rules for the application of Article 81(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;

(c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 81 and 82;

As stated above, the competition law instruments are mentioned here for the sake of completeness. This Article will focus on the use of the liberalization and harmonization instruments.

The main institutional agents involved in EU regulation and policy making are the Commission, the Council and the Parliament. The Commission is the main initiator of regulation and oversees the enforcement of the treaties. The Member States of the EU are represented in the Council. Since 1979, the Parliament is directly elected in the Member States according to their election rules. The Parliament has increasingly received co-decision power by the various changes to the treaties. With the Treaty of Amsterdam, the Parliament can now be regarded as co-legislator together with the Council.¹³ With the appointment of the President of the Commission being subject to Parliament's approval, Parliament has also gained more

(d) to define the respective functions of the Commission and of the Court of Justice in applying the provisions laid down in this paragraph;

(e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.

Id. art. 83. Article 84 states:

Until the entry into force of the provisions adopted in pursuance of Article 83, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Article 81, in particular paragraph 3, and of Article 82.

Id. art. 84. Article 85 states:

1. Without prejudice to Article 84, the Commission shall ensure the application of the principles laid down in Articles 81 and 82. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, who shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

Id. art. 85.

13. See TREATY OF AMSTERDAM, arts. J.11, K.17, 109q & 12o.

weight in its relationship to the Commission.¹⁴ As we shall see, this gradual shift of power has significant effects on the way telecommunications regulation evolved.

B. The Regulatory Toolbox

Liberalization, harmonization and checks on competition describe the functional objectives of the instruments of Community law that are available to the EU institutions.

1. Liberalization

Liberalization measures have been based on EC Treaty Article 86 (ex Article 90). National telecommunications operators were among those undertakings which had been granted special and exclusive rights in the general economic interest. For a long time, their role was not questioned, although the EC Treaty had made it clear that such undertakings could pose competition problems in the EU market.¹⁵ However, Article 86 also confirmed that such undertakings enjoyed possibilities for exemption if necessary to enable those undertakings to perform the particular tasks assigned to them.¹⁶ But this exemption itself was subject to an exemption: the Commission has to act when and where necessary to ensure, by decisions and/or directives, that this exemption in turn is guided only by the requirements of the particular tasks assigned to the undertakings, or is based on particular aspects of general economic interest accepted in the context of the EC Treaty (like public health and safety, which already permit exemption from the free movement of goods and services), and that the exemption does not disrupt trade to an extent that would be contrary to the Community's interests.¹⁷

14. For a concise description of these developments, see KLEMENS H. FISCHER, *THE EUROPEAN UNION: A COMPACT GUIDE FOR BUSINESS-GOVERNMENT-RELATIONS* 62-63 (2001); Europarl, *Fact Sheets*, at http://www.europarl.eu.int/factsheets/default_en.htm (last visited Apr. 20, 2002) [hereinafter *Fact Sheets*].

15. See EC TREATY art. 86.

16. Such a derogation was explicitly given to voice telephony. See Commission Directive 90/388 of 28 June 1990 on Competition in the Markets for Telecommunications Services, 1990 O.J. (L 192) 10 [hereinafter Commission Directive 90/388].

17. See EC TREATY art. 86.

When the Commission started to intervene on this legal basis in the area of telecommunications, it immediately created a source of conflict among EU institutions and with the Member States. We will briefly look at these conflicts when we describe the situation before the 1999 Communications Review. However, in preview of some of the final observations of this Article, it may be observed that Commission policy gradually seems to re-emphasize aspects of public interest and public service, again not without consequences for telecommunications regulation.

2. Harmonization

“Harmonization” according to EC Treaty Article 95 (ex Article 100a) had been the traditional *good for everything* method. The Article allows for approximation of regulatory mechanisms (not only laws) in the Member States as long as such approximation serves the EU market, unless other provisions are more directly applicable. The harmonization effort, however, has to be the main thrust of the proposed measure.¹⁸

3. Competition

The traditional competition law instruments are general instruments of market (re)balance directed at undertakings. Since the focus of this Article is the specific telecommunications law landscape created by the EU for the Member States, these measures are described here only to complete the picture. There are, however, overlaps: overlaps of competence between general competition authorities and specific telecommunications regulatory authorities and overlaps of definition for intervention thresholds. As we shall see, sector specific regulatory activities in telecommunications have attempted to address some of these problems. There are three instruments which the Commission uses to ensure and maintain competition: (1) ac-

18. See Case C-187/93, *Parliament v. Council*, 1994 E.C.R. I-2857; Case C-155/91, *Commission v. Council*, 1993 E.C.R. I-939. For further comments, see PIERRE LAROCHE, *COMPETITION LAW AND REGULATION IN EUROPEAN TELECOMMUNICATIONS* 408 (2000).

tion against concerted practices; (2) action against abuses of dominant positions; and (3) investigations into mergers.¹⁹

In the context of telecommunications, the bases for actions against concerted practices are EC Treaty Articles 3(g), 81, 83, 84 and 85 (ex Articles 85, 87, 88 and 89).²⁰ These actions are governed by the prohibition principle of Article 81(1) and (2) which states that all agreements between undertakings (including associations and concerted practices) that may affect trade between Member States are prohibited and void.²¹

Article 81(3) is an exemption to this principle and relates to agreements which are deemed to have positive effects on the economy, such as agreements that improve the production or distribution of goods or promote technical or economic progress. These agreements, however, have to show direct benefits for the consumers as well, and they may not impose unnecessary restrictions or aim to eliminate competition for a substantial part of the products concerned.²²

The Commission intervenes according to Council Regulation 17/62 of 6 February 1962 (based on EC Treaty Article 83) - with various later amendments. The Commission finds infringements and may impose fines and penalty payments. Damages to third parties may be granted, but only by national courts, whereas penalties and fines may also be charged by national competition authorities. The Commission may also grant what is known as a "negative clearance," i.e., provide a certificate to an undertaking that its agreements are not in conflict with the prohibition principle. In addition, the Commission may grant individual exemptions. There is also the widely used possibility of an "en bloc negative clearance" for certain typical agreements in specific areas.²³

19. There are other measures – against state aid – used to ensure competition, however, they are not directly relevant here. *See, e.g.*, EC TREATY arts. 87-89.

20. *See Fact Sheets, supra* note 14, at pt. 3, ch. 3.1.

21. EC TREATY art. 81(1)-(2).

22. *Id.* art. 81(3).

23. *See, e.g.*, Council Regulation 19/65 of 2 March 1965 on Application of Article 85(3) of the Treaty to Certain Categories of Agreements and Concerted Practices, 1965-1966 O.J. SPEC. ED. 35; Council Regulation 2821/71 of 20 December 1971 on Application of Article 85(3) of the Treaty to Categories of Agreements, Decisions and Concerted Practices, 1971 O.J. SPEC. ED. (L 285) 49; Council Regulation 1215/99 of 10 June 1999 Amending Regulation

Even if there is an infringement, the Commission will not act in cases of minor importance. This *de minimis* principle not only reduces the workload, but also tends to favor small and medium sized enterprises. The threshold for agreements which fall under the scrutiny of the Commission is a market share of 10% for vertical agreements and 5% for horizontal agreements. However, certain activities remain generally prohibited regardless of the *de minimis* rule: price fixing, joint sales offices, production or delivery quotas, sharing of markets or supply sources in the area of horizontal agreements and fixing the resale price and absolute territorial protection clause as regards vertical agreements. All these rules are currently under revision, independently of the changes in the telecommunications regulation sector, aiming at a more flexible and a more decentralized system of competition control.²⁴

Measures against abuse of a dominant position²⁵ are based on EC Treaty Article 82 (ex Article 86). Abuse of a dominant position occurs when the undertaking influences the structure of the relevant market or its degree of competition (e.g., imposing unfair prices or unfair trading conditions; limiting production, markets or technical development to the detriment of consumers; etc.) throughout the EU market, or at least a substantial part of it.²⁶ Criteria are the nature of the product, substitute products and consumers' perception. Abuse of a dominant position must adversely affect trade between Member States, or be likely to do so.²⁷ The Commission may decide to order a stop to such abuse, may impose a fine or penalty, or, as the case may be, may also issue a "negative clearance" at an undertaking's request if it considers that the practice concerned does not infringe EU law.²⁸ This system is currently subject to reform as well.

19/65 on the Application of Article 81(3) of the Treaty to Certain Categories of Agreements and Concerted Practices, 1999 O.J. (L 148) 1.

24. See Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty and Amending Regulations 1017/68, 2988/74, 4056/86 and 3975/87 ("Regulation Implementing Articles 81 and 82 of the Treaty"), COM(00)582 final.

25. See *Fact Sheets*, *supra* note 14, at pt. 3, ch. 3.2.

26. *Id.*

27. *Id.*

28. *Id.*

The rules on abuse of a dominant position imply merger control as a proactive risk control measure against the imminent danger of an abuse of a dominant position.²⁹ A merger occurs when a firm acquires exclusive control of another firm or of a firm it controlled jointly with another firm, or where several firms take control of a firm or create a new one. The Commission has the power to examine mergers before they occur. The Commission will analyze their compatibility with the European market by looking at the impact on the relevant market. This comprises: (1) defining the relevant product market; (2) defining the relevant geographic market; and (3) assessing the compatibility of the merger with the internal market on the basis of the principle of a dominant position. The Commission looks at cases if certain thresholds are reached.³⁰

The main instruments of EU regulatory power are decisions, directives and regulations:

(1) Decisions can be directed at other EU institutions, Member States or physical and legal persons;³¹

(2) Directives are addressed to Member States. Member States have a time span set by the directive in which the objectives of the directive must be transformed into national law. In theory, Member States have a certain measure of discretion to use the appropriate means to achieve these objectives.³² Increasingly, however, directives have become more and more

29. See Council Regulation 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings, 1989 O.J. (L 395) 1 [hereinafter Council Regulation 4064/89]. It was subsequently amended by Council Regulation 1310/97 of 30 June 1997 Amending Regulation 4064/89 on the Control of Concentrations between Undertakings, 1997 O.J. (L 180) 1, which took effect on Mar. 1, 1998 [hereinafter Council Regulation 1310/97].

30. The companies concerned have a combined worldwide turnover of at least ECU 5 billion; and at least two of the companies concerned have a minimum Community-wide turnover of ECU 250 million. Each of the companies concerned generates no more than two-thirds of its aggregate Community-wide turnover in one Member State; or the companies have a combined worldwide turnover of more than ECU 2.5 billion and a turnover of more than ECU 100 million in each of at least three Member States. Individually, for at least two of the companies concerned, a turnover of more than ECU 25 million in each of the three Member States and more than ECU 100 million in the Community as a whole. See Council Regulation 1310/97, *supra* note 29, art. 1.

31. EC TREATY art. 249.

32. *Id.*

precise to counterbalance occasional reluctance in Member States to transform directives appropriately. Directives or appropriate parts of the directives may become directly binding in such Member States which have failed to transform the directive within the given time limit.³³ In addition, the Commission may start infringement procedures before the European Court of Justice ("ECJ").³⁴ It should be kept in mind that whenever reference is made to a directive, it does not effect change directly, but requires — as indicated by the term "directive" — internal national transformation procedures which may or may not always fully reflect the objectives of the directive; and

(3) Regulations are directly applicable in the Member States. They directly become part of a Member State's legal system without any further national transformation act.³⁵

Depending on the subject of regulation, EU institutions act separately or in prescribed cooperative procedures. The typical instrument of regulation in the telecommunications field is the directive. Where such a directive aims at the harmonization of the regulatory environment of telecommunications in the Member States, the adequate procedure is the "co-decision procedure."³⁶ Such regulatory activity is initiated by the Commission. The proposal goes to the Council and to the First Reading

33. See, e.g., Case 8/81, *Becker v. Finanzamt Münster-Innenstadt*, 1982 E.C.R. 53 (holding that unconditional and precise provisions of a directive trump national provisions that are incompatible with the directive).

34. See The Court of Justice of the European Communities, *Court of Justice and Court of First Instance: Jurisdiction*, at <http://www.curia.eu.int/en/pres/comp.htm> (last visited Apr. 15, 2002) [hereinafter ECJ Website]. The ECJ consists of the Court of First Instance ("CFI") and the Court of Justice ("CJ"). The CJ decides — among other issues — on disputes between Member States; and disputes between the EU and Member States; disputes between EU institutions; and disputes between individuals and the EU. *Id.* It provides opinions on international agreements and preliminary rulings, which help to ensure the uniform interpretation of Community law. *Id.* Preliminary rulings are provided in cases where a question of law has been referred to the CJ by national courts, which have a case pending before them for which the answer to that legal question is decisive. *Id.*; see also EC TREATY art. 234. The CFI is the court of first instance for (among others) disputes between the Community institutions and staff, and for certain actions brought against the Commission by undertakings or associations or individuals. ECJ Website, *supra* note 34. CFI judgments can be appealed to the CJ only on points of law. EC TREATY art. 234.

35. EC TREATY art. 249.

36. *Id.* art. 251.

in Parliament. Depending on the outcome, there will be amendments from that First Reading, a “Common Position” from the Council and an amended proposal, which then go to a Second Reading of the Parliament and, if necessary, into conciliation procedure, or the proposal simply fails.³⁷

III. THE REGULATORY STORY: BEFORE THE REVIEW, THE REVIEW AND AFTER THE REVIEW

The plot of the following story is very simple: the 1999 Communications Review³⁸ is taken as the watershed for telecommunications regulation in Europe. Other historical moments would offer themselves as well, such as the full liberalization of the European telecommunication markets on January 1, 1998.³⁹ Emphasizing the 1999 Communications Review also implies the danger of overlooking the importance of other EU documents which may have carried perhaps a hidden, but nevertheless important meaning for the future course of telecommunications regulation. The author will, in the course of this Article, argue the importance of both the Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implication for Regulation — Towards an Information Society (“Green Paper on Convergence”)⁴⁰ and another paper which normally is not considered in direct connection with European telecommunications regulation — the Communication on Services of General Interest in Europe.⁴¹ It was the 1999 Communications Review, however,

37. *Id.*

38. Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Towards a New Framework for Electronic Communications Infrastructure and Associated Services: The 1999 Communications Review, COM(99)539 final [hereinafter 1999 Communications Review].

39. This is true with the exception of Luxemburg, Spain, Ireland, Portugal and Greece, which were granted longer transition periods. See EUROPEAN COMMISSION, STATUS REPORT ON EUROPEAN UNION ELECTRONIC COMMUNICATIONS POLICY 40 n.113 (1999), at <http://europa.eu.int/ISPO/infosoc/telecompolicy/en/tcstatus.pdf>.

40. Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation: Towards an Information Society Approach, COM(97)623 final [hereinafter Green Paper on Convergence].

41. Commission Communication on Services of General Interest in Europe, 1996 O.J. (C 281) 3 [hereinafter Services of General Interest].

which brought with it the new regulatory package and the design of the future regulatory landscape, and this is why we take it as the turning point.

A. The State of Telecommunications Regulations Before the 1999 Communications Review

1. The Early Beginnings

EU telecommunications policy began in 1987 with the Green Paper — Towards A Dynamic European Economy, Green Paper On The Development Of The Common Market For Telecommunications Services And Equipment (“1987 Green Paper”)⁴² — although other authors refer to earlier yet failed beginnings.⁴³ At that time, the public telecommunications operators (“PTOs”) enjoyed national monopolies with regard to both infrastructure and services. In most cases, these operators were owned by the state and very often they were also integrated into the administrative system of that state.⁴⁴ Nevertheless, there was European cooperation. In 1959, the Western European countries founded, outside the institutional framework of the EU, the Conférence Européen des Administrations des Postes et des Télécommunications (European Conference of Postal and Telecommunications Administrations) (“CEPT”) to assist in setting standards for transborder electronic communications.⁴⁵ At that time, there had also been failed attempts, now found within the framework of the EU, to open at least the internal procurement markets of the telecommunications sector. Only in the United Kingdom, after the rise of the Thatcher government, did British Telecom turn into an entity separate from the state (although still owned by it at least for a short while), and a competitive network operator, Mercury Communications, was allowed to enter the market.⁴⁶

42. Towards a Dynamic European Economy, Green Paper on the Development of the Common Market for Telecommunications Services and Equipment, COM(87)290 final [hereinafter The 1987 Green Paper].

43. See ELI NOAM, TELECOMMUNICATIONS IN EUROPE 305-06 (1992).

44. LAROCHE, *supra* note 18, at 2.

45. Radiocommunications Agency, *European Conference of Postal and Telecommunications Administrations*, at <http://www.radio.gov.uk/topics/international/ceptintro.htm> (last visited Apr. 23, 2002).

46. See NOAM, *supra* note 43, at 104.

The U.K. had already been the testing ground for a Commission decision which contained all the drama and curious coalitions of power that were to mark the coming changes in telecommunications regulation in the EU. In 1982, a Commission decision based on EC Treaty Article 82 (ex Article 86) intervened against British Telecom to stop the prevention of service companies from forwarding high speed telefax messages between foreign countries using telephone lines.⁴⁷ While British Telecom, now in its new British environment, accepted that decision, the Italian government did not, mainly as its PTO was losing money because of the activities of those service companies. The Italian government brought the case before the ECJ, arguing that the Commission had overstepped its competence.⁴⁸ The British government also intervened, but on behalf of the Commission to uphold the decision. The ECJ ruled in favor of the Commission and made it clear that EU competition law did apply to those public sector players which dominated telecommunications in the Member States.⁴⁹ This case also showed the coming front lines between those Member States who were open to change and sided with the Commission, and the more reluctant Member States on the other side.

2. Forces at Play

Another frontline was soon to become visible in a different conflict to be solved by the ECJ: the conflict between the Commission and the Council over legal instruments, where the Commission had claimed it could use the liberalization article to proceed and open the telecommunications market.⁵⁰ This instrument had no small advantage — the Commission could use it alone without formal consent from the Council or the Parliament.

The Parliament, so as not to forget the third institutional player, took rather a liberal view on telecommunications regu-

47. See Günter Knieps, *Regulatory Reform of European Telecommunications: Past Experience and Forward-looking Perspectives*, Paper Presented at *Diskussionsbeiträge des Institut für Verkehrswissenschaft und Regionalpolitik* (May 2001), available at <http://www.vwl.uni-freiburg.de/fakultaet/vw/disk77.pdf>.

48. Case 41/83, *Italy v. Commission*, 1985 E.C.R. 873.

49. *Id.*

50. See *infra* Part III.A.4.

latory policy. As regards the discussion on the appropriate legal instruments, the Parliament sided with the Council's approach due, perhaps, to a natural suspicion towards Commission activities. In substance, however, the Parliament had also already started to worry about the social implications of liberalization.⁵¹ With increasing power, especially with the introduction of the "co-decision procedure" in the Maastricht Treaty in 1993, Parliament became more outspoken on the issue of public services and their importance for solidarity and social integration in the EU, which did not remain without consequences for the regulatory policies in the telecommunications sector.⁵²

At that time, however, the fronts were not that clearly cut. Mark Thatcher refers to a complex pattern of national players and their telecommunications policies interwoven with other activities on the level of the EU institutions.⁵³ In all Member States there was an understanding of the need for change and that this change would fundamentally affect the future role of PTOs, which in most cases themselves were already open to change.⁵⁴ The main question was timing and the control of timing, and there was the expectation of receiving gains, perhaps in other areas, if one showed a willingness to change. Governments could still envisage their national PTOs playing an important macro-economic role in a liberalized environment while cashing in on eventual privatization and harvesting the political benefits from an economy revitalized by a more competitive telecommunications infrastructure and market. PTOs, particularly in top management, saw new opportunities to prove their management skills which, in their opinion, had been reigned in too much and for too long by national administrative thinking.⁵⁵ The PTOs were looking for new sources of capital influx in order to become global players. Even European trade un-

51. LAROCHE, *supra* note 18, at 43.

52. See THOMAS HART, EUROPÄISCHE TELEKOMMUNIKATIONSPOLITIK: ENTWÜRFE FÜR EIN ZUKUNFTSORIENTIERTES REGULIERUNGSKONZEPT 53 n.35 (1999); LAROCHE, *supra* note 18, at 43.

53. MARK THATCHER, THE EUROPEANISATION OF REGULATION: THE CASE OF TELECOMMUNICATIONS (European Univ. Inst., Working Paper RSC No. 99/22, 1999), available at http://www.iue.it/RSC/WP-Texts/99_22t.html (last visited Apr. 15, 2002).

54. See *id.*

55. See *id.*

ions, already in the process of fighting their own identity crises, could prove themselves reliable agents of change, while at the same time seeking advantages for their members and their organizations before the inevitable settled in. And consumers, the “end-end users,” did not feel affected as long as voice telephony was not disturbed, and as long as they could get their standard services a little faster than before.⁵⁶

Furthermore, in all the national negotiations, reference could be made to EU negotiations, Commission requirements and Council outcomes, thus all the apparent “European necessities” helped to accelerate transformation processes. This did not restrain Member States from also using the Council to slow down such processes again if deemed necessary. At that time, what was actually happening in the Council occurred behind a curtain of institutional secrecy with only limited access for the general public.

3. Reasons for Change

The Commission never stopped displaying its intention to speed up change. And the need for change was obvious: technological change had questioned the basis of natural monopolies. Globalization (at that time known under the heading of “operations of international companies”)⁵⁷ required international networks and services, and so did national industries and world trade in general. Even the individual end user, the consumer, became increasingly dissatisfied with the level of services available. In addition, since 1984, deregulation in the United States had sent new powerful competitors into international markets. Indeed, 1984 became the year which saw the beginning by various attempts of the recently unbundled American Telephone and Telegraph Company (“AT&T”) to take a hold in the European market by founding, for example, AT&T and Philips Telecommunications Besloten Vennootschap together with Koninklijke Philips Electronics NV (first attempts of cooperation dating back to 1982), a venture which later became AT&T Network System International. AT&T bought a

56. *See id.*

57. *See id.*

25% share of Olivetti.⁵⁸ AT&T was also initiating negotiations with Alcatel and began various other activities in Europe.⁵⁹

Change was happening in the Commission as well. In 1983, a task force for information technology and telecommunications was formed. In 1984, the Senior Officials Group on Telecommunications was set up to give advice to the Commission.⁶⁰ This group promptly proposed an action program.⁶¹ That same year, the CEPT agreed to cooperate with the EU in the European Committees for Standardization and Electrotechnical Standardization. The first recommendations on standardization in the telecommunication area were issued in that year as well,⁶² followed by another recommendation on liberalizing the terminal equipment market. The year 1985 was mainly dedicated to getting research activities off the ground.⁶³ In 1986, the Directorate-General XIII (Telecommunications, Information Industries, and Innovation) was created (today called "Information Society"). In 1987, the EU saw a wide range of directives and regulations which, however, did not yet fundamentally affect the operations of the national PTOs.⁶⁴ So while the 1987 Green Paper became the first clearly visible sign of change for telecommunication regulation in the EU, it did not necessarily come as a total surprise.

The main aim of the 1987 Green Paper was, in its own words, "[to open up] the telecommunications sector without destroying

58. See ANNE-MARIE DEALAUNAY MACULAN, *HISTOIRE COMPARÉE DE STRATÉGIES ET DÉVELOPPEMENT DES TÉLÉCOMMUNICATIONS* 98 (1997).

59. *Id.*

60. See Communication from the Commission to the Council on Telecommunications: Progress Report on the Thinking and Work Done in the Field and Initial Proposals for an Action Programme, COM(84)277 final.

61. *See id.*

62. See Council Recommendation 84/549 of 12 November 1984 Concerning the Implementation of Harmonization in the Field of Telecommunications, 1984 O.J. (L 298) 49.

63. See Council Decision 87/372 of 25 July 1985 on a Definition Phase for a Community Action in the Field of Telecommunications Technologies: R & D Programme in Advanced Communications Technologies for Europe (RACE), 1985 O.J. (L 210) 24; Council Decision 88/28 of 14 December 1987 on a Community Programme in the Field of Telecommunications Technologies: Research and Development (R&D) in Advanced Communications Technologies in Europe (RACE Programme), 1988 O.J. (L 16) 35.

64. For more details, see ECKART WIECHERT, *EUROPÄISCHES TELEKOMMUNIKATIONSRECHT – EU TKR - RECHTSVORSCHRIFTEN UND DOKUMENTE DER EU; EINFÜHRUNGEN UND ERLÄUTERUNGEN* 28 (1995).

the organizational structures which maintain the integrity and viability of the infrastructures, and which allow the operators to carry out their public service functions.”⁶⁵ However, this was only part of the message. When addressing the solutions, the 1987 Green Paper did concede that the telecommunication administrations were essentially necessary in order to provide for public service functions. But, at the same time, the Commission pointed out that it would become increasingly difficult to draw a line between those services that could be reserved to the PTOs and those which should be opened.⁶⁶ And it added that time was running short to get started for change. After consultation on the 1987 Green Paper, the Commission published its plans for the next five years up to 1992,⁶⁷ which were then accepted by the Council in 1988.⁶⁸

4. Regulatory Activities Before the 1999 Communications Review

Not all instruments available to start the regulatory game were equal. Liberalization measures as provided by EC Treaty Article 86 (ex Article 90) had the particular advantage already mentioned above: they could be used by the Commission alone — at least in theory.⁶⁹ On the other hand, harmonization procedures, based on EC Treaty Article 95 (ex Article 100a), were a matter essentially for the Council for final decision.⁷⁰ Which route to take for telecommunications? Following Yogi Berra’s advice on what to do when one comes to a fork in the road, both institutions went ahead with their ways. The Commission is-

65. The 1987 Green Paper, *supra* note 42, at 7. See also STEPHAN POLSTER, DAS TELEKOMMUNIKATIONSRECHT DER EUROPÄISCHEN GEMEINSCHAFT 8 (1999).

66. For further details, see LAROCHE, *supra* note 18, at 9.

67. See Communication from the Commission: Towards a Competitive Community-wide; Telecommunications Market in 1992 Implementing the Green Paper on the Development of the Common Market for Telecommunications Services and Equipment, COM(88)48 final.

68. See Council Resolution 88/C 257/01 of 30 June 1988 on the Development of the Common Market for Telecommunications Services and Equipment up to 1992, 1988 O.J. (C 257) 1.

69. EC TREATY art. 86.

70. *Id.* art. 95.

sued the "Terminal Equipment" directive in May 1988.⁷¹ While there had been common basic agreement on the goals, some Member States did challenge this kind of procedure which threatened their control of timing. They challenged the directive in court. The same happened to the later Commission Directive 90/388 on Competition in the Markets for Telecommunications Services ("Services Directive"), although by then a compromise on procedure with the Council had already been found, but still not all Member States had been happy with the consequences.⁷²

This compromise ("Compromise of December 1989")⁷³ was primarily a compromise on substance, the details of which have now lost their importance with the progress of liberalization and harmonization. But it was also a compromise on procedure in so much as both institutions would carry on with their liberalization and harmonization procedures. The Commission would use self-restraint and would go ahead with a liberalization directive only if there were as many Member States behind such an instrument as required if the same issue would have to be adopted by the Council in a harmonization procedure, i.e., a qualified majority of Member States.⁷⁴ It is significant for the transparency of policy-making in the EU, at least at the time, that such information had to be deduced from a frugal press bulletin of a Council meeting, since the record of such meetings had not been publicly accessible.⁷⁵

In its judgments on the challenged directives, the ECJ basically affirmed the Commission's legal argument, but with a

71. Commission Directive 88/301 of 16 May 1988 on Competition in the Markets in Telecommunications Terminal Equipment, 1988 O.J. (L 131) 73. This directive was subsequently updated by Commission Directive 94/46 of 13 October 1994 Amending Directive 88/301 and Directive 90/388 in Particular with Regard to Satellite Communications, 1994 O.J. (L 268) 15 [hereinafter Commission Directive 94/46].

72. Commission Directive 90/388, *supra* note 16.

73. For further discussion and sources see LAROUCHE, *supra* note 18, at 43.

74. *See id.* at 47.

75. The transparency situation, although still heavily criticized, has now changed legally, as far as any visit to European Community websites can show. *See* Parliament and Council Regulation 1049/2001 of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission Documents, 2001 O.J. (L 145) 43 [hereinafter Parliament and Council Regulation 1049/2001].

slight twist.⁷⁶ The court stated that the Commission could not act against Member States directly, but it could set the specification in general terms of obligations arising under EC Treaty Article 86.⁷⁷ It concluded furthermore that approaches according to the liberalization rules and approaches according to the harmonization rule of EC Treaty Article 95 (ex Article 100a) were not mutually exclusive — an argument the contesting parties had used against each other.⁷⁸ But even more important was the confirmation from the ECJ that those “special or exclusive rights” in Article 86, which had been taken for granted for so long, could be subjected to liberalization measures.

In any case, as far as procedures were concerned, the ECJ in essence confirmed the Compromise of December 1989:⁷⁹ the Commission and the Council could go ahead in parallel with liberalization and harmonization measures.⁸⁰ These decisions and the Compromise of December 1989 set the stage for the regulatory activities to come, but it also bred inconsistencies which would become apparent much later. Indeed, the next five years saw a wide range of activities both in the area of liberalization and harmonization, however, not always in a sufficiently harmonized manner.⁸¹

As indicated above, the main instrument to start liberalization had been the Commission’s Services Directive.⁸² This Di-

76. See Case 202/88, French Republic v. Commission, 1991 E.C.R. I1223 (against Commission Directive 88/301) [hereinafter Case 202/88]; Joined Cases C-271, C-281 & C-289/90, Spain v. Commission, 1992 E.C.R. I5833 (against Commission Directive 90/388).

77. See Case 202/88, 1991 E.C.R. I1223, ¶ 17.

78. See LAROCHE, *supra* note 18, at 52.

79. See *id.* at 53.

80. See *id.*

81. JOACHIM SCHERER, DIE ÜBERPRÜFUNG DES EUROPÄISCHEN TELEKOMMUNIKATIONSRECHTS: REGULIERUNGSBEDARF UND OPTIONEN FÜR DAS KÜNFTIGE RECHT DER ELEKTRONISCHEN KOMMUNIKATIONSINFRASTRUKTUR 7 (2000).

82. See Commission Directive 90/388, *supra* note 72. This directive is referred to, somewhat emphatically, since it exempted voice telephony but defined voice telephony rather narrowly, as “the very basis for . . . the introduction of the Internet in the European Union.” HERBERT UNGERER, USE OF EC COMPETITION RULES IN THE LIBERALISATION OF THE EUROPEAN UNION’S TELECOMMUNICATIONS SECTOR: ASSESSMENT OF PAST EXPERIENCE AND CONCLUSIONS FOR USE IN OTHER UTILITY SECTORS 4 (2001), at http://europa.eu.int/comm/competition/speeches/text/sp2001_009_en.pdf.

rective subsequently provided the basis for directives on: (1) satellite services, for which exclusive rights were to be phased out by the end of 1994;⁸³ (2) cable networks, which had to be opened to telecommunications services (with the exception of voice telephony at that time) and allowed to interconnect with telecommunication networks;⁸⁴ and (3) mobile telephony, for which separate networks could be installed and which could then interconnect with third party networks.⁸⁵ Total liberalization came with the "Full Competition" Commission Directive 96/19,⁸⁶ except for those countries which had been granted transition periods.⁸⁷ These transition periods have now expired.

The starting document for the harmonization activities was Council Directive 90/387 on "Open Network Provisions" ("ONP"), which set out the harmonized conditions for network access.⁸⁸ On that basis, further sector and issue specific directives followed, such as: (1) Council Directive 92/44 on "Leased Lines;"⁸⁹ (2) Parliament and Council Directive 97/13 ("Licensing Directive"), which harmonized procedural questions;⁹⁰ (3)

83. See Commission Directive 94/46, *supra* note 71, arts. 1, 2 & 4.

84. See Commission Directive 95/51 of 18 October 1995 Amending Directive 90/388 with Regard to the Abolition of the Restrictions on the Use of Cable Television Networks for the Provision of Already Liberalized Telecommunications Services, art. 1, 1995 O.J. (L 256) 49, 54.

85. See Commission Directive 96/2 of 16 January 1996 Amending Directive 90/388 with Regard to Mobile and Personal Communications, art. 1, 1996 O.J. (L 20) 59, 65.

86. See Commission Directive 96/19 of 13 March 1996 Amending Directive 90/388 with Regard to the Implementation of Full Competition in Telecommunications Markets, 1996 O.J. (L 74) 13.

87. See *supra* note 39 and accompanying text.

88. Council Directive 90/387 of 28 June 1990 on the Establishment of the Internal Market for Telecommunications Services Through the Implementation of Open Network Provision, 1990 O.J. (L 192) 1.

89. Council Directive 92/44 of 5 June 1992 on the Application of Open Network Provision to Leased Lines, 1992 O.J. (L 165) 27. This directive was later amended by Parliament and Council Directive 97/51 of 6 October 1997 Amending Council Directives 90/387 and 92/44 for the Purpose of Adaptation to a Competitive Environment in Telecommunications, 1997 O.J. (L 295) 23 [hereinafter Parliament and Council Directive 97/51]; and Commission Decision 98/80 of 7 January 1998 on Amendment of Annex II to Directive 92/44, 1998 O.J. (L 14) 27.

90. Parliament and Council Directive 97/13 of 10 April 1997 on a Common Framework for General Authorizations and Individual Licenses in the Field of Telecommunications Services, 1997 O.J. (L 117) 15 [hereinafter Parliament and Council Directive 97/13].

Parliament and Council Directive 97/33 on “Interconnection,” which also contained the first rules on EU wide universal services;⁹¹ and (4) Parliament and Council Directive 98/10 on “Voice Telephony,” which again also contained further regulations on universal service (collectively the “ONP Directives”).⁹²

5. Evaluation

In all, these packages did not necessarily provide a transparent and clearly structured regulatory environment. Liberalization and harmonization directives could not avoid occasionally addressing the same subject, nor was the terminology always consistent. Consequently, the new design for the regulatory environment became an important part of the Commission’s suggestions in the 1999 Communications Review.⁹³

Throughout this “first phase”⁹⁴ (and up to this day) the Commission kept evaluating progress at regular intervals in its reports on the Implementation of the Telecommunications

91. Parliament and Council Directive 97/33 of 30 June 1997 on Interconnection in Telecommunications with Regard to Ensuring Universal Service and Interoperability Through Application of the Principles of Open Network Provision (ONP), 1997 O.J. (L 199) 32 [hereinafter Parliament and Council Directive 97/33]. It was later amended by Parliament and Council Directive 98/61 of 24 September 1998 Amending Directive 97/33 with Regard to Operator Number Portability and Carrier Pre-selection, 1998 O.J. (L 268) 37.

92. Parliament and Council Directive 98/10 of 26 February 1998 on the Application of Open Network Provision (ONP) to Voice Telephony and on Universal Service for Telecommunications in a Competitive Environment, 1998 O.J. (L 101) 24 [hereinafter Parliament and Council Directive 98/10].

93. See 1999 Communications Review, *supra* note 38.

94. LAROCHE, *supra* note 18, at ch. 1. Larouche identifies four phases or “regulatory models.” *Id.* at 1. The first model running, in Larouche’s opinion, until 1990, and followed by the “regulatory model of the 1987 Green Paper” until 1996. *Id.* at 1-3. The time between 1996 and 1997 is termed the “transitional model” initiated by the 1992 Review of the Situation in the Telecommunications Services Sector, SEC(92)1048 final; Communication from the Commission, Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks: Part One: Principle and Timetable, COM(94)440 final; and Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks: Part II: A Common Approach to the Provision of Infrastructure for Telecommunications in the European Union, COM(94)682 final. The fourth phase, the “fully liberalized model” started in 1998. LAROCHE, *supra* note 18, at 22. Since this Article focuses on the year 1999 and after, the author has taken the liberty of providing a more compressed time model.

Regulatory Package.⁹⁵ Obviously, in these reports, implementation in the Member States played the main role. Up to the fifth report — the situation shortly before the 1999 Communications Review — this situation was still far from optimal. By that time the Commission had started about ninety infringement procedures against Member States because they were not in conformity with the directives, particularly in the areas of authorization and interconnection.⁹⁶ Authorizations were very often found not to be in conformity with the conditions set by the Commission. Moreover, procedures were found to be overly time consuming, lacking transparency or were simply too complicated or too expensive (not reflecting, it seemed, the costs of administration as prescribed in the Licensing Directive). Incumbents proved to be reluctant in many cases to provide sufficient standard interconnection offers. National regulatory authorities (“NRAs”) were lacking stamina or sufficient legal competence. Accounting principles established in the various sector specific ONP Directives had not been sufficiently implemented in many Member States.

But the basic figures looked fairly bright. Prices for regional and long distance calls had gone down, whereas prices for local

95. Reports are being periodically published by the Commission regarding the Implementation of the Telecommunications Regulatory Package: (1) Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the Implementation of the Telecommunications Regulatory Package, COM(97)236 final; (2) Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the Implementation of the Telecommunications Regulatory Package: First Update, COM(97)504 final; (3) Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Third Report on the Implementation of the Telecommunications Regulatory Package, COM(98)80 final; (4) Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Fourth Report on the Implementation of the Telecommunications Regulatory Package, COM(98)594 final; (5) Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Fifth Report on the Implementation of the Telecommunications Regulatory Package, COM(99)537 final; and (6) Sixth Report on the Implementation of the Telecommunications Regulatory Package, COM(00)814 final [hereinafter Sixth Report].

96. See SCHERER, *supra* note 81, at 13. In July 2001, there were still about sixty-five cases pending. *Id.*

calls seemed to have risen only moderately. By November 1999, in all Member States there were roughly 250 providers of long distance calls, more than 220 local call providers, about 180 national and international network providers and almost 400 local network service providers. But, of course, there still were problems, and the 1999 Communications Review was designed to address them, and more.

And politically? The political aim of the Commission — and the Commission did have political aims — was basically reached by solving the “service of a general economic interest” problem, the only area that could have generated potential political resistance. The Member States had either reluctantly or willingly given up on the idea of the usefulness of a nationally privileged PTO, even for the purpose of such a public (universal) service. This service would have to be organized differently, and it might as well still end up with the incumbents. But politically the Member States by now were convinced, as seen in the words of a European official at that time:

[T]he full effect of EU competition law in this respect could only be achieved by carefully correlating the measures with the development of the general regulatory framework and the build-up of a national “regulatory infrastructure” [with the help of the ONP Directives]. The approach was based on the conviction that the objectives at EU level of liberalising sectors must be internalised into the Member States political and regulatory structures to create the necessary base and the “political mass” required for major liberalisation exercises.

The very basis of action in the telecommunications sector was that the Commission recognised the objective of universal service in the sector, but that it strongly emphasised proportionality of measures to secure this goal. It generated, by broad consultation exercises, the general conviction that this task could be secured by less restrictive means than retention of monopoly rights, e.g. by financial contributions or the creation of universal service funds. The telecommunications sector is now seen as the best demonstration in the Community that the goals of competition and public service can therefore be complementary and mutually reinforcing.⁹⁷

The future will tell what remains of this confidence.

97. UNGERER, *supra* note 82, at 7.

B. The 1999 Communications Review

1. The Mandate

The various ONP Directives had included reference to a necessary review of telecommunication regulation in view of market developments.⁹⁸ The review was preceded by a number of studies from external experts. The results of the studies were incorporated in the 1999 Communications Review. The term "Review" in this context is, of course, perhaps slightly misleading since the main thrust of this exercise was to argue for and to initiate change. Indeed, this communication not only announced but effected change, or is still in the process of doing so.

2. The Main Elements of the 1999 Communications Review

The starting point of the 1999 Communications Review is the changing market, or rather market and technology changes. The 1999 Communications Review states:

Technological and market change in the communications sector is proceeding at an ever-increasing pace. . . . The Internet is to a large extent overturning traditional market structures, providing a common platform for the delivery of a wide range of services. . . . Wireless applications are increasingly important in all segments of the market. . . . Finally, the development of technologies within the media sector, in particular digital television (DTV) is providing transactional "on demand" services and new services such as data, Internet and E-commerce, characterised both by services on digital terrestrial (DTTV) networks in many Member States, and a wave of satellite and cable TV digital platforms.⁹⁹

The impact of these changes is not clearly foreseeable. Based on this dilemma, the Commission goes on with a rhetorical balancing act: these markets should be left to develop, but they should also be helped by stimulation, then these markets

98. See Parliament and Council Directive 97/51, *supra* note 89, art. 1 (amended art. 8 of the Council Directive 90/387); *id.* art. 2 (amended art. 14 of the Council Directive 92/44); Parliament and Council Directive 98/10, *supra* note 92, art. 31; Parliament and Council Directive 97/33, *supra* note 91, art. 23(2); Parliament and Council Directive 97/13, *supra* note 90, art. 23. See also SCHERER, *supra* note 81, at 15.

99. 1999 Communications Review, *supra* note 38, at iii-iv.

should be sustained, but, of course, public and consumer interests should also be protected in these markets. It seems worthwhile to reread this balancing act in the Commission's very own words:

How all the above trends [market and technology changes] will shape the market over the next decade cannot be forecast precisely. Regulators and market players alike face uncertainty as they look towards the future convergent environment. Regulators will need to have very clear objectives, including those of public interest, and a set of general-purpose regulatory "tools" if they are to succeed in stimulating and sustaining a market that remains vigorously competitive and meets users' needs, while at the same time protecting consumers' rights.¹⁰⁰

Judging from these observations, regulation is seen as essentially a management issue, i.e., reaching an optimum created from conflicting goals by balancing conflicting interests. In the 1999 Communications Review environment, this management task is no longer primarily to manage the transition to competition by mainly helping new entrants — it is now about managing competition itself.

The 1999 Communications Review does not necessarily imply a change of policy objectives, although one could argue that consumer interests seem to have a stronger political weight now than in previous policy papers. Rather — and this seems to coincide with a general change of the political climate in the EU and Member States — there is perceivably less enthusiasm for EU institutions and almost consequently, the 1999 Communications Review seems to propagate a phase of regulatory minimalism. We shall return later to this phenomenon.

Then again, this regulatory minimalism runs into its own conflicting objectives: regulatory stability, yes, but in face of the dynamics of the market; technological neutrality, yes, but all equal services should be treated equally. Finally, there is another example of elegant "European regulatory speak": "future regulation should: . . . be enforced as closely as practicable to the activities being regulated, whether regulation has been agreed globally, regionally or nationally."¹⁰¹

100. *Id.* at iv.

101. *Id.* at v.

How does the new philosophy of regulatory minimalism translate into the old environment of EU regulation? The 1999 Communications Review suggests a two-tiered approach: (1) binding measures would be complemented by non-binding measures, or rather, the importance of non-binding measures would be made more visible; and (2) the range of the binding measures would be curtailed drastically. The 1999 Communications Review sees the new regulatory order like this:

(1) Binding Measures: (a) a framework directive for the general and specific policy objectives; (b) four specific directives (on licensing, access and interconnection, universal service, privacy and data protection); and (c) the continuing task of competition law with an intention to substitute sector specific regulation by general competition law;¹⁰² and

(2) Non-Binding Measures: recommendations, guidelines, codes of conduct and other non-binding instruments to respond to market developments.¹⁰³

The very near future, however, would show how insufficient non-binding measures could turn out to be. The "local loop" problem was waiting to show its persistence. It was not that the Commission had not already seen the local loop problem looming in the background. The 1999 Communications Review in fact had stated: "Urgent action is required to increase competition in the local loop."¹⁰⁴ But the Commission was a bit too hopeful with regard to the efficiency of non-binding measures and a bit too confident that competition tools would be sufficient. Nevertheless, it is interesting to read how the necessity of binding regulations leads (at least in a first step) to a need for "recommendations":

National regulators in many Member States are introducing requirements for incumbents to unbundle their local access networks for use by competing service providers. The Commission welcomes this trend and considers that Community action cannot wait for legislation to be adopted in this area. Instead, the Commission will use Recommendations and, in specific cases, its powers under the competition rules of the

102. *Id.* at v-vi, 16.

103. *Id.* at 18.

104. *Id.*

Treaty to encourage local loop unbundling throughout the EU.¹⁰⁵

Whereas the regulatory approach adopted the minimal perspective, the general concept and outlook of the Commission had by now broadened: the 1999 Communications Review shows the Commission's intent to address the electronic communication infrastructure of the EU as such, allowing exceptions only for content related rules. In short, the Commission was ready not only to make telecommunications regulation "lighter" but also to take on convergence.

This perspective had been prepared by the above mentioned Green Paper on Convergence in 1997.¹⁰⁶ It had been open for consultation processes which were summarized in a working document. The working document had invited a second round of consultations asking for input on "access to networks and digital gateways in a converging environment, creating the framework for investment, innovation, and encouraging European content production, distribution and availability, and ensuring a balanced approach to regulation."¹⁰⁷ The results of that second round had become part of yet another communication,¹⁰⁸ which was then integrated into the 1999 Communications Review.¹⁰⁹

105. 1999 Communications Review, *supra* note 38, at ix.

106. See Green Paper on Convergence, *supra* note 40. As Scherer points out, the change is also the result of subtle changes resulting from inner-institutional competition between the now called "Education and Culture" General Directorate, formerly called "Information, Communication, Culture and Audio-Visual Media," and the "Information Society" General Directorate, formerly called "Telecommunications, Information Market and Exploitation of Research, Information Industry and Market and Language Processing." SCHERER, *supra* note 81, at 18 n.52

107. Working Document of the Commission: Summary of the Results of the Public Consultation on the Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors; Areas For Further Reflection, SEC(98)1284, available at <http://europa.eu.int/ISPO/convergencegp/workdoc/1284en.pdf>.

108. See Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: The Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation: Results of the Public Consultation on the Green Paper [COM(97)623], COM(99)108 final.

109. See SCHERER, *supra* note 81, at 19.

Furthermore, the 1999 Communications Review took in the results from the consultations on the Green Paper on Radio Spectrum Policy¹¹⁰ and conclusions from the Report on the Development of the Market for Digital Television in Europe.¹¹¹ In the 1999 Communications Review, the Commission thus marked the beginning of at least the intention to develop a comprehensive “electronic communications policy” rather than a merely reformed continuation of “telecommunications policy.”

As regards the regulatory consequences of convergence, the 1999 Communications Review again gives a slightly confusing impression. The Commission affirms that a single regulatory framework for communications infrastructure and associated services is advisable and will be the objective for further regulation.¹¹² Technical convergence, however, does not necessarily lead to regulatory convergence. There may be different public sector interests in different converging areas which require different treatment.¹¹³ The Commission cannot deny the existence of a highly differentiated system of regulations in the Member States which seek to meet the different public interest issues in the different areas of communications services and which have led to separation into:

(1) telecommunications services or, in the new terminology of the working papers accompanying the 1999 Communications Review, “communication service” defined as:

[S]ervices provided for remuneration which consist wholly or mainly in the transmission and routing of signals on electronic communications networks; it covers *inter alia* telecommunications services and transmission services in networks used for broadcasting. It does not cover services such as the

110. See Green Paper on Radio Spectrum Policy in the Context of European Community Policies such as Telecommunications, Broadcasting, Transport, and R&D, COM(98)596 final [hereinafter Green Paper on Radio Spectrum Policy].

111. Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: The Development of the Market for Digital Television in the European Union: Report in the Context of Directive 95/47 of the European Parliament and of the Council of 24 October 1995 on the Use of Standards for the Transmission of Television Signals, COM(99)540 final.

112. See 1999 Communications Review, *supra* note 38, at vi.

113. *Id.* at 5.

content of broadcasting transmissions, delivered using electronic communications networks and services.¹¹⁴

(2) electronic mass communication services (e.g., radio and television); and

(3) “Information Society” services, defined rather elaborately, for example, in Council Directive 2000/31 (“Electronic Commerce Directive”) as:¹¹⁵

[A]ny service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service; those services . . . which do not imply data processing and storage are not covered by this definition. Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request; by contrast, services which are transmitted point to

114. Communication from the Commission: The Results of the Public Consultation on the 1999 Communications Review and Orientation for the New Regulatory Framework, COM(00)239 final [hereinafter Results of the Public Consultation].

115. Earlier definitions can be found in Parliament and Council Directive 98/34 of 22 June 1998 Laying Down a Procedure for the Provision of Information in the Field of Technical Standards and Regulations, 1998 O.J. (L 204) 37. The directive was later amended by Parliament and Council Directive 98/48 of 20 July 1998 Amending Directive 98/34 Laying Down a Procedure for the Provision of Information in the Field of Technical Standards and Regulations, 1998 O.J. (L 217) 18; and Parliament and Council Directive 98/84 of 20 November 1998 on the Legal Protection of Services Based on, or Consisting of, Conditional Access, 1998 O.J. (L 320) 54.

point, such as video-on-demand or the provision of commercial communications by electronic mail are information society services; the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service; the contractual relationship between an employee and his employer is not an information society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.¹¹⁶

Consequently, the Commission states in the 1999 Communications Review that: "These rules would of course be without prejudice to regulatory obligations (whether at EU or national level) which apply to the content of broadcasting services or other information society services."¹¹⁷ Thus, the 1999 Communications Review leaves untouched the system of division between contents, conduit and transaction services, but at the same time the Commission seeks to introduce its own concept.¹¹⁸ The Commission first sets aside services provided over

116. Parliament and Council Directive 2000/31 of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), ¶¶ 17-18, 2000 O.J. (L 178) 1, 34 [hereinafter Parliament and Council Directive 2000/31].

117. 1999 Communications Review, *supra* note 38, at vi.

118. The activities in the area of Internet content, based on the Council Recommendation 98/560 of 24 September 1998 on the Development of the Competitiveness of the European Audiovisual and Information Services Industry by Promoting National Frameworks Aimed at Achieving a Comparable and Effective Level of Protection of Minors and Human Dignity, 1998 O.J. (L 270) 48; and resulted in Parliament and Council Decision Adopting a Multi-annual Community Action Plan on Promoting Safer Use of the Internet by Combating Illegal and Harmful Content on Global Networks, 1999 O.J. (L 33) 1, are not aimed at regulation but are encouraging self-regulatory activities and user empowerment.

Contents regulations or at least content related regulations in the Council Directive 89/552 of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23, relate to the services aspects of broadcasting. The directive is later amended by Parliament and Council Directive 97/36 of 30 June 1997 Amending Directive 89/552 on the Coordination of Certain Provisions Laid

networks, e.g., broadcasting services and electronic banking. This is an area to be regulated, as the case may be, by national law or by specific measures of EU law, like the Electronic Commerce Directive already quoted or Council Directive 97/36.¹¹⁹ According to the 1999 Communications Review, the remaining traditional “conduit” part then has two sub-parts: (1) “Associated Services” are communications services like the traditional telecommunications services, following the definition given above, and conditional access services; and (2) “Communications infrastructure” are communications networks and associated facilities like cable television networks and application program interfaces (“APIs”).¹²⁰

But even with this model, the 1999 Communications Review cannot avoid (and even implicitly points to) a dilemma that it cannot sufficiently resolve itself. There are issues which link at least content and conduit almost inseparably, and these issues occur whenever one has to weigh property interests of owners of scarce or at least limited transport resources (frequencies) against public interests. This weighing of interests produces “must carry” rules which the Commission has to address.¹²¹ And these rules show the limitations of such a separating approach. So, although the 1999 Communications Review started out with a broad perspective on convergent infrastructures, it is stuck with the need to carry on with regulatory differentiation.

The minimalism philosophy, the broadened but somewhat double-bound view on convergence and the practical experiences with the past regulatory arrangements lead the Commission to give specifics in its new regulatory program. As regards the binding measures and the new framework directive, the Commission suggests that such a directive should:

[1] [I]dentify specific policy objectives for Member States. . .

[2] guarantee specific consumers’ rights (e.g. dispute resolution procedures, emergency call numbers, access to information, etc.);

Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1997 O.J. (L 202) 60 [hereinafter Parliament and Council Directive 97/36].

119. Parliament and Council Directive 97/36, *supra* note 118.

120. 1999 Communications Review, *supra* note 38, at vii fig.

121. *See id.* at 30; SCHERER, *supra* note 81, at 21.

[3] ensure an appropriate level of interoperability for communications services and equipment;

[4] set out the rights, responsibilities, decision making powers and procedures of NRAs (e.g. criteria for implementation of flexibility clauses, forbearance), including possibilities for appeal at national level and obligations to exclude arrangements that are contrary to Community competition law.¹²²

The four specific directives would comprise the following:

[1] Directive on authorisations and licensing, (based on the Licensing Directive including rules for effective management of, and access to, scarce resources);

[2] Directive on the provision of universal service, incorporating elements of the current Voice Telephony Directive, and Interconnection Directive;

[3] Directive on access and interconnection (based on the current Interconnection Directive and the TV standards Directive); [and]

[4] Directive on data protection and privacy in the telecommunications sector (based on the Telecoms Data Protection Directive, updated and clarified to take account of technological developments).¹²³

The 1999 Communications Review did provide some further information on how such regulation would look in more detail. We will revisit the themes below when analyzing the current situation. In the area of non-binding instruments, the Commission remained very “flexible”:

Complementary measures include guidelines and recommendations developed by the Commission or national authorities. Where appropriate, codes of conduct, co-regulation agreements, recommendations, standards, memoranda of understanding, redress procedures, and other similar measures could be drawn up in parallel with the aim of achieving harmonised solutions to common problems. Such measures can be more easily and quickly agreed or adapted than legislation and — where they are agreed by consensus of interested parties and backed up by effective sanctions in cases of non-compliance — can be very effective. . . . They provide a flexible tool for regulators, and will allow for regulation that is re-

122. 1999 Communications Review, *supra* note 38, at 15.

123. *Id.*

sponsive to the changing needs of the communications services market.¹²⁴

There was another, this time outspoken, question in the air at least since the Green Paper on Convergence: would there be or should there be a European regulatory authority ("ERA")?¹²⁵ However, based on external advice¹²⁶ and institutional insight in view of the responses to public consultation, the Commission refrained from proposing such an authority. This does not imply that the then institutional structure of regulation was considered satisfactory: since the beginning of deregulation, Member States had separated the regulatory activities of their administration from their operational functions.¹²⁷ There had been manifold information and notification duties of NRAs to the Commission, and there had already been dispute resolution.¹²⁸ In addition, EU regulations had created several new bodies and committees, with different purposes and procedures on the Community level.¹²⁹

It was thus tempting to cut through these organizations and create an ERA. The Commission's concession not to pursue this idea any longer came with a price for the NRAs. The Commission suggested in the 1999 Review:

Since the rules at EU level will be more general than at present, there will be a need for mechanisms to ensure that NRAs apply the objectives and principles set out in the directives in a way which safeguards the integrity of the internal market.

. . . .

124. *Id.* at 18.

125. See SCHERER, *supra* note 81, at 80. For general information on the problem of such an authority within the context of EU law in contrast to U.S. law, see Xénophon A. Yataganas, Delegation of Regulatory Authority in the European Union: The Relevance of the American Model of Independent Agencies, Harvard Jean Monnet Working Paper No. 03/01, <http://www.jeanmonnetprogram.org/papers.01/010301.rtf> 2001.

126. See EUROSTRATEGIES/CULLEN INT'L, FINAL REPORT ON THE POSSIBLE ADDED VALUE OF EUROPEAN REGULATORY AUTHORITY FOR TELECOMMUNICATIONS (1999), available at <http://europa.eu.int/ISPO/infosoc/telecompolicy/en/erastudy.pdf>.

127. See SCHERER, *supra* note 81, at 79.

128. See Parliament and Council Directive 98/10, *supra* note 92, art. 26.

129. For more details, see SCHERER, *supra* note 81, at 80.

The Commission continues to have a number of concerns with regard to the effectiveness of some of these arrangements, and will strengthen existing legal provisions to ensure that:

- the independent national regulator can undertake its role of supervision of the market free from political interference, without prejudice to the government's responsibility for national policy;
- allocation of NRA responsibilities to different bodies does not lead to delays and duplication of decision making;
- where sector-specific regulators and national competition authorities are both involved in issues related to communications infrastructure and associated services, there is effective co-operation between the two bodies and that NRAs ensure that their decisions are compatible with Community competition law;
- the decision-making procedures at national level are transparent.

...

The Commission recognises the need for a clear regulatory function to be exercised at the level of the Union The Commission proposes to:

- replace the existing two telecommunications committees with a new Communications Committee, drawing on the expertise of a new High Level Communications Group involving the Commission and NRAs to help improve the consistent application of Community legislation;
- review existing legal provisions with a view to (i) strengthening the independence of NRAs, (ii) ensuring that the allocation of responsibilities between institutions at national level does not lead to delays and duplications of decision making (iii) improving cooperation between sector specific and general competition authorities and (iv) requiring transparency of decision making procedures at a national level.¹³⁰

How much coordination and information this would mean for NRAs would soon be shown in the new regulatory package, when the ideas as to institutional balances in the new regulatory framework would take shape. Again, this is an issue worth revisiting later for a more general analysis.

130. 1999 Communications Review, *supra* note 38, at 53.

C. Consequences of the 1999 Communications Review: The New Regulatory Package

1. The New Regulatory Package and its Progress

The 1999 Communications Review contained a number of specific proposals for: (1) licensing and authorizations; (2) access and interconnection; (3) universal service; (4) competition in the local loop; and (5) consistent regulatory action at the EU level.¹³¹ The 1999 Communications Review proposals initiated the usual consultation process, which lasted until February

131. *Id.* at 55. The 1999 Communications Review also contained observations on the radio spectrum policies. The main purposes of regulatory activities in this area have been transparency and coordination, allowing discussion of radio spectrum issues at Community level where Community interests and policies are concerned, and ensuring a (partial) mandate to defend Community interests in international negotiations. *Id.* at 55-57.

This approach has so far been dealt with in the following documents: Green Paper on Radio Spectrum Policy, *supra* note 110; Parliament Resolution A4-0202/99 on the Commission Green Paper on Radio Spectrum Policy in the Context of European Community Policies such as Telecommunications, Broadcasting, Transport, and R&D (COM(98)0596 – C4-0066/99), 1999 O.J. (C 279) 72; Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Next Steps in Radio Spectrum Policy: Results of the Public Consultation on the Green Paper, COM(99)538 final; and Parliament Resolution A5-0122/2000 on the Commission Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on “Next Steps in Radio Spectrum Policy - Results of the Public Consultation on the Green Paper” (COM(99)538 – C5-0113/2000 – 2000/2073(COS)), 2001 O.J. (C 59) 245.

Further documents include: Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Results of the World Radiocommunications Conference 2000 (WRC-2000) in the Context of Radio Spectrum Policy in the European Community, COM(00)811 final; Proposal for a Decision of the European Parliament and of the Council on a Regulatory Framework for Radio Spectrum Policy in the European Community, 2000 O.J. (C 365 E) 256 [hereinafter Radio Spectrum Policy Proposal]. This proposal was discussed in the Council (of Telecommunications Ministers) on June 27, 2001 and has received its First Reading in the European Parliament on July 5, 2001. See also [Report](#) on the Proposal for a Decision of the European Parliament and of the Council on a Regulatory Framework for Radio Spectrum Policy in the European Community, A5-0232/2001 final, at <http://www2.europarl.eu.int/omk/OM-Europarl?PROG=REPORT&L=EN&PUBREF=//EP//NONSGML+REPORT+A5-2001-0232+0+DOC+PDF+V0//EN&LEVEL=3&NAV=S> (last visited May 1, 2002).

2000. In April 2000, the result of this consultation process was made public in a communication to the Parliament and the Council.¹³²

In July 2000, the Commission adopted several proposals which formed the new regulatory package: (1) a proposal for a directive on the new regulatory framework;¹³³ (2) a proposal for a directive on access and interconnection;¹³⁴ (3) a proposal for a directive on authorizations;¹³⁵ (4) a proposal for a directive on universal service and users' rights;¹³⁶ (5) a proposal for a directive on data protection;¹³⁷ (6) measures as regards the local loop problem; and (7) a Proposal for a Decision of the European Parliament and the Council on a Regulatory Framework for Radio Spectrum Policy in the European Community.¹³⁸

The five directive proposals were of the "harmonization" type based on EC Treaty Article 95, to be adopted in a co-decision procedure by the Council and the Parliament.¹³⁹ In March 2001, these proposals were supplemented by a notice from the Commission on the proposal of a "liberalization" directive based on EC Treaty Article 86 for which the Commission is solely responsible (within the limits of the Compromise of December

132. See Results of the Public Consultation, *supra* note 114.

133. See Proposal for a Directive of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communications Networks and Services, 2000 O.J. (C 365 E) 198 [hereinafter Framework Proposal].

134. See Proposal for a Directive of the European Parliament and of the Council on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities, 2000 O.J. (C 365 E) 215.

135. See Proposal for a Directive of the European Parliament and of the Council on the Authorisation of Electronic Communications Networks and Services, 2000 O.J. (C 365 E) 230.

136. See Proposal for a Directive of the European Parliament and of the Council on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services, 2000 O.J. (C 365 E) 238 [hereinafter Universal Service Proposal].

137. See Proposal for a Directive of the European Parliament and of the Council Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, 2000 O.J. (C 365 E) 223 [hereinafter Data Protection Proposal]; Parliament and Council Directive 97/66 Concerning the Processing of Personal Data and the Protection of Privacy in the Telecommunications Sector, 1998 O.J. (L 24) 1 [hereinafter Parliament and Council Directive 97/66].

138. See Radio Spectrum Policy Proposal, *supra* note 131.

139. EC TREATY art. 95.

1989) and which will consolidate the Services Directive of 1990 as modified in 1996 and 1999.¹⁴⁰

As regards measures for competition in the local loop, the Commission was immediately going ahead, taking the usual steps but taking them unusually fast, first by directly issuing — in parallel to the communication on the general results of the post-1999 Communications Review consultation process — a communication and a proposal for a recommendation,¹⁴¹ then a month later the recommendation.¹⁴² In the end, the recommendation proved to be insufficient: a regulation was needed, and a proposal for a regulation concerning the local loop became part of the regulatory package of July 2000.¹⁴³ Although the proposal for the local loop regulation received several amendments in the Council and the Parliament,¹⁴⁴ it became the first and so far only proposal of that package that was turned into a legally binding instrument, entering into force in the beginning of 2001.¹⁴⁵

So, from the various options available to address the local loop issue,¹⁴⁶ the Commission had given up the recommendation approach and had made true its 1999 Communications Review warning by now directly prescribing a standard offer for unbundled access, strictly cost-based and to be supervised by the NRAs. This fast-track approach was also another, and

140. See Notice by the Commission Concerning a Draft Directive on Competition in the Markets for Electronic Communications Services, 2001 O.J. (C 96) 2.

141. See Communication from the Commission: Unbundled Access to the Local Loop: Enabling the Competitive Provision of a Full Range of Electronic Communication Services Including Broadband Multimedia and High-Speed Internet, COM(00)237 final.

142. See Commission Recommendation of 25 May 2000 on Unbundled Access to the Local Loop: Enabling the Competitive Provision of a Full Range of Electronic Communications Services Including Broadband Multimedia and High-Speed Internet, 2000 O.J. (L 156) 44.

143. See Proposal for a Regulation of the European Parliament and of the Council on Unbundled Access to the Local Loop, 2000 O.J. (C 365 E) 212.

144. See Proposal for a Regulation of the European Parliament and the Council on Unbundled Access to the Local Loop, COM(00)394 final; Amended Proposal for a Regulation of the European Parliament and of the Council on Unbundled Access to the Local Loop, 2001 O.J. (C 62 E) 314.

145. See Parliament and Council Regulation 2887/2000, *supra* note 1.

146. For more detail, see LAROCHE, *supra* note 18, at 324.

this time more direct answer to the question whether telecom law was still needed in addition to competition law.

The whole of the regulatory program of the 1999 Communications Review had in fact been an answer to that question whether it would not be sufficient — after having reached the stage of “full competition” — to rely on (general) competition law alone, rather than to carry on (also) with sector specific (and framework) regulations for communications services. In the context of the Green Paper on Convergence, there had already been a strongly supported opinion that EU competition law would, at least in the near future, be fully sufficient to handle the problems of telecommunications.¹⁴⁷ But there were a number of deficiencies in competition law.¹⁴⁸ Among them the local loop situation. Whereas, looking at the European situation in general, at the level of the trunk networks, there was a fair amount of services and infrastructure competition in Europe. The incumbent telecommunications operators had still kept an almost natural monopoly in the area of the “last mile” or “local loop” or “subscriber network,” a situation which allowed for hardly anything else than service based competition in this field. Or, as Herbert Ungerer had keenly observed in 1999:

[W]hile we have changed successfully the regulatory framework across Europe and . . . as well as in implementation control, we have not changed market structures. In all EU Member States . . . the incumbents continue to have a firm bottleneck control on competition in the local loop. Europe has deregulated, but it has done this without a divestiture.¹⁴⁹

New technologies, like wireless services, did not necessarily change this situation, since the question of which of the local lines would eventually be accepted by the subscriber adds additional investment risks. In the Commission's view, what it called “regulatory minimalism” did not imply leaving intervention to competition law alone. The urgency of this situation explains why the Commission had moved ahead so vigorously

147. *See id.* at 322 n.1.

148. *See id.* at 322.

149. Herbert Ungerer, Local Loop Unbundling, Keynote Address at London Business School. (June 14, 1999), at http://www.europa.eu.int/comm/competition/speeches/text/sp1999_011_en.html.

in the area of the local loop without waiting for the fate of the other parts of the new regulatory package.

The remaining five “harmonization” directive proposals (framework, access and interconnection, authorization, universal services and users’ rights and data protection)¹⁵⁰ which will now be the center of our further interest,¹⁵¹ are also progressing at different speeds. The Commission had initially planned to pass the whole package by the end of 2001. As shown, it has only succeeded with regard to the local loop issue. By September 2001, four proposals had their First Reading in Parliament, and the Council had reached political agreement on a “Common Position”¹⁵² on those four¹⁵³ — the proposal on data protection

150. See *supra* notes 133-37 and accompanying text.

151. For a very detailed, yet highly readable analysis of the status of the package as of April 2001, see Robert Queck, *Vers un Nouveau Cadre Réglementaire Européen des Réseaux et Services de Communications Électroniques: Réflexions à Mi-Chemin*, 9 REVUE UBIQUITÉ 41 (2001).

152. Political agreement means agreement on a “common position” in principal while the exact wording is still being framed in appropriate committees. See ROWE & MAW’S EU COMPETITION AND TRADE GROUP, EUROPEAN DEVELOPMENTS IN THE COMMUNICATIONS SECTOR 1 (June 2001), available at http://www.mayerbrownrowe.com/london/pdf/ec_comms_jun01.pdf [hereinafter ROWE & MAW’S EU COMPETITION AND TRADE GROUP]. Such agreement was reached for the framework proposal, the access and interconnection proposal and the authorization proposal in the meeting of the Telecommunications Council (the responsible ministers for telecommunications from the Member States) in its meeting in April 2001. See Press Release, 2340th Council Meeting, Transport/Telecommunications (Apr. 4-5, 2001), available at <http://ue.eu.int/newsroom/LoadDoc.asp?MAX=1&BID=87&DID=66088&LANG=1> [hereinafter 2340th Council Meeting]. Political agreement on the universal service proposal was reached in the meeting of the Telecommunications Council in June 2001. See ROWE & MAW’S EU COMPETITION AND TRADE GROUP, *supra* note 152, at 1.

153. The first proposal is the Amended Proposal for a Directive of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communications Networks and Services, COM(01)380 final [hereinafter Amended Framework Proposal]. For the current state of the drafting of the Common Position in the Council, see Council of the European Union Brussels, Outcome of Proceedings, Draft Directive of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communications Networks and Services – Common Positions, May 11, 2001, Interinstitutional File 2000/0184 (COD) 8208/01 ECO 116 CODEC 357.

The second proposal is the Amended Proposal for a Directive of the European Parliament and of the Council on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities, COM(01)369

is still waiting for the First Reading,¹⁵⁴ and any fast agreement on this issue is highly unlikely.¹⁵⁵ It is assumed now that the package will be passed in Spring 2002, with an obligation for the Member States to transform the directives into national law by 2003. For reasons given in the introduction, an overview of the most important substantive elements of the proposals will be based on the original proposals as presented by the Commission in 2000.

final [hereinafter Amended Interconnection Proposal]. For the current state of the drafting of the Common Position in the Council, see Council of the European Union Brussels, Outcome of Proceedings, Draft Directive of the European Parliament and of the Council on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities – Common Position, May 11, 2001, Interinstitutional File 2000/0186 (COD) 8200/01ECO 114 CODEC 355.

The third proposal is the Amended Proposal for a Directive of the European Parliament and the Council on the Authorisation of Electronic Communications Networks and Services, COM(01)372 final [hereinafter Amended Authorization Proposal]. For the current state of the drafting of the Common Position in the Council, see Council of the European Union Brussels, Draft Directive of the European Parliament and the Council on the Authorisation of Electronic Communications Networks and Services – Common Position, May 11, 2001, Interinstitutional File 2000/0188 (COD) 8203/01 ECO 115CODEC 356.

The fourth proposal is the Proposal for a Directive of the European Parliament and of the Council on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services, COM(00)392. For the current state of the drafting of the Common Position in the Council, see Council of the European Union Brussels, Draft Directive of the European Parliament and of the Council on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services, July 6, 2001, Interinstitutional File 10661/01 ECO 211 CODEC 717.

154. For the current state of the drafting of the Common Position in the Council, see Council of the European Union Brussels, 29 June 2001, Outcome of Proceedings, Proposal for a Directive of the European Parliament and of the Council Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, Interinstitutional File 2000/0189 (COD) 10451/01ECO 202 CODEC 677. There is still disagreement on the question of unsolicited communications and French and British delegations still maintain parliamentary scrutiny reservations. *Id.*

155. See Council of the European Union, Outcome of Proceedings of Working Party on Telecommunications, July 23, 2001, Interinstitutional File 2000/0189 (COD) 11164/01 ECO 221 CODEC 778.

2. Some Observations on the Substance of the Regulatory Package

The Proposal for a Directive of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communications Networks and Services (“Framework Proposal” or “FP”) maintains the convergence approach and the content/conduit-division, however, “it is open to address contents issues in the interest of media pluralism, cultural diversity and consumer protection.”¹⁵⁶ The Framework Proposal consequently defines its objects of regulation as: (1) electronic communications networks; (2) electronic communications services; and (3) associated facilities:

“[E]lectronic communications network” means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, networks used for radio and television broadcasting, “powerline” systems and cable TV networks, irrespective of the type of information conveyed.¹⁵⁷

“[E]lectronic communications service” means services provided for remuneration which consist wholly or mainly in the transmission and routing of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but excluding services providing, or exercising editorial control over, content transmitted using electronic communications networks and services,¹⁵⁸[and]

. . . .

“[A]ssociated facilities” means those facilities associated with an electronic communications network and/or an electronic communications service, to which enable and/or support the provision of services via that network and/or service. It includes conditional access systems and electronic programme guides.¹⁵⁹

156. See Framework Proposal, *supra* note 133.

157. Amended Framework Proposal, *supra* note 153, art. 2(a).

158. *Id.* art. 2(b).

159. *Id.* art. 2(d).

With these definitions, the FP has, of course, followed the convergence approach by integrating the transport side of radio and television and Internet services. At a closer look, however, and as a result of what might be called the convergence trap, this integration is more a textual than a functional integration. One of the main reasons for separate regulatory cultures in telecommunications and electronic mass media has been the content sensitivity of the latter. If one leaves untouched contents in a converging approach, as was the declared intention of the Green Paper on Convergence and the 1999 Communications Review, convergence remains a formality. But even on the formal level, the new regulatory package prefers to place telecommunications, radio and television regulations side by side under a common heading rather than seeking functional integration in one new conduit concept. And as indicated above, contents comes back even on that level as the must carry rules. To call this result “a merger of hitherto separate regulatory cultures”¹⁶⁰ sounds slightly euphemistic.

What the Framework Proposal does achieve, however, is changing the benchmark of intervention for the NRAs. The basic market oriented question of a sector specific approach is when to allow authorities to set *ex ante* obligations for market participants. In the pre-1999 Communications Review regulatory framework, the threshold of intervention, or “significant market power” (“SMP”), was defined as follows:

An organization shall be presumed to have significant market power when it has a share of more than 25% of a particular telecommunications market in the geographical area in a Member State within which it is authorized to operate. National regulatory authorities may nevertheless determine that an organization with a market share of less than 25% in the relevant market has significant market power. They may also determine that an organization with a market share of more than 25% in the relevant market does not have significant market power. In either case, the determination shall take into account the organization's ability to influence market

160. Director General Robert Verrue, The New Regulatory Framework for Electronic Communications, Remarks at the Roundtable on Multi-Media and Telecommunications on the Future of Spectrum Management Organized by the European Institute (May 10, 2001), *available at* <http://www.eurunion.org/news/speeches/2001/010510rv.htm>.

conditions, its turnover relative to the size of the market, its control of the means of access to end-users, its access to financial resources and its experience in providing products and services in the market.¹⁶¹

This definition was seen as too formal to take fully into account the fact that since the gradual liberalization of the late 1990's, the situation of the incumbent national telecommunications operators which had originally been the addressees of that regulation was changing. Also, the SMP concept could not sufficiently address situations where a small number of companies were exercising oligopoly power. And finally, this definition still left a large amount of discretion for intervention by the NRAs. The Commission had therefore intended to set a more clearly defined threshold for ex ante regulatory intervention.¹⁶² In the FP, the definition of SMP moves away from a numerical benchmark notion. It now seeks to harmonize the definition with the general competition law definition (the concept of "dominance"), and with the interpretation of this definition by the ECJ, justifying this move explicitly by referring, e.g., to oligopoly situations.

Article 13 of the FP now gives the following definition of SMP:

Undertakings with significant market power

1. Where the Specific Measures require national regulatory authorities to determine whether operators have significant market power, paragraphs 2 and 3 shall apply.

2. An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

3. Where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market,

161. Parliament and Council Directive 97/33, *supra* note 91, art. 4(3). The same definition can be found in the directives on leased lines, voice telephony and authorization. See Parliament and Council Directive 97/51, *supra* note 89, art. 2(3); Parliament and Council Directive 98/10, *supra* note 92, art. 2(2)(i); Parliament and Council Directive 97/13, *supra* note 90, art. 2(2).

162. See SCHERER, *supra* note 81, at 38.

thereby strengthening the market power of the undertaking.¹⁶³

163. Amended Framework Proposal, *supra* note 153, art. 13. The Framework Proposal therefore introduces rather a complex procedure for determining such markets in Article 14:

Market analysis procedure

1. After a public consultation and consultation with national regulatory authorities through the Advisory Communications Group, the Commission shall issue a Decision on Relevant Product and Service Markets (hereinafter “the Decision”), addressed to Member States. The Decision shall identify those product and service markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the Specific Measures, without prejudice to markets that may be defined in specific cases under competition law. The Commission shall also publish Guidelines on market analysis and the assessment of significant market power (hereinafter “the Guidelines”), which shall be in accordance with the case law of the Court of Justice and the Court of First Instance of the European Communities.

The Commission may indicate in the Decision those markets which are trans-national. In such markets, the national regulatory authorities concerned shall jointly conduct the market analysis and decide on any imposition of regulatory obligations under paragraphs 2 to 5 in a concerted fashion.

National regulatory authorities shall seek and receive the prior agreement of the Commission before using market definitions that are different from those identified in the Decision or before imposing sector-specific regulatory obligations on markets other than those identified in the Decision. The Commission shall regularly review the Decision and the Guidelines.

2. Within two months of the date of adoption of the Decision or any updating thereof, national regulatory authorities shall carry out an analysis of the product and service markets identified in the Decision, in accordance with the Guidelines. Member States shall ensure that national competition authorities are fully associated with that analysis. The national regulatory authorities’ analysis of each market shall be published.

3. Where a national regulatory authority is required under Articles 16, 25 or 27 of Directive 2000/. . . /EC [on universal service and users rights relating to electronic communications networks and services], or Articles 7 or 8 of Directive 2000/. . . /EC [on access to and interconnection of electronic communications networks and associated facilities] to determine whether to impose, maintain or withdraw obligations on undertakings, it shall determine on the basis of its market analysis referred to in paragraph 2 whether a market identified in the Decision is effectively competitive in a specific geographic area in accordance with the Guidelines.

In practice this means that, as explained in the recital of the FP ex ante obligations, NRAs:

[A]re justified only for undertakings which have financed infrastructure on the basis of special or exclusive rights in areas where there are legal, technical or economic barriers to market entry, in particular for the construction of network infrastructure, or which are vertically integrated entities owning or operating network infrastructure for delivery of services to customers and also providing services over that infrastructure, to which their competitors necessarily require access.¹⁶⁴

This more general definition, although clarified by ECJ case law, makes a concise (and harmonized) definition of the relevant market even more important, because that market definition now defines the ex ante possibilities for the interventions of NRAs.

On the one hand, the (independent) NRAs remain free in their decision on which undertaking to select as a SMP to become the subject of ex ante measures (as foreseen in the specific directives of the package). However, on the other hand, the criteria for their decision making, the Commission Working Document on Proposed New Regulatory Framework for Electronic Communications Networks and Services ("Draft Guidelines"), and in particular the definition of the markets which are the basis of market power analysis, remain subject to the

4. Where a national regulatory authority concludes that the market is effectively competitive, it shall not impose sector specific regulatory obligations set out in the Specific Measures. In cases where such sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that specific market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations.

5. Where a national regulatory authority determines that a market identified in the Decision is not effectively competitive in a specific geographic area in accordance with the Guidelines, it shall impose the sector-specific regulatory obligations set out in the Specific Measures, or maintain such obligations where they already exist.

6. Measures taken pursuant to paragraphs 4 and 5 shall be subject to the procedure set out in Article 6.

Id. art. 14.

164. *Id.* ¶ 20.

discretion of the Commission.¹⁶⁵ Since such “definition decisions” of the Commission are not regulatory in the proper sense, and do not affect the decisions of the NRAs directly, the process of making such definition decisions is not embedded in the usual procedures of Commission decision making power.¹⁶⁶ Such specific procedures are only foreseen where the Commission makes decisions in the area of standardization¹⁶⁷ and harmonization,¹⁶⁸ and in some of the specific directives of the proposal package.

The definition of SMP and the resulting actions by the NRAs are thus embedded in complex definition procedures. In addition, the NRAs have to observe information, consultation and

165. See Commission Working Document on Proposed New Regulatory Framework, *supra* note 4.

166. The general rules for Commission decision making power are now set out in Council Decision 1999/468 of 28 June 1999 Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission, 1999 O.J. (L 184) 23. This decision on procedures differentiates between four types of procedures of interaction between the Commission and the Member States for those areas where the Commission has decision making powers: (1) advisory procedure (art. 3); (2) management procedure (art. 4); (3) regulatory procedure (art. 5); and (4) safeguard procedure (art. 6). *Id.* The most important is the regulatory procedure. If there is disagreement between the Commission and the committee of representatives of the Member States during that procedure, a complex resolution procedure takes place involving the Parliament and the Council with a slight structural advantage of the Commission because of the way the procedures are laid out and because of time limits imposed. This structure is generally referred to as “comitology.” For further discussion, see FISCHER, *supra* note 14, at 79. This complex pattern of interaction is not unusual but reflects the framework of the Commission’s rule making power. In the context of the (general) data protection directive, see, e.g., Parliament and Council Directive 95/46 of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 3 [hereinafter Parliament and Council Directive 95/46]. The Commission centralizes the power to make the decisions on the “adequate level of protection” provided by third countries. *Id.* art. 25(6). In this decision, the Commission is advised by the committee of independent data protection authorities which in this case is called the “Working Party on the Protection of Individuals with Regard to the Processing of Personal Data.” *Id.* art. 29. The measures the Commission intends to undertake are submitted to the representatives of the Member States, which together with the Commission representative form the “Committee.” *Id.* art. 31.

167. See Amended Framework Proposal, *supra* note 153, arts. 15(4), 19(2)-(3).

168. *Id.* art. 16(1)-(2).

publication procedures. Having brought the SMP definition nearer to the competition law definition of “dominance” does not exclude differences. As the Draft Guidelines point out:

18. To ensure consistency of approaches, these Guidelines are based on . . . existing jurisprudence of the Court of First Instance and the Court of Justice concerning market definition and the notion of dominant position within the meaning of Article 82 of the EC Treaty

19. Markets defined by the Commission and NCAs [national competition authorities] in competition cases may, nevertheless, vary from those identified in the Commission Decision and from market definitions identified by NRAs. . . . The market definitions used by NRAs are without prejudice to those used by NCAs and by the Commission in the exercise of their respective powers.

20. In practice, parallel procedures under ex ante regulation and competition law may arise with respect to different kinds of problems in relevant markets. NCAs may therefore investigate a market and market behaviour and impose appropriate competition law remedies alongside any sector specific measures applied by NRAs. However; it must be noted that such simultaneous application of remedies by different regulators would address different problems in such markets.

21. NRAs will exercise their powers under Article 14 of [the Framework Proposal] to determine whether to designate undertakings in the market as having SMP. In so doing, NRAs enjoy considerable discretion in the exercise of their powers, with respect to the complexity of inter-related factors that must be assessed concerning the economic, factual and legal elements of identified markets, subject to the consultation and transparency procedure foreseen.¹⁶⁹

Even this remaining “decisional freedom” of the NRAs needs additional control to prevent the decisions from undermining the criteria. The “transparency mechanism”¹⁷⁰ in the FP therefore requires NRAs to provide the Commission with draft measures (ex ante measures following from the SMP assessment¹⁷¹ and measures in the context of the proposed directive

169. See Commission Working Document on Proposed New Regulatory Framework, *supra* note 4, at 6.

170. Amended Framework Proposal, *supra* note 153, art. 6.

171. See *id.* art. 14(4)-(5).

on “access and interconnection”¹⁷²) after a period of consultation on the national and EU level. As a backup measure, the Commission reserves the right to intervene if the objectives of an open and competitive market and/or the regulatory principles¹⁷³ are not met.¹⁷⁴

This approach in the new regulatory package has, of course, already created some resistance. The Commission, it was felt, losing out on the ERA model, sought to establish a functional equivalent. Robert Verrue, Director General of the Commission Directorate responsible for telecommunications, answered this criticism in a recent a speech in the U.S.:

[L]et me outline our thinking. The electronic communications market is developing at an unprecedented speed. National regulators are closest to their market, so it should be for them to tailor regulation to fit the circumstances of that market. The new Directives leave a very large degree of flexibility to national regulators. NRAs assess the degree of competition on a given product market in their territory. They decide what obligations to impose. They decide which operators will be subject to those rules. The proposal from the Commission seek [sic] to counter-balance this decentralisation of decision making with strong co-ordination mechanisms to ensure consistency of application of the rules. The over-riding rationale for a regulatory framework at [the] European level is to ensure a minimum level of harmonisation. Similar firms should be subject to similar obligations in similar market circumstances, wherever they operate in the EU.¹⁷⁵

While the author intended to basically restrict the analysis to the state of the July 2000 proposals, it nevertheless seems useful to warn that the Council (in its meeting in April 2001) has already shown its reluctance to follow the Commission. In its view, the “transparency mechanism” should run only as follows:

The Commission may make public a detailed opinion which it shall communicate to the NRA concerned stating why it considers that the draft measure is not compatible with Community law. The NRA may adopt the envisaged measures after

172. Amended Interconnection Proposal, *supra* note 153, art. 8(2).

173. See Amended Framework Proposal, *supra* note 153, art. 7.

174. See *id.* art. 6(4)-(6).

175. See Verrue, *supra* note 160.

the publication of the detailed opinion of the Commission, and shall communicate them to the Commission. Where the NRA does not follow the Commission's opinion, it shall give its reasoning.¹⁷⁶

As seen from the Commission proposal which has already taken in the comments of the Parliament's First Reading (although not following them completely), this approach is not what the Commission intended. It will now largely depend on the Parliament's Second Reading and if necessary, the conciliation procedure to arrive at results.¹⁷⁷

In general, we are witnessing once again an attempt to strike what might be called a "dynamic balance" between centripetal forces, as represented by the Commission, and centrifugal forces, as represented by the Member States. What remains interesting to observe is that the instruments with which the Commission seeks to maintain its influence have become more refined, aiming at setting information and consultation duties, as well as defining criteria for establishing thresholds rather than seeking direct intervention. Closely connected to this tension between the Commission and the NRAs is the other main instrument for regulatory authorities: the licensing (authorization) procedure.

a. The Authorization Proposal

The Proposal for a Directive of the European Parliament and of the Council on the Authorization of Electronic Communications Networks and Services ("Authorization Proposal" or "AP")¹⁷⁸ had its First Reading in the Parliament and passed the (Telecommunications) Council in April 2001. Observations are, as above, based basically on the Commission's original AP but not without a glimpse at the Commission's reflections after the First Reading in the Parliament.¹⁷⁹

176. See 2340th Council Meeting, *supra* note 152.

177. For details on the European Union Co-Decision Procedure for Regulations and Directives, see FISCHER, *supra* note 14, at 77.

178. Proposal for a Directive of the European Parliament and of the Council on the Authorisation of Electronic Communications Networks and Services, COM(00)386 final.

179. See Amended Authorization Proposal, *supra* note 153.

The Authorization Proposal sets out the general conditions of authorization for electronic communication services and networks, as defined in the FP. Authorization (licensing) is a particularly crucial area since, in practice, this is where NRAs leave their mark, as the Commission seems painfully aware. In 1992, and independently of its policy as regards a potential ERA, the Commission had already tried to at least introduce a mutual recognition system, an approach always used when Member States' resistance to harmonization seems too strong. But the Commission failed, another example that the telecom regulatory process has witnessed occasional defeat.¹⁸⁰ The Licensing Directive¹⁸¹ returned to the traditional harmonization approach with the intention of reducing individual licensing occasions,¹⁸² and as remembrance of dreams gone, it opened the way for one-stop-shopping procedures which, however, bundled the licensing decisions of NRAs only organizationally.¹⁸³

The current Authorization Proposal continues with the traditional approach by emphasizing general authorizations, harmonizing and raising the substantive contents of such authorizations. Since the AP is now a "convergence proposal," it has grown larger, incorporating specific sections on radio-frequency authorizations, thus providing an example that convergence can also be reached simply by combining different regulations under a single heading. The most crucial issue, however, is the fee issue. Based on unpleasant experiences, the AP approaches this issue in far more detail than in the old Licensing Directive in order to put stronger control on the Member States' NRA fee policies. There is, of course, the "internal market stick" giving the Commission power of intervention:

Where divergences between national charges, fees, procedures or conditions concerning general authorisation or the grant of

180. For a description of the failure, see LAROUCHE, *supra* note 18, at 416 n.450.

181. Parliament and Council Directive 97/13, *supra* note 90.

182. See LAROUCHE, *supra* note 18, at 416.

183. See Parliament and Council Directive 97/13, *supra* note 90, art. 13. This procedure is not restricted to Member States and is organized in the context of CEPT by the European Telecommunications Office ("ETO"). These functions are now being carried out by the European Radiocommunications Office ("ERO"), located in Copenhagen, which took over all ETO functions as of Jan. 2001. See CEPT Organisation, at <http://www.ero.dk> (last visited Mar. 18, 2002).

rights of use create barriers to the internal market, the Commission may adopt measures to harmonise such charges, fees, procedures or conditions in accordance with the procedure referred to in Article 19(3) of Directive [on a common regulatory framework for electronic communications networks and services].¹⁸⁴

b. The Access and Interconnection Proposal

Observations are based on the Amended Proposal for a Directive of the European Parliament and of the Council on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities.¹⁸⁵ The general principle remains that interconnection agreements may be requested, and are then negotiated among undertakings.¹⁸⁶ Interconnection obligations may be imposed, amended and withdrawn on SMP operators following the procedure set up in the FP.¹⁸⁷ Obligations may also be imposed on undertakings with SMP regarding access to only specific network facilities.¹⁸⁸ Existing interconnection obligations remain in operation, but the NRAs are required to review them taking into account the new definitions of SMP.¹⁸⁹ Interconnection itself remains based on non-discrimination, cost-oriented pricing and transparency, and allows explicitly for access to specific network elements.¹⁹⁰ Providers of conditional access systems (e.g., digital television) are required to offer access on fair, reasonable and non-discriminatory terms.¹⁹¹ Decisions will be made according to market development on the basis of the comitology structure envisaged in the FP. Again, in working on its common position, the Council is trying to reduce the possible impact of the Commission, mostly in the area of conditional access systems.

184. Amended Authorization Proposal, *supra* note 153, art. 16.

185. Amended Interconnection Proposal, *supra* note 153.

186. *See id.* arts. 3-4.

187. *See id.* arts. 5, 8.

188. *Id.* art. 12.

189. *Id.* art. 7.

190. *See id.* arts. 9-12.

191. *See* Amended Interconnection Proposal, *supra* note 153, art. 6.

c. The Universal Service and Users' Rights Proposal

Observations are based on the Commission Proposal for a Directive of the European Parliament and of the Council on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services ("Universal Service Proposal" or "USP").¹⁹² The USP addresses the traditional universal service obligations. It includes regulations on the choice of designated universal service operators by the Member States, including new provisions on cost assessment and recovery of costs by these operators.¹⁹³ Member States must find the most efficient way to attribute universal service, opening the opportunity to all undertakings and using allocation mechanisms for part or all universal service obligations either by tender or auction.¹⁹⁴ There is a specific requirement for the Commission to review the scope of universal service obligations¹⁹⁵ and a prescribed procedure for this task.¹⁹⁶ The rather narrow scope of universal service according to the USP, if compared to the U.S.,¹⁹⁷ is comprised of:

[A]ll reasonable requests for connection to the public telephone network at a fixed location and for access to publicly available telephone services at a fixed location are met by at least one operator. . . . The connection provided shall be capable of allowing users to make and receive local, national and international telephone calls, facsimile communications and data communications, at data rates that are sufficient to permit Internet access."¹⁹⁸

Further requirements include: (1) adequate directory enquiry services and directories;¹⁹⁹ (2) if so decided by the NRA, public

192. See Universal Service Proposal, *supra* note 136.

193. See *id.* arts. 3-13.

194. *Id.* art. 8.

195. *Id.* art. 15.

196. *Id.* at annex V.

197. For example, the European definition does not comprise the provision of broadband communications for health care establishment, nor internet access for schools. The Commission is of the opinion that such services should be financed by the appropriate government departments and not by the telecommunications sector, although the proposal would allow for direct government payments also within the framework of telecommunications.

198. Universal Service Proposal, *supra* note 136, art. 4.

199. *Id.* art. 5.

payphones with the possibility of free emergency calls;²⁰⁰ (3) special measures for disabled and specific needs users;²⁰¹ and (4) special provisions for users with low incomes or with special needs, including user enabling techniques for cost control.²⁰² The quality of services is to be monitored by the NRAs.²⁰³

Cost recovery can be obtained through special funds or from general government budgets. There is no longer a universal service surcharge on interconnection prices.²⁰⁴ In view of Community enlargement and the ensuing wide variety of market situations and different levels of service quality, special attention is again necessary for undertakings with SMP. These undertakings can be submitted to retail tariff regulation by their NRAs in order to prevent distortions of competition. The NRAs have to observe all procedural obligations, information and publication duties as prescribed for actions in relation to undertakings with SMP in the Framework Proposal.²⁰⁵

In the general spirit of EU consumer protection, the Universal Service Proposal relies on information duties in the interest of the consumer rather than on direct intervention. The information requirements of the USP, however, seem either obvious or of rather low quality;²⁰⁶ tariffs and contractual information are to be made only sufficiently transparent.²⁰⁷ Yet, while rather grandly including the promotion of interests of European citizens among the tasks of NRAs, the FP had already restricted the means of "requiring transparency of tariffs and conditions for using publicly available electronic communications services; and . . . addressing the needs of specific social groups, in particular disabled users."²⁰⁸

Other information related clauses of the USP refer to information on the quality of services.²⁰⁹ There are further consumer protection elements in the USP which relate to specific issues such as the assurance that all equipment sold in the EU

200. *Id.* art. 6.

201. *Id.* art. 7.

202. *Id.* arts. 9-10.

203. *Id.* art. 11.

204. Universal Service Proposal, *supra* note 136, arts. 12-13.

205. *Id.* art. 16.

206. *See id.* art. 17.

207. *Id.* art. 18.

208. *See* Amended Framework Proposal, *supra* note 153, art. 7(4).

209. Universal Service Proposal, *supra* note 136, art. 19.

for reception of digital television is technically compatible with the relevant European standard,²¹⁰ — an assurance which also demonstrates that some of these regulations have an astonishing concern for detail, in contrast, it seems, to the relative importance and relevance of the issue.²¹¹ Further measures comprise: (1) the right to operator assisted calls; (2) a single directory in a fair and non-discriminatory manner;²¹² (3) the single European emergency call number (“112”);²¹³ (4) the existing requirement of a single international access code (“00”) and the obligation of operators to handle calls using the new European regional code (“3883”);²¹⁴ (5) the obligation for all public access

210. *See id.* art. 20.

211. *See, e.g., id.* at annex VI. It specifies under which conditions these assurances apply:

Any analogue television set with an integral screen of visible diagonal greater than 42 cm which is put on the market for sale or rent in the Community shall be fitted with at least one open interface socket (as standardised by a recognised European standardisation body) permitting simple connection of peripherals, especially additional decoders and digital receivers.

Any digital television set with an integral screen of visible diagonal greater than 30 cm which is put on the market for sale or rent in the Community shall be fitted with at least one open interface socket (either standardised by a recognised European standardisation body or conforming to an industry-wide specification) permitting simple connection of peripherals, and able to pass all the elements of a digital television signal. Apart from video and audio streams, this includes conditional access information, the full application programme interface (API) command set of the connected devices, service information and copy protection information.

Id. Such detail is, of course, less astonishing when remembering the EU industrial policy tradition.

212. *Id.* art. 21.

213. This includes the already existing requirement of emergency services to be available free of charge, and adds a provision stipulating that caller location information be made available to emergency authorities for such calls. *Id.* art. 22.

214. Universal Service Proposal, *supra* note 136, art. 23. The number “3883” will be a “pan-European” country code for subscribers wishing to establish a “European identity,” or rather a “CEPT identity,” since the code will apply to subscribers in the fifteen EU Member States (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom) and in Bulgaria, Cyprus, the Czech Republic, Croatia, Norway, Poland, Slovenia, the Slovak Republic and Switzerland. *Id.*

operators to provide additional services (tone dialing and itemized billing) to all citizens (and not just obligations only for SMP or designated universal service operators), again, however, NRAs are given the option not to require such obligations if they do not consider them necessary;²¹⁵ and (6) the obligation of number portability to mobile operators.²¹⁶

The proposal also confirms the continuing need for leased lines and other mandatory services as already regulated in Directive 92/44 (as amended by Directive 97/51).²¹⁷ The Universal Service Proposal contains a new provision which ensures proportionate compensation to network operators that bear must carry obligations in relation to public service broadcasting. One of the few “convergence” rules, it states in full:

“Must carry” obligations

1. Member States may impose “must carry” obligations, for the transmission of specified radio and television broadcasts, on undertakings under their jurisdiction providing electronic communications networks established for the distribution of radio or television broadcasts to the public. Such obligations shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate, transparent and limited in time.

2. Member States shall ensure that the undertakings subject to “must carry” obligations receive appropriate compensation on reasonable, transparent and non-discriminatory terms taking into account the network capacity required.²¹⁸

The last chapter of the USP deals with procedure (consultation by national regulatory authorities with user and consumer groups before adopting national measures).²¹⁹

d. The Data Protection Proposal

The issue of data protection was dealt with in the working papers, which were part of the consultation processes after the

215. *Id.* art. 24.

216. *Id.* art. 25. This does not apply between mobile and fixed network operators.

217. *Id.*

218. *Id.* art. 26.

219. Universal Service Proposal, *supra* note 136, arts. 29-36.

1999 Communications Review,²²⁰ and later became part of the July 2000 package. Observations are based on the Proposal for a Directive of the European Parliament and of the Council Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector ("Data Protection Proposal" or "DPP").²²¹

As known from other contexts, in 1995 the EU enacted Council Directive 95/46, a general directive on data protection covering the private sector and the public sector in as far as there is EU regulatory competence.²²² In 1997, the EU also enacted Council Directive 97/66, a special sector directive on telecommunications.²²³ In both cases, the Commission had to open infringement proceedings against certain Member States since they had not transformed the directives into national law within the time frame set by those directives. Some of these proceedings are still pending. There was no intention of introducing large changes to the existing situation created by Directives 95/46 and 97/66. It is not without irony that the intention of this proposal to become (more?) technologically neutral was induced by changes in the technology.

The Data Protection Proposal puts the intended regulations under the umbrella of the framework proposal definition and appends existing regulation accordingly. Since Article 6 ("traffic data") of Directive 97/66, for example, only referred to

220. See EUROPEAN COMMISSION, DIRECTORATE-GENERAL INFORMATION SOCIETY, DOC. NO. INFSO A/1DG, COMMUNICATIONS SERVICES: POLICY AND REGULATORY FRAMEWORK (Apr. 27, 2000).

221. Data Protection Proposal, *supra* note 137. See also Parliament and Council Directive 97/66, *supra* note 137. As discussed previously, the proposal is currently under consideration in the Council for developing a Common Position. The First Reading in Parliament is expected in September 2001. The procedure is unusual but possible. Normally, it is the Council who reacts to the position of the Parliament with a Common Position, as in the other elements of the new regulatory package. The Chairman of the Committee on Citizen's Freedoms and Rights, Justice and Home Affairs of the Parliament has already indicated that the amendments of the Council are unlikely to find acceptance in the First Reading of the Parliament. See sources cited *supra* note 153. The Council recognizes that this package is politically, the most difficult element of the package, and since it is the political intention of the Council to see through the whole of the "new regulatory package" on a single date before the end of 2001, there is a certain interest in speeding up procedures. *Id.*

222. Parliament and Council Directive 95/46, *supra* note 166.

223. *Id.*

“calls,”²²⁴ adjustments are made to relate these and other clauses to “the transmission of a *communication*.”²²⁵ Since technical and organizational opportunities as regards traffic data have also increased, there is now an express possibility to allow for processing of this traffic data with the informed consent of the subscriber. Traffic data, however, seems to become a very controversial issue in the current political debate, if not the most controversial in the new regulatory package. Law enforcement interests seek extended periods of data retention on traffic data, as well as access to that data at telecom undertakings.²²⁶ There is currently resistance from the Commission, from some Member States and from telecom undertakings, since Directive 97/66 had affirmed that traffic data may only be kept for billing purposes.²²⁷

Location data — which will become more important in view of mobile-commerce or “m-commerce” — is strictly speaking, part of traffic data and regulated as such by Directive 97/66. But in view of this information becoming more precise, an explicit article appeared to be necessary. This article, however, only repeats the basic principle of directive 97/66: subscribers should have the choice (of temporarily disabling the location device — similar to “caller ID”) and should give prior consent.²²⁸ This does not alter already existing exemptions — again in the context of caller identification — in emergency situations and by Member States’ legislation for law enforcement purposes.²²⁹

In view of technological changes and new social and economic uses, the basic assumption of Directive 97/66 — that a central directory service should be maintained with a default rule of entering subscribers into such a directory — can no longer be

224. Parliament and Council Directive 97/66, *supra* note 137, art. 6(1).

225. Data Protection Proposal, *supra* note 137, art. 6(1) (emphasis added).

226. Work is progressing on a resolution to replace the Council Resolution of 17 January 1995 on the Lawful Interception of Telecommunications, 1996 O.J. (C 329) 1, which was not published until the end of 1996. For the current status of this legislation, see Council Resolution 9194/01 on Law Enforcement Operational Needs with Respect to Public Telecommunications and Services, June 20, 2001, at <http://www.ue.eu.int>.

227. See Parliament and Council Directive 97/66, *supra* note 137, art. 6(2).

228. See Data Protection Proposal, *supra* note 137, art. 9.

229. *Id.* arts. 10, 15.

maintained. It will now be the choice of the subscriber to decide in which directories to appear and with what information.²³⁰

Another issue likely to remain controversial is the protection against unsolicited calls. Here the Data Protection Proposal has, while extending the definition, given up the idea of technological neutrality once again: for “automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing,” the default rule is now that such communication is forbidden unless the subscriber has consented.²³¹ As regards the other forms of “communication,” the opt-out or opt-in choice is left to regulation in the Member States.²³² And this only applies to natural persons — as regards other entities, “Member States shall also ensure . . . that the legitimate interests of subscribers other than natural persons with regard to unsolicited communications are sufficiently protected.”²³³ One reason for controversy is that the Electric Commerce Directive already provides for a Member State’s solution for e-mail.²³⁴

Finally, the Data Protection Proposal addresses the possibilities of privacy enhancing technologies.²³⁵ The DPP suggests that the Commission might propose measures to ensure that terminal equipment incorporates the necessary safeguards to guarantee the protection of personal data and privacy of users and subscribers.²³⁶

3. Summary

Considering all these content descriptions, what then are the main characteristics of change initiated by the 1999 Communications Review, or more precisely, what are the main charac-

230. *Id.* art. 12.

231. *Id.* art. 13(1).

232. *Id.* art. 13(2).

233. *Id.* art. 13(3).

234. *See* Parliament and Council Directive 2000/31, *supra* note 116, art. 7.

235. For a discussion of these technologies, see Herbert Burkert, *Privacy-Enhancing Technologies: Typology, Critique, Vision*, in TECHNOLOGY AND PRIVACY: THE NEW LANDSCAPE 125 (1998).

236. *See* Parliament and Council Directive 1999/5 of 9 March 1999 on Radio Equipment and Telecommunications Equipment and the Mutual Recognition of Their Conformity, 1999 O.J. (L 91) 10; Council Decision 87/95 of 22 December 1986 on Standardization in the Field of Information Technology and Telecommunications, 1987 O.J. (L 36) 31.

teristics of the *proposed* changes that still have to emerge from the rule making process and be implemented in national law?:

(1) After initial hesitation, the EU has addressed the local loop issue as the most pressing structural problem of telecommunication markets with impressive decisiveness: unbundled access to the local loop, either exclusively or shared, has been implemented, with the basic principles of non-discrimination, co-location and cost-orientation on fair, reasonable and non-discriminatory terms and with the requirement of standard publicized offers for undertakings with SMPs.

(2) With regard to the relationship between the Commission and the NRAs, there is an attempt, although somewhat cached in regulatory speech, to arrive at better co-ordination and to ensure faster and more comprehensive alignment with the rules of EU telecommunications regulations. Since this issue is essential for the future of the regulatory landscape in Europe, it will receive further scrutiny in Part IV below.

(3) The new regulatory package attempts to reflect convergence. The approach seems to be more one of verbal regulatory technique than of full functional integration: definitions are extended, articles on specific electronic (mass) media developments are added rather than integrated, not always necessarily reflecting the intention of a more technology neutral approach. The package does not address contents, except when explicitly opening the possibility of must carry obligations.

(4) The basic addressee of ex ante intervention, the undertaking with SMP, will now be defined in closer harmony with the definitions of general competition law intervention, although not necessarily exactly in the same manner and not necessarily with more clarity.

(5) The main intention of the authorization proposal is to achieve better control over the varying fee practices in the Member States.

(6) The access and interconnection proposal mainly ensures that definitions and terminology are adjusted to the new framework and the convergence aim.

(7) The same seems to apply to the more ex post oriented proposals of universal service and users' rights, except perhaps that review procedures for financing models by NRAs have to take place at more regular intervals. Certain service features are now expanded into the area of mobile telephony. There are no fundamental changes to the definition of universal services.

(8) Finally, in the area of data protection, we again see adjustments of terminology to the broader scope of the convergence philosophy, while old conflicts continue, albeit now perhaps with a more data protection minded Commission.

In all, there is no basic change observable. Whether the regulatory hand of the Commission will be lighter or heavier on NRAs is yet to be decided or rather experienced. The regulatory material now appears better structured and organized, and it might facilitate *regulatory orientation* for NRAs, undertakings, users and consumers. This would then be the general description of the emerging post-deregulatory landscape for telecommunications in the EU, with one exception: in the material examined, the original plans analyzed, the pre-1999 Communications Review spirit remembered, the discussions watched and the exchanges followed, there seem to be indications of a deeper change, a change that does not necessarily originate in developments of the telecommunications markets, but one that might eventually influence the outcome of the tensions between the Commission and the Member States' authorities, or rather between the Commission and the Member States' view on the role of their NRAs.

IV. A SECOND LOOK: A "NATURAL HISTORY OF REGULATION" OR THE "UNIQUE EUROPEAN EXPERIENCE"

There are, of course, many other questions to be asked about the role of transparency and the involvement of consumers and users outside the traditional structures of the current built-up of regulatory agencies. There is enough writing on the wall; even the imperfect and perhaps soon obsolete Internet Corporation for Names and Numbers model is casting its shadow. To this day, there is no comprehensive comparative study on national regulatory authorities that focuses on the transparency of procedures or the integration of public interest representations in their organizational and procedural structure.²³⁷

237. This approach would, of course, also be necessary on the level of EU institutions. In the area of transparency, there have been considerable efforts by Community institutions over the last years. See, e.g., Parliament Council Regulation 1049/2001, *supra* note 75. Against the general trend of skepticism, the EU has enforced its attempts to address its legitimacy, governance and acceptance problems, again, however, mainly in view of preparing acceptance for yet further treaty changes and, of course, the enlargement. See

We, however, shall put ourselves to a less ambitious task. The general understanding of the changes described above, taking the 1999 Communications Review as the watershed, often summarizes as if they provided a sort of “natural history of telecommunications regulations” where one moves from the natural monopoly to breaking this monopoly, taming the incumbents, ensuring access and entry and gradually making regulation disappear. This Article has shown these developments — as unfinished as they are and as limited to a particular period in EU telecommunications regulations — in some detail because they may answer the long-standing question whether the development towards the post-deregulatory landscape, towards regulation *with a lighter touch*, may indeed be read as a *natural* development where the Commission and the Member States only had to make one effort in the early 1980’s to give the clauses on services in the general economic interest a push.

A. Revisiting the NRA and ERA Issue

Already, the current situation does not reflect such easiness, if we review the previous account. The local loop problem had to be addressed by a *regulation*, the strongest instrument in EU telecommunications law. The Commission still carries on with a large number of breach of treaty procedures against the Member States who are still battling with the pre-1999 Communications Review regulatory package. The issue of an ERA appeared, and seems to have disappeared again. The relationship between the NRA and the Commission is characterized as critical in the new regulatory package. The universal service issue seems to stand fairly high on current agendas, while in the early telecommunications policy documents the issue was hardly evident. Telecommunications privacy does not have a clear cut profile. And there is a highly critical debate on the regulatory package as such, and neither in the Council nor the Parliament do all elements of the package receive an equally easy ride.

The issue of an ERA seems to show most clearly the first cracks of deeper tectonic changes. At minimum, the outside

observer will see that the Commission's (and the Parliament's) toying with the idea of an ERA was at least influenced by the example of the Federal Communications Commission ("FCC"). EU competition law in general has been driven by the American example, and to a large extent was designed by Americans, even if the empirical and historical evidence is, while basically acknowledged, occasionally downplayed.²³⁸ Would it be useful to have an institution like the FCC on the European level, eventually as a counterpart in the "regulatory world series"?

Although there are a number of constitutional problems in setting up a regulatory agency of some sort on the EU level, or delegating rule-making power from existing institutions to such an institution,²³⁹ the issue of an ERA has always been and continues to be a strong wish, although it is not always clear who the wisher is. The ERA theme certainly provides a leitmotiv of the regulatory developments described so far and also echoes the old (albeit not always clearly expressed) double-bind situation in which Europe looks at the United States: always a dream and always a fear, always an attraction and always a repulsion.

With or without that American-centered addition, the notion of an ERA has been put forward by the Parliament at various occasions.²⁴⁰ Even the "euro-centric world open," — then famous (and now somewhat lesser referred to as such) — "Bangemann Group" had suggested such an authority in 1994, at a time when reference to a "High Level Group" consisting purely of industrialists was still considered to bring enlightened guidance to European policies.²⁴¹

While it was the Parliament that put the issue on the agenda of the 1999 Communication Review, the Commission itself had undertaken various studies on its own to test the ground.²⁴² The actual position of the Commission remained difficult to

238. For a history of European integration and the influence of U.S. competition law, see DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* 334 (1998).

239. For further detail, see Yataganas, *supra* note 125.

240. For further references to EU action in this field, see LAROCHE, *supra* note 18, at 414.

241. Robert Queck, *The Future of National Telecommunications Regulatory Authorities*, in 2 *THE JOURNAL OF POLICY, REGULATION AND STRATEGY FOR TELECOMMUNICATIONS INFORMATION AND MEDIA* 251, 259 (2000).

242. For further detail, see LAROCHE, *supra* note 18, at 415.

ascertain. There are different currents of opinion in the Commission, and which of these currents or which mix of those currents see the light of an official document is the result of complex interactions within and among the General Directorates. In a statement in the *EC Competition Policy Newsletter*, a Commission official from the Competition General Directorate elaborated on the issue, indicating that a commissioned study did favor a specific EU institutional arrangement short of an ERA.²⁴³ The official, of course, remained non-committal and emphasized, as usual, “subsidiarity” and “co-operation.”²⁴⁴ In the Green Paper on Convergence, there were, however, some comments alarming for those who had been skeptical of a new European authority. Since these comments are a very good example of “Commission speak” and the way the Commission deals with critical points, a quote seems illustrative. Appropriately, the Commission starts with a bow to subsidiarity:

In looking at the options for a possible future regulatory model, account must be taken of the way in which responsibilities will continue to be shared between the Community and Member States and within Member States, between national, regional and sometimes local authorities. From a Community perspective, the EC Treaty defines on the basis of subsidiarity those areas in which the Community has a role to play. Such action may be taken, assuming it is an area for which the Community is competent, “only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”²⁴⁵

The Commission then takes the decisive turn:

Given the regional and global nature of many of the services being delivered, that subsidiarity test may be met. Diverse national approaches may harm rather than promote users’ interests, could undermine the diversity which the internal market offers, and may well introduce distortions which fa-

243. See Alexander Schaub, *Competition in the Telecoms Sector*, EC COMPETITION POLICY NEWSLETTER, Apr. 1, 1996, at 1, 6-7, available at http://europa.eu.int/comm/competition/speeches/text/sp1996_030_en.html.

244. *Id.*

245. Green Paper on Convergence, *supra* note 40, at 31.

your the establishment of production facilities in regions where a lighter regime applies.²⁴⁶

Not surprisingly, some of the questions which the Commission put forward in the Green Paper on Convergence on this issue may be seen by some as leading questions. However, something else happened. By explicitly or at least implicitly turning telecommunications regulation into a convergence issue, and by proposing — again mostly between the lines — to take the spirit of telecommunications liberalization into mass media, the Green Paper on Convergence helped to create new alliances of opposition mainly between the public service telecommunications operators, or rather the “incumbents” and the providers of public service broadcasting. Traditionally, these broadcasters still have a high political standing and considerable political impact in at least some Member States. And *their* regulatory authorities started to see issues they shared with telecommunications regulatory authorities, but not necessarily in the same way as the Green Paper on Convergence seemed to insinuate.

Nor was the pressure without reaction from the telecommunications NRAs. Apart from the usual pressures and exigencies, many of these authorities see themselves under a double weight. On the national level, they have to justify their existence as *special* regulatory agencies, in addition to general regulators of competition. On the EU level, they have to defend their existence as *national* authorities. The reaction to the Green Paper on Convergence insinuations regarding a need for an ERA was then, it seemed, sufficiently reserved to lead to the withdrawal of the ERA idea in the 1999 Communications Review. Another way to confront the pressure for an ERA model has been to show, at least symbolically, the inherently imperfect logic of such an authority. It is imperfect because the process of European unity is still far from complete, and any authority on the EU level would then be asked how European it really is. Consequently, as one is almost inclined to assume, NRAs from the EU joined with NRAs from the European Free Trade Association (“EFTA”) states²⁴⁷ and had formed the Inde-

246. *Id.*

247. European Free Trade Association, at <http://www.efta.int/structure/main/index.htm>. Member States are Iceland, Liechtenstein, Norway and

pendent Regulators Group, slightly emphasizing, perhaps, the qualification *independent*.

But something else had also changed. By now, the general climate had become more skeptical towards liberalization, particularly since the positive, even if only secondary economic effect of liberalization was not yet evident. Unemployment remained the main economic issue in the EU; *euro-skepticism* was growing. December 1998 saw the refusal of the EU budget by the Parliament, and in January 1999, the “Commission crisis” — the vote of non-confidence by the Parliament which forced the demission of the Commission — followed.²⁴⁸ And most important: The new treaty — the Treaty of Amsterdam — which had already been in the making at least since October 1997, saw its ratification ensured only in the first half of 1999, and not without difficulties.

So, with the 1999 Communications Review, the wording for the relationship between the Commission and the Member States’ NRAs had changed significantly; there was no longer any talk of an ERA, and the key word now became “cooperation.”²⁴⁹ However, against the current political background described above, NRAs may suspiciously look at *cooperation* for signs of a functional equivalent of an ERA, even if the term is no longer fashionable and the window of opportunity for centripetal forces in this area may well be closed for some time. As we shall see, this is not the only change which, while not necessarily introduced *with* the new regulatory package, will nevertheless have its impact *on* that package.

B. The Great Climate Change: The Return of the Public Service and the Consumer?

A more fundamental change seems to be underway, although it is far from certain what the result will be. In his speech in the Summer of 2001, from which this Article quoted several times, Robert Verrue answered the question “[w]hy have we made these proposals?” by giving, *inter alia*, as the main objec-

Switzerland. The EU and EFTA (except Switzerland) cooperate on the basis of the Agreement on the European Economic Area of 1992. *Id.*

248. See Peter Schwartz, *The Failed Vote of No-Confidence in the European Parliament*, at <http://www.wsws.org/articles/1999/jan1999/parl-j2l.shtml> (Jan. 21, 1999).

249. Queck, *supra* note 241, at 259.

tives: "(1) to benefit the citizen; (2) to promote, sustain and deepen an open and competitive market; [and] (3) to consolidate the EU's internal market."²⁵⁰

While this, at first glance, is restating the obvious, the ranking of the objectives is still remarkable. The author recalled in Part III.A.5., *supra*, that the notion of the universal service had entered the regulatory debate at a relatively late stage, only shortly before the complete liberalization of the market. This Article has also shown that only about thirty years after its entry into force, the interpretation of the then EC Treaty Article 90 had changed somewhat dramatically. And it has also seemed as if this change has largely been accepted in the Member States and in the perception of the general public, to the extent that the general public was following these developments at all, due to the disappointment with the level of public service and the changing perception of the natural monopoly.

Recall, however, the increasing influence of the Parliament due to changes in the general power structure of the EU. Since the introduction of direct elections (only in 1979), the co-decision procedure (1993) and the enlargement of this procedure (1999), the Parliament was moving closer to the "end user" and consumer (and as a side effect, is also now more exposed to temptations from lobbying). It was the Parliament which started to re-emphasize public interest considerations and the importance of services in the general economic interest. In telecommunications, the Parliament had simply to pick up those cards which the Commission and the Member States had not yet sufficiently played, because they were to leave the public telephony service until the very last.

The Commission and the Council had appeased the *re-discovery* of the public interest partly by introducing universal service parts into the various directives and partly (but mainly due to other pressures, incentives and developments)²⁵¹ by emphasizing data protection more strongly. As so often in European politics, and as exemplified with the ERA issue above,

250. Verrue, *supra* note 160.

251. It should be remembered that it had taken the EU more than twenty years to move from the first discussions of data protection issues in the then not yet directly elected European Parliament (1974) to the Data Protection Directive.

legal policy developments cannot be explained by looking simply at application areas and application specific developments.

Again, one must recall general political developments. There have been other players emphasizing public interest and public services. There had been national developments, most strongly signaled first by the end of the Thatcher administration and later with the Conservative government in the U.K. by 1997. Although this did not lead to a recognizable change of the British position on telecommunications, these developments were perceived as symbolic indicators of change.

As noted above, unemployment remained an important issue in public debate. This is not the place to expand on unemployment and telecommunications liberalization and their complex interrelations; reference is only made in view of the changes in public opinion and its view on the role and responsibility of the EU. Furthermore, certainly since 1989, and well before the European crisis years already referred to, the end of East/West confrontations favored centrifugal tendencies in the EU which gained further momentum as a counterbalance to the intention of the EU to become more integrated in the area of foreign and military policy.

Last but not least, end users' views gradually changed as well. Changes brought by, or at least with, liberalization had been welcome. Services had improved. Prices had gone down on long-distance calls, but they had also gone up for local calls and continue to do so. Choice had increased, but the burden of choice had become heavier and information costs had increased as well, leaving the consumer with an undercurrent of feeling that there might always be a better choice than the one made (and ironically because of these choices), which seems to lead to a lingering feeling of being trapped, if not cheated.²⁵²

The Commission, of course, has not and will not stop at telecommunications. Other areas are undergoing similar changes: energy and water, public banking and public transport and (tentatively) public radio and television. This multi-front ap-

252. EOS Gallup Europe, *The European Commission: The Situation of Telecommunication Services in the Regions of the European Union*, at <http://europa.eu.int/ISPO/infosoc/telecompolicy/en/EOStudy/Resid/accueil.htm> (last visited Mar. 18, 2002) (based on over 44,000 household interviews in 130 regions within the fifteen Member States, in conjunction with a survey of 7500 small companies).

proach of the Commission with or without direct support from the Council has also generated — as already shown in the reactions to the Green Paper on Convergence — a multi-front opposition.

With its general loss of appeal, the EU also seemed to have lost control over its regulatory playing field. The need for institutional reform, and the then upcoming Treaty of Amsterdam in particular, allowed players to carry their sectoral concerns to other levels. Players could choose to take the specific issue to the national or to the European level, they could choose to turn the specific issue into a general issue or they could choose a combination thereof.²⁵³ This approach was strongly emphasized, for one, by the French government.²⁵⁴ Also, the European courts increasingly seemed to have rediscovered the charm of services of a general economic interest and specific state involvement.²⁵⁵ So, in European politics, concessions for services in the general economic interest had to be made. The willingness to make such concessions was expressed in the Commission Communication on Services of General Interest in Europe²⁵⁶ and in a 2000 update to the Communication.²⁵⁷ Furthermore, due to changes in the Treaty of Amsterdam, the EC Treaty now contains a specific article:

Article 16 (ex Article 7d)

Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting

253. As regards these multi-player, multi-level politics, see generally Adrienne Héritier, *The Politics of Public Services in European Regulation*, in PREPRINTS AUS DER MAX-PLANCK-PROJEKTSGRUPPE RECHT DER GEMEINSCHAFTSGÜTER (2001).

254. The account provided by Héritier, *id.* at 11, slightly overemphasizes the impact of French developments, most likely due to the source material used.

255. See, e.g., Case T-106/95, *Fédération Française des Sociétés d'Assurances (FFSA) & Others v. Commission*, 1997 E.C.R. II-229; Case C-392/92, *Municipality of Almelo and Others v. Energiebedrijf IJsselmij NV*, 1994 E.C.R. I-1447; Case T-32/93, *Ladbroke Racing Ltd. v. Commission*, 1994 E.C.R. II-1015; Case C-320/91, *Criminal Proceedings Against Paul Corbeau*, 1993 E.C.R. I-2565.

256. See Services of General Interest, *supra* note 41.

257. See Communication from the Commission, Services of General Interest in Europe, COM(00)580 final [hereinafter Services of General Interest 2000].

social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.²⁵⁸

And public broadcasting, in particular, found special recognition in the Protocol on the System of Public Broadcasting in the Member States:

THE HIGH CONTRACTING PARTIES,

CONSIDERING that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism,

HAVE AGREED UPON the following interpretative provisions, which shall be annexed to the Treaty establishing the European Community,

The provisions of the Treaty establishing the European Community shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.²⁵⁹

EC Treaty Article 16 remains rather guarded and the Communication on Services of General Interest sounds rather cautious, and defensive, particularly the 2000 amendment.²⁶⁰ All these developments are indications that the tone has changed and that the burden of argumentation may be shifting. Recently, services of general economic interest have even found their place in the Charter of Fundamental Rights of the EU:

Article 36

258. EC TREATY art. 16.

259. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts - Protocol Annexed to the Treaty of the European Community - Protocol on the System of Public Broadcasting in the Member States, 1997 O.J. (C 340) 109, 109.

260. See generally EC TREATY art. 16; Services of General Interest 2000, *supra* note 257.

Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.²⁶¹

Furthermore, consumer protection has gained considerable momentum. Again quoting from the EC Treaty where, since the changes introduced with the Treaty of Amsterdam, consumer protection now has its own title:

TITLE XIV (ex Title XI)
CONSUMER PROTECTION
Article 153 (ex Article 129a)

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

2. Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.²⁶²

It should be remembered in this context that it was only in 1995 that consumer protection was seen as worthy of receiving its own General Directorate. Again the Charter of Fundamental Rights reads: "Union policies shall ensure a high level of consumer protection."²⁶³

Finally, consumer protection has gained an even higher political standing against the background of yet another "Commission crisis," this time in the area of agriculture. The reports on the implementation of the regulatory tools in telecommunications become, in spite of the ever increasing annexes, more concise. Unfortunately, but for obvious reasons, they emphasize quantitative data or approaches where qualitative statements are quantitatively operationalized.²⁶⁴ But, in the new spirit of consumer orientation, even these reports can be sur-

261. Charter of Fundamental Rights of the European Union, art. 36, 2000 O.J. (C 364) 1, 17 [hereinafter Charter of Fundamental Rights].

262. EC TREATY art. 153(1)-(2).

263. Charter of Fundamental Rights, *supra* note 261, art. 38.

264. For the most recent data, see Sixth Report, *supra* note 95.

prisingly blunt when assessing or trying to assess the current situation of consumer protection in telecommunications:

There is still little evidence of a systematic effort at [the] national level to monitor the protection of consumers and the promotion of users' interests as regards telecommunications services. While institutional arrangements vary from country to country, there appears to be a disappointingly low level of coordination between NRAs and other agencies responsible for consumer protection. This makes it difficult to discern particular trends or problems at [the] EU level, even in relation to the services and quality of service indicators the use of which is obligatory under the EC framework.²⁶⁵

In sum, the climate *is changing*. It is against the background of these changes that the new regulatory package will have to be re-read and eventually implemented.

C. Concluding Observation: On Comparison and Uniqueness

The subject of the post-deregulatory landscape invites or insinuates at least comparison. To compare is a deliberate act in which one is prepared to reduce differences, to move towards generalizations to reach at least some common ground for comparison. Emphasizing the specifics of the EU environment and of the European approach was driven not so much by an attempt to avoid comparison or to neglect common challenges and common responses. Rather, this Article has attempted to introduce some of the "ethnological" differences in regulatory environments for telecommunications and to help to create — generally — a more critical distance between "the foreign example" and the need to develop an intrinsic policy that absorbs the specific cultural needs (but also the temporary fashions) of one's own regulatory environment. In doing so, from a perspective of historical and institutional observation, this Article echoes conclusions of the authors of another analysis who in contrast to this author have chosen a primarily economic and empirical approach. Olivier Boylaud and Giuseppe Nicoletti conclude their extensive empirical analysis *Regulation, Market Structure and Performance in Telecommunications*:

265. *Id.* at 22.

These findings underscore the limits of purely descriptive cross-country comparisons of regulation and performance, insofar as they fail to account for economic and policy developments in different countries, as well as the danger of using such analysis for policy purposes without an understanding of the different markets and their specific characteristics.²⁶⁶

In fact, European telecommunications regulation, or at least the examples chosen from this area, illustrate how issues apparently manageable mainly by reflections on economic efficiency remain deeply connected and dependent on economic, but also on cultural and political developments of the European region. Such phenomenon is due to the complex and specific patterns of interaction between European players on the various levels provided to them by the specific structure of the EU.

266. OLIVIER BOYLAUD & GIUSEPPE NICOLETTI, REGULATION, MARKET STRUCTURE AND PERFORMANCE IN TELECOMMUNICATIONS 24 (OECD Econ. Dep't, Working Paper No. 237, 2000).

GOVERNING NETWORKS: TELECOMMUNICATION DEREGULATION IN EUROPE AND THE UNITED STATES

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I. INTRODUCTION

In the Summer of 2001, while visiting the United States, a Ukrainian official in charge of telecommunication regulations raised his voice. Clearly, he said, not telecom competition but coordination is what his country needed. Two months earlier, a U.S. telecom policy maker exasperatedly remarked at an international conference, “This is the problem with you Europeans. You don’t believe in competition. You’d rather have state-imposed coordination.”¹

These statements may be simplistic, but they exemplify two quintessential positions in telecom regulation (and regulations in general): competition and coordination. Much of the history of telecommunications infrastructure is one of state ownership and heavily regulated private monopolies. But over the last fifteen years we have witnessed a widespread liberalization, especially in the U.S. and the European Union (“EU”), accelerating rapidly over the past five years.² Today, the telecommunication markets are highly competitive on both sides of the Atlantic. In many European countries, for example, rates for

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1. Interview with unnamed United States official, in Zurich, Switzerland (June 28, 2001).

2. See Viktor Mayer-Schönberger & Mathias Strasser, *A Closer Look at Telecom Deregulation: The European Advantage*, 12 HARV. J. LAW & TECH. 561, 562 n.2 (1999).

long distance phone services have come down a staggering 80% or more from what they used to be only a decade ago.³

On the surface, both the U.S. — through its Telecommunications Act of 1996⁴ — and the EU — through its telecommunication directives⁵ — have approached liberalization fairly similarly, substituting a monopoly with a market in which new entrants may successfully challenge the incumbents with the help of a complex competition-inducing regulatory framework. On a closer look, however, one discovers substantial differences in how the two tackled the regulatory task.

Comparing the successes and failures of the two regulatory frameworks may reveal important insights on how to better legislate in the future, in other countries, and perhaps, even in other sectors yet to be deregulated. But the authors think that it is still too early to comprehensively assess the two regulatory frameworks. Only a few years have passed since these frameworks have been put in place, and the long-term impacts may not yet be visible. Moreover, accurate economic and quantitative comparative studies are still scarce. The central hurdle, however, is the lack of an adequate and objective benchmarking framework. What are we supposed to compare when evaluating different regulatory regimes? How do we *measure* success?

To better understand the existing legal frameworks and to aid future law makers, the authors propose a first building block for such a benchmark: an evaluative model based on political economy theories of policy interdependence. This model provides an assessment of the challenges that a system of jurisdictions faces and of the capacity of a particular legal framework for deregulation to meet those challenges.

The authors will discuss three types of regulatory interdependence: competitive, coordinative and informational. An effective governance model, the authors argue, needs to be responsive to the types of interdependencies that exist in a par-

3. This decline is not limited to end-user call charges. For example, charges for leased telecommunication lines have come down by 30% within two years (1997-99). See Sixth Report on the Implementation of the Telecommunications Regulatory Package, COM(00)814 final at 3.

4. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

5. See *infra* notes 15-22.

ticular policy area. As components of each of these interdependencies are present in the telecommunications sector, a hybrid governance model is required. The title of this Article therefore has a dual meaning: on one level, it is about telecommunication networks; on another level, it is about governance networks. The authors find that the EU model in telecom has a number of distinct advantages: (1) it has centralized a core set of standards that address interface concerns; (2) it spurs innovations through what is an otherwise decentralized system; and (3) it has created an effective informational network through which those innovations might spread.

Part II of this Article reviews the current legal framework of liberalized telecom markets. Part III introduces the competitive, coordinative and informational modes of regulatory interdependence and shows that all three of them are present in various forms in the existing legal frameworks. In Part IV, the Article suggests that the key to understanding these frameworks is to accept that the regulatory structure should not be optimized to address just one of the three types of interdependencies.

II. THE EUROPEAN TELECOM REGULATORY FRAMEWORK

In Europe, since its inception, telecommunication was administered as a public utility by government owned and operated national carriers. They controlled long-distance and local services as well as terminal equipment.⁶ In the early 1980's, spurred by the developments in the U.S. and fueled by Margaret Thatcher's policies of deregulation, the United Kingdom took the lead in European telecom liberalization. The door for a European deregulatory movement was opened in 1985, when the European Court of Justice ("ECJ") decided that competition rules applied to the telecommunication sector.⁷ In 1987, the European Commission ("Commission") published its blue print for pan-European liberalization.⁸ This 1987 Green Paper envi-

6. See REGULATION OF NETWORK UTILITIES: THE EUROPEAN EXPERIENCE 1 (Claude Henry et al. eds., 2001).

7. See Case 41/83, Italian Republic v. Commission, 1985 E.C.R. 873 (1985).

8. See *generally* Towards a Dynamic European Economy, Green Paper on the Development of the Common Market for Telecommunications Services

sioned a comprehensive regulatory framework leading towards progressive liberalization.⁹ It also defined harmonized access conditions to networks, which later were turned into the Open Network Provision (“ONP”) concept.¹⁰

The liberalization advanced along two distinct tracks: Commission directives based on competition law, and the Council of the European Union (“Council”) directives based on the ONP concept of set access conditions.¹¹ While competition law is based on Article 82 of the Treaty Establishing the European Community (“EC Treaty”)¹² and its general notion of antitrust, the ONP concept is based on national regulatory frameworks enforced by national regulatory authorities.¹³ Based on the detailed ONP concept mandated by the EU, these national authorities lay down concrete rules on transparency, unbundling, pricing and accounting.¹⁴ Examples of the competition law approach are the directive deregulating the terminal equipment market adopted in 1988,¹⁵ as well as directives to open up the markets for value-added services (1990),¹⁶ data services (1990),¹⁷ satellite communications (1994)¹⁸ and mobile communication (1996).¹⁹ At an EU Telecom Review in 1993, agreement was achieved to fully liberalize the telecom markets by January 1, 1998, including voice

and Equipment, COM(87)290 final [hereinafter Green Paper on Development].

9. *Id.* at 184-85.

10. *Id.* at 189.

11. This point has been well made by Herbert Ungerer, *Access Issues Under EU Regulation and Antitrust Law: The Case of Telecommunications and Internet Markets* at 12 n.10 (Program on Information Resources Policy), at http://pirp.harvard.edu/pubs_pdf/ungerer/ungerer-i00-3.pdf (July 2000).

12. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, art. 82, O.J. (C 340) 3, 209 (1997) [hereinafter EC TREATY].

13. See Green Paper on Development, *supra* note 8.

14. *Id.*

15. See Commission Directive 88/301 on Competition in the Markets in Telecommunications Terminal Equipment, 1988 O.J. (L 131) 73.

16. See Commission Directive 90/388 on Competition in the Markets for Telecommunications Services, art. 2, 1990 O.J. (L 192) 10, 15.

17. See *id.* art. 3.

18. See Commission Directive 94/46 Amending Directive 88/301 and Directive 90/388, in Particular with Regard to Satellite Communications, 1994 O.J. (L 268) 15.

19. See Commission Directive 96/2 Amending Directive 90/388 with Regard to Mobile and Personal Communications, 1996 O.J. (L 20) 59.

January 1, 1998, including voice telephony.²⁰ This agreement was implemented in 1996.²¹ At the same time, the ONP concept was advanced through a framework directive,²² which was followed by issue and sector-specific directives,²³ especially on interconnection²⁴ and recommendations.²⁵ Later, the ONP con-

20. See Communication to the Council and European Parliament on the Consultation on the Review of the Situation in the Telecommunications Services Sector, COM(93)159 final at 35.

21. See Commission Directive 96/19 Amending Commission Directive 90/388 with Regard to the Implementation of Full Competition in Telecommunications Markets, 1996 O.J. (L 74) 13.

22. See Council Directive 90/387 on the Establishment of the Internal Market for Telecommunications Services Through the Implementation of Open Network Provision, 1990 O.J. (L 192) 1 [hereinafter ONP Framework Directive].

23. See Council Directive 92/44 on the Application of Open Network Provision to Leased Lines, 1992 O.J. (L 165) 27; Parliament and Council Directive 95/62 on the Application of Open Network Provision (ONP) to Voice Telephony, 1995 O.J. (L 321) 6; Parliament and Council Directive 98/10 on the Application of Open Network Provision (ONP) to Voice Telephony and on Universal Service for Telecommunications in a Competitive Environment, 1998 O.J. (L 101) 24; Parliament and Council Directive 97/66 Concerning the Processing of Personal Data and the Protection of Privacy in the Telecommunications Sector, 1998 O.J. (L 24) 1 [hereinafter Parliament and Council Directive 97/66].

24. Specifically on interconnection, see Parliament and Council Directive 97/33 on Interconnection in Telecommunications with Regard to Ensuring Universal Service and Interoperability Through Application of the Principles of Open Network Provision (ONP), 1997 O.J. (L 199) 32 [hereinafter Parliament and Council Directive 97/33], amended by Parliament and Council Directive 98/61 with Regard to Operator Number Portability and Carrier Preselection, 1998 O.J. (L 268) 37.

25. See, e.g., Council Recommendation 92/382 on the Harmonized Provision of a Minimum Set of Packet-Switched Data Services (PSDS) in Accordance with Open Network Provision (ONP) Principles, 1992 O.J. (L 200) 1; Council Recommendation 92/383 on the Provision of Harmonized Integrated Services Digital Network (ISDN) Access Arrangements and a Minimum Set of ISDN Offerings in Accordance with Open Network Provision (ONP) Principles, 1992 O.J. (L 200) 10; Commission Recommendation 98/322 on Interconnection in a Liberalised Telecommunications Market, 1998 O.J. (L 141) 6; Commission Recommendation 98/511 Amending Recommendation 98/195 on Interconnection in a Liberalised Telecommunications Market (Part I — Interconnection Pricing), 1998 O.J. (L 228) 30.

cept was substantially revised to take into account the changing shape of the competitive telecom market.²⁶

Directives are not directly applicable legal rules. Rather, they oblige Member States to transpose their substance into national law within a time period specified in the directive.²⁷ In addition to this two-level implementation structure, there is also a track-specific adjudication structure: Competition directives are adjudicated by the legal system and ultimately decided by the ECJ. On the other hand, ONP directives, once transposed into national laws of Member States, are applied and used by national regulatory authorities to create and enforce ex-ante provisions.²⁸

The European (de)regulatory history is therefore substantially different from that in the U.S. In the U.S., Congress decided to grant the American Telephone and Telegraph Company ("AT&T") first a temporary, later a permanent monopoly over almost all aspects of telecommunications.²⁹ For decades, AT&T was the dominant provider of both telecom services and equipment. By 1970, modest competition had been introduced in the telecom equipment market, and — with the advent of microwave transmission — long-distance services.³⁰

In 1974, the U.S. Department of Justice charged AT&T with violations of sections 2 and 4 of the Sherman Anti-Trust Act.³¹ In 1984, the decade long anti-trust struggle was finally settled with the so-called Modification of Final Judgement ("MFJ"),³² which ordered the break-up of AT&T.³³ The company was allowed to provide long-distance telecommunication services, but it had to divest its local exchanges into seven Regional Bell Op-

26. Parliament and Council Directive 97/51 Amending Council Directive 90/387 and 92/44 for the Purpose of Adaptation to a Competitive Environment in Telecommunications, 1997 O.J. (L 295) 23.

27. See EC TREATY, *supra* note 12, art. 249.

28. See Ungerer, *supra* note 11, at 17.

29. See Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 COLUM. L. REV. 835, 838-39 (1997).

30. *Id.* at 843-50.

31. See *United States v. American Tel. & Tel. Co.*, 427 F. Supp. 57, 58 (D.D.C. 1976).

32. See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

33. See ROBERT W. CRANDALL, *AFTER THE BREAKUP: U.S. TELECOMMUNICATIONS IN A MORE COMPETITIVE ERA* 41 (1991).

erating Companies ("RBOCs"),³⁴ which in turn were prohibited from providing long-distance services and manufacturing terminal equipment.³⁵

In 1996, Congress ventured into a second phase of liberalization with the Telecommunications Act of 1996 ("1996 Act").³⁶ The 1996 Act abolishes the RBOCs' public utilities status and revokes their exclusive franchises under state law.³⁷ Attempting to facilitate the entry of new competitors, the 1996 Act mandates interconnection and forces the former RBOCs to provide unbundled network access and collocation.³⁸ RBOCs were permitted to compete in long-distance markets, as long as competition was introduced in their local markets.³⁹ Similarly, AT&T was permitted to enter the local exchange markets, and has done so through its AT&T Broadband subsidiary.⁴⁰

Institutionally, the Communications Act of 1934 gave the Federal Communications Commission ("FCC") the power to regulate long-distance services and terminal equipment, while giving the states the power to regulate the local exchange as a public utility.⁴¹ States then granted their local carriers (mostly AT&T branches) exclusive franchises.⁴² The 1996 Act federalized much of U.S. telecommunications law, favoring the FCC as a regulatory authority by expressly empowering it to implement the Act's local competition provisions.⁴³ At the same time,

34. At that time, the seven RBOCs were: American Information Technologies Corporation, Bell Atlantic Corporation, Bell South Corporation, Nynex Corporation, Pacific Telesis Group, Southwestern Bell Corporation and US West. *Id.* at 10.

35. *See id.* at 37.

36. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

37. *See* Telecommunications Act of 1996, 47 U.S.C. § 253(a) (Supp. III 1998) [hereinafter 1996 Act].

38. *See id.* §§ 251(a)-(c), 252.

39. *See id.* § 271.

40. *See AT&T Grows Larger*, N.Y. TIMES, May 6, 1999, at A32.

41. *See* Communications Act of 1934, 47 U.S.C. §§ 151-612 (1994).

42. The local exchange, even more so than the telecom infrastructure at large, was seen as a typical "natural monopoly." Daniel F. Spulber, *Deregulating Telecommunications*, 12 YALE J. ON REG. 25, 31 (1995).

43. *See* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 377-78 (1999). The Court stated:

Section 201(b), a 1938 amendment to the Communications Act of 1934, provides that "[t]he Commission may prescribe such rules and

Congress severely curtailed the FCC's decisional discretion in this matter through the highly detailed clauses in the 1996 Act.⁴⁴ In the areas in which the FCC continued to enjoy decisional discretion, implementation of its decision was stalled through legal action, and only partly resolved by the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*, which reaffirmed the FCC's extended jurisdiction.⁴⁵

III. THREE MODES OF REGULATORY INTERDEPENDENCE

In a simple model, rule making is purely a response to domestic demands for regulation, combined with a capacity and willingness of the state to provide regulation. However, in practice, regulatory rule making is part of a larger process of competition, coordination and learning among states. As economies have become increasingly intertwined, these interdependencies have increased dramatically. The most often discussed interdependence are so-called "races to the bottom," but the interdependence of regulations is much more complex than a simple spiral into the ground. Below, the Article discusses three modes of cross-jurisdictional regulatory interdependence, which are labeled competitive, coordinative and informational.

A. *Competitive Interdependence*

In many ways, jurisdictions are in competition with each other, and the regulatory system is one tool among many where states seek a competitive edge through a distinctive regulatory system. There are two reasons why jurisdictions might seek to be distinctive: (1) to gain a competitive advantage over other jurisdictions; or (2) to block competition in the domestic market through non-tariff barriers.

An example of the first case is where one jurisdiction may offer lower tax rates or subsidies to attract capital. If multiple

regulations as may be necessary in the public interest to carry out the provisions of this Act." Since Congress expressly directed that the 1996 Act, along with its local-competition provisions, be inserted into the Communications Act of 1934, 1996 Act § 1(b), 110 Stat. 56, the Commission's rulemaking authority would seem to extend to implementation of the local-competition provisions.

Id. (citation omitted).

44. See 1996 Act, 47 U.S.C. §§ 251-261, 271-276 (Supp. III 1998).

45. *Iowa Utils. Bd.*, 525 U.S. at 366.

jurisdictions are seeking to be distinctive in this manner, there is likely to be a ratcheting effect with respect to what is distinctive, where what offers a competitive advantage today may simply be average tomorrow. What may result is a race to the bottom where all jurisdictions would prefer more stringent rules, but choose lax ones so as not to fall at a competitive disadvantage. This is the so-called "Delaware effect,"⁴⁶ where it has been argued that the state became the preferred home of corporations in the U.S. because it has a lax regulatory regime.⁴⁷ In this scenario, jurisdictional competition may limit the capacity of a jurisdiction to implement redistributive policies, if those who would lose wealth are mobile. The danger of an imminent race to the bottom has also been described in the area of privacy legislation in Europe, including telecommunication privacy, arguably necessitating EU action.⁴⁸ It is important to note that in the regulatory area where there has been the most research — environmental regulation — there are few studies that support the conclusion that race to the bottom dynamics happen.⁴⁹ The second case where states select distinctive standards is where they choose them so as to protect domestic manufacturers. The regulation of terminal equipment markets in Europe before liberalization offers excellent examples: standards were designed to favor domestic manufacturers, resulting in a protected domestic market.⁵⁰

These two cases of "competition" are, in substance, quite different, but both potentially have a prisoner's dilemma structure of payoffs, where cooperation leads to a better outcome for

46. DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 5-6 (1995) [hereinafter TRADING UP].

47. See William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 663 (1974).

48. See Viktor Mayer-Schönberger, *Operator, Please Give Me Information: The European Union Directive on Data Protection in Telecommunications*, in COMPETITION, REGULATION, AND CONVERGENCE: CURRENT TRENDS IN TELECOMMUNICATIONS POLICY RESEARCH 121, 123-25 (Sharon Eisner Gillett & Ingo Vogelsang eds., 1999).

49. See Robert E. Hudec, *Introduction to the Legal Studies, in 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE?* 1, 1-2 (Jagdish Bhagwati & Robert E. Hudec eds., 1996).

50. See generally Marc T. Austin & Helen V. Milner, *Strategies of European Standardization*, 8 J. EUR. PUB. POL'Y 411 (2001).

both parties than non-cooperation.⁵¹ As has been analyzed extensively elsewhere, the prisoner's dilemma may resolve itself under particular circumstances, notably: (1) where there is a long future of potential cooperation at stake (as compared to a one-time transaction);⁵² and (2) where there is a small number of actors.⁵³ The smaller the future stakes and the larger the number of actors involved, the more difficult it is for actors to resolve the dilemma without resorting to a higher authority. Thus, under these circumstances, it may be beneficial for a central authority to step in and limit the range of policies that a jurisdiction may choose.

Not all jurisdictional competition, of course, is bad. And it is not desirable for all prisoner's dilemmas to be resolved through mutual cooperation. In fact, in the literal prisoner's dilemma scenario (two prisoners facing the choice of whether to turn in their co-conspirator), it is societally undesirable for the prisoners to cooperate with each other. There is a similar concern about cooperation among jurisdictions. To the extent that governments seek objectives other than the welfare of their citizens, competition among jurisdictions might limit their capacity to do so.⁵⁴ For example, there has been a powerful revisionist interpretation of the Delaware effect that Delaware does not have a more relaxed regulatory environment.⁵⁵ In fact (the argument goes) such a regime would be counterproductive to

51. Kenneth W. Abbott & Duncan Snidal, *International "Standards" and International Governance*, 8 J. EUR. PUB. POL'Y 345, 347-48 (2001); David Lazer, *Regulatory Interdependence and International Governance*, 8 J. EUR. PUB. POL'Y 474, 476 (2001) [hereinafter *Regulatory Interdependence*].

52. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); COOPERATION UNDER ANARCHY (Kenneth A. Oye ed., 1986).

53. See Duncan Snidal, *Coordination Versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923, 936-37 (1985).

54. In fact, much of the public choice literature is based on such an assumption regarding government behavior. See, e.g., Geoffrey Brennan & James M. Buchanan, *Towards a Tax Constitution for Leviathan*, 8 J. PUB. ECON. 255, 271-72 (1977); WILLIAM NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971). For a more recent example, see ANDREI SHLEIFER & ROBERT W. VISHNY, *THE GRABBING HAND: GOVERNMENT PATHOLOGIES AND THEIR CURES* (1998).

55. See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1210 (1992).

cause investors would not invest in companies if there were not an effective regulatory regime.⁵⁶ Instead, what Delaware offers is efficient government — one that moves quickly and predictably. In essence, Delaware finds an “optimal” balance between protecting shareholders rights and minimizing burdens on corporations.⁵⁷

In this scenario, competition may reduce the room that governments have to maneuver, but at the benefit of the governed.⁵⁸ Ironically, the role of any central authority would therefore be to foster a prisoner’s dilemma among its constituent units. For example, it should not limit policy options of individual jurisdictions, and attempt to eliminate collusion among jurisdictions.

The EU’s mandate to create independent national regulatory authorities (“NRAs”) for the telecom sector provides a good example.⁵⁹ Previously, national regulatory power rested mostly with the telecom ministries, which typically had long and close ties with the incumbent telecom monopolist and with politicians in power.⁶⁰ This institutional set up likely encouraged deals to support the national incumbent and coordination among similarly situated ministerial regulators in other countries to maximize political slack. Forcing Member States to set up independent NRAs disrupted this close linkage and limited the potential for collusion.

B. Coordinative Interdependence

Coordination is an issue when there are benefits to all to having a uniform standard. This most obviously is the case where a technological interface comes into play. Who does not recall the problem of plugging in an electrical device manufactured in a different country? The world’s three different televi-

56. *Id.*

57. *See id.*

58. *See* Timothy Besley & Anne Case, *Incumbent Behavior: Vote-Seeking, Tax Setting, and Yardstick Competition*, 85 AM. ECON. REV. 25, 34-36 (1995).

59. The ONP interconnection directive, among other documents, defines this in detail. *See* Parliament and Council Directive 97/33, *supra* note 24, art. 9.

60. *See* Carl B. Kress, *The 1996 Telekommunikationsgesetz and the Telecommunications Act of 1996: Toward More Competitive Markets in Telecommunications in Germany and the United States*, 49 FED. COMM. L.J. 551, 558 (1997).

sion standards — National Television Standards Committee in North America, Phased Alternation by Line in Europe and Sequential Color with Memory in France and Russia, among others — are another example.⁶¹ This is also the case for health and safety standards where incompatible standards increase the costs of exporting — e.g., with agricultural goods.⁶²

In such an area, the need for conformity will be driven by: (1) the technological and societal needs to interface; (2) the cost of producing products compatible with multiple standards; and (3) the cost of producing multiple lines of products to different standards.⁶³ For example, before the advent of laptop computers connecting to the Internet, having an international standard for phone plugs was not an issue, as one would almost never take one's phone on an international trip. Only with the rise of the Internet and mobile computing came the technological (and market) need for conformity. On the other hand, if the cost of producing products compatible with multiple standards is low, incentives for conformity are low, too. The power supplies in today's mobile phones, laptops and even desktop computers for instance, automatically switch between 110 and 220 volts, therefore reducing the pressure to create a uniform global electricity standard.⁶⁴

However, if the production of multiple lines of products to different standards is very costly, the benefits of a widely held standard will be high. Again the European phone equipment market provides a case in point. While the transmission standards have been harmonized, the pressure for conformity was strong because of interface concerns, as many EU Member States still have millions of legacy phone plugs that comply with earlier national standards.⁶⁵ Equipment manufacturers have responded by producing one line of phones, with a standard (American) plug. Each phone is then "customized" to the target market by adding the right cord with the appropriate plug. This strategy substantially lowers the cost of maintaining

61. See Austin & Milner, *supra* note 50, at 428 nn.12-14.

62. See David Vogel, *Trading Up and Governing Across: Transnational Governance and Environmental Protection*, 4 J. EUR. PUB. POL'Y 556, 563-64 (1997) [hereinafter *Transnational Governance*].

63. See *Regulatory Interdependence*, *supra* note 51, at 476.

64. *Id.* at 477.

65. *Id.*

multiple production lines.⁶⁶ On the other hand, there will be little need for a single standard even in case there is a need to interface, if it is cheap to manufacture products that are compatible.

The phone plug example also highlights the importance of *switching costs*.⁶⁷ Obviously, producers and consumers invest in a particular standard. Consequently, a shift to another standard will involve a loss of useful assets. The gains of harmonization therefore must be weighed against the loss of these assets. Thus, for example, it probably does not make sense for the U.K. to switch the side of the street its cars drive on, even though there would some interface and economies of scale benefits to having *compatible* cars with the continent.

The selection of a frequency band for third generation mobile phones (often called “3G” or “UMTS”) provides another example. As a result of international negotiations, dozens of nations around the world agreed to use a particular frequency band for 3G mobile devices.⁶⁸ This will permit these devices to be used internationally, hence — at least this is the hope — stimulate their use by providing a seamless experience for the customers.⁶⁹ The U.S. has chosen a different frequency band. This is in part because the U.S., due to its size, has relatively less need for interface with other countries than most states do. It was also driven by concerns about switching costs: the frequency band selected by the rest of the world is used heavily in the

66. The “Euro Plug,” a standard European phone plug, will ultimately eliminate the necessity for multiple lines altogether. See Commission Decision 97/486 on a Common Technical Regulation for the General Attachment Requirements for Terminal Equipment to Interface to Open Network Provision (ONP) Two-Wire Analogue Leased Lines, 1997 O.J. (L 208) 44. European Standard ETS 300 012 harmonizes the plug for digital phones. Harmonization of the analogue phone plugs (the Euro Plug) is outlined and envisioned based on the Commission Directive 97/486 by EUROPEAN TELECOMMUNICATIONS STANDARDS INST., TERMINAL EQUIPMENT (TE): TECHNICAL FEASIBILITY OF A HARMONIZED PLUG AND SOCKET STANDARD FOR EUROPEAN PUBLIC SWITCHED TELEPHONE NETWORK (PSTN) ACCESS, DTR/ATA-005037 (1997), available at <http://www.etsi.org/getastandar/home.htm> > “free download” > “publications” > “ETR 344.”

67. See CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 103-04 (1999).

68. MOBILE LIFESTREAMS, “YES 2 3G” — WHITE PAPER 13 (2001), available at http://www.gsmworld.com/presentations/white_papers/yes23g.pdf.

69. *Id.*

U.S. by the military.⁷⁰ Replacing the existing military standard and infrastructure would be more costly than the benefits reaped from fully interoperable mobile devices.

The possibility of switching costs also highlights a *timing* issue with respect to resolving coordination challenges. At some point, as jurisdictions invest in a particular standard, it will not make sense to switch to competing standards, even if there are major benefits to compatibility.⁷¹ Thus, where there is substantial potential for switching costs, there are particular benefits to early collective intervention.

The development of the Groupe Special Mobile ("GSM") standard for digital cellular mobile telecommunications in Europe offers a telling example, where the EU acted early to encourage the development of a Europe-wide digital standard.⁷² In the absence of centralized intervention, it is plausible that Europe might have balkanized around competing standards, leading to interface problems and higher unit costs — as, indeed, has occurred in the U.S.⁷³

In a world with a dominant actor, coordination challenges will generally resolve themselves efficiently, although perhaps not equitably.⁷⁴ Jurisdictions will evaluate their choices in light of what the dominant actor has chosen, and if the benefits of conformity with that dominant standard are high enough, they will choose that standard. The decision of a small jurisdiction to conform to the standard of the dominant jurisdiction will generate a small benefit for the dominant jurisdiction and potentially a much larger benefit (at least per capita) for the small jurisdiction.

70. See Elisa Batista, *U.S. 3G Spectrum Price-tag Soars*, WIRED (June 13, 2001), at <http://www.wired.com/news/wireless/0,1382,44468,00.html>.

71. See Stanley M. Besen & Joseph Farrell, *Choosing How to Compete: Strategies and Tactics in Standardization*, 8 J. ECON. PERSP. 117, 129 (1994).

72. See Jacques Pelkmans, *The GSM Standard: Explaining a Success Story*, 8 J. EUR. PUB. POL'Y 432, 433 (2001). For a general overview of the GSM standard, see generally MICHEL MOULY & MARIE-BERNADETTE PAUTET, *THE GSM SYSTEM FOR MOBILE COMMUNICATIONS* (1992); SIEGMUND H. REDL, *AN INTRODUCTION TO GSM* (1995).

73. See Pelkmans, *supra* note 72, at 433.

74. In game theory terms, this type of strategic interdependence is called "battle of the sexes." See, e.g., ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* 31 (1989).

Thus, many nations have chosen to follow the GSM standard.⁷⁵ While this choice generates some positive externalities for the EU (through greater international interoperability, and slightly lower per unit costs), most of the benefits are accrued by adopters (as compared to a counterfactual world where small states created their own standards). For example, for a small country like Israel, development of its own standard would result in exorbitant unit prices, in addition to loss of interoperability. Adoption of EU standards results in far cheaper handsets, as well as interoperability in Europe. While Israeli adoption of GSM generates some benefits for Europe (since they potentially gain the benefits of interoperability when they visit Israel, as well as (tiny) reductions in per-unit costs), Israeli benefits are far greater.

There are two distributional concerns with respect to coordination, combined with decentralized governance and a concentration of power. First, where there are significant benefits to convergence, the dominant actor will almost always get its preferred policy outcome.⁷⁶ Second, where regulation may be arrayed along a spectrum of least to most strict, and it is costly to produce multiple versions of a particular good, there will be a bias toward adopting the strictest standards — so that the product may have access to *all* markets. That is, there may be a race toward the top, as evidenced by the spread of strict pesticides and auto emissions regulations.⁷⁷ The auto emissions regulations case is a telling one, where California adopted emissions standards that exceeded federal standards.⁷⁸ These Californian standards have become de facto national standards, because it was not efficient for manufacturers to produce multiple versions of their products.⁷⁹ As a result, the costs of California's standards are borne in part (mostly) by other ju-

75. GSM accounts for 75% of the world's digital market and 71% of the world's wireless market. The number of countries/areas with GSM System is 178 and total subscribers are 677 million by March 2002. See Press Release, GSM World News, GSM Association Welcomes 122 New Member Companies At 47th Plenary Meeting (Apr. 17, 2002), available at http://www.gsmworld.com/news/press_2002/press_12_p147.shtml.

76. See Charles P. Kindleberger, *Standards as Public, Collective and Private Goods*, 36 KYKLOS 377, 393 (1983).

77. See TRADING UP, *supra* note 46, at 6, 250.

78. *Transnational Governance*, *supra* note 62, at 561.

79. *Id.* at 561-62.

risdictions, including some that place little or no value on emissions reduction.

In a world where power is more diffuse, coordination will be more difficult to achieve without some centralized intervention. As for the benefits to justify the costs of adopting a new standard, a critical mass of jurisdictions must already adhere to that standard.⁸⁰ A dominant actor (by assumption) provides that critical mass. In the absence of a dominant actor, it may require multiple actors to provide that critical mass — the more diffuse power is, the more actors will be required.⁸¹ In the absence of centralized institutions to facilitate bargaining, conflicts over the distributional implications of different standards may preclude a common standard.⁸²

A simple example will illustrate the challenge. Let us imagine there are ten states each with their own widget standard. As there are major economies of scale to producing widgets, some manufacturers have multiple product lines to sell to multiple markets (at higher per unit costs), while some manufacturers produce only for their home market. Consumers pay higher prices because manufacturers' costs are higher, and because there is less competition in each market. Each state faces the choice of adopting another state's standard. This would have the benefit of increasing the scale of production for goods produced to that standard. It would, however, have the cost of stranding many of the assets (presumably disproportionately in the home state) devoted uniquely to producing to that state's standard. If these costs are extremely high, or the benefits to cheaper production costs and greater competition are small, then it may not make sense for all ten states to harmonize, since the costs may exceed the benefits. However, often there will be a wide range of benefits and costs where it would not make sense for a pair of states to harmonize, but it

80. See Nicholas Economides & Charles Himmelberg, *Critical Mass and Network Evolution in Telecommunications*, in TOWARD A COMPETITIVE TELECOMMUNICATIONS INDUSTRY: SELECTED PAPERS FROM THE 1994 TELECOMMUNICATIONS POLICY RESEARCH CONFERENCE 47 (Gerard W. Brock ed., 1995); Brian W. Arthur, *Competing Technologies, Increasing Returns, and Lock-In by Historical Events*, 99 ECON. J. 116, 127 (1989).

81. See Kindleberger, *supra* note 76, at 393.

82. Besen & Farrell, *supra* note 71, at 121.

would make sense for the entire set of states to agree to a single standard.

Philipp Genschel and Thomas Plümper provide an example in the banking arena, where prior to 1987, there was no effective global standard with respect to accounting standards for banks.⁸³ In 1987, with the Basle Accord, the U.S., the U.K. and Japan effectively imposed a global standard on the rest of the world.⁸⁴ They were successful in doing so because once a critical mass (provided by those three countries) adopted a standard, banks from non-compliant countries would be placed at a competitive disadvantage internationally. The rest of the world quickly fell in line behind the standard.⁸⁵

The value of centralized governance when there are coordination concerns is therefore threefold. First, it limits the capacity of a large jurisdiction to unilaterally create de facto international standards. Second, it limits the ability of stricter jurisdictions to transfer the costs of strict standards to other jurisdictions. Third, it provides a mechanism to provide the *public good* of a common standard.

Information is at the foundation of coordination challenges. In the absence of information and communication, coordination is impossible. As a result, associated with coordination challenges are a variety of mechanisms to transmit data on what other states are doing. Effective transmission of information will help resolve coordination challenges even in the absence of centralized governance mechanisms, as jurisdictions adapt to what other states are doing. However, even in the absence of the incentives to conform discussed above, the transmission of information has an independent effect on policy making, because that information will also convey lessons as to what are good and what are bad policies, which is the focus of the "informational" mode of regulatory interdependence.⁸⁶

83. See Philipp Genschel & Thomas Plümper, *Regulatory Competition and International Co-Operation*, 4 J. EUR. PUB. POL'Y 626, 628 (1997).

84. *Id.* at 629-30.

85. *Id.* at 630.

86. See *Regulatory Interdependence*, *supra* note 51, at 480-81.

C. Informational

The principle of the informational mode is simple: Even if policies among jurisdictions are not interdependent in the sense that jurisdiction *A*'s choice affects the payoffs to jurisdiction *B*, *A*'s choice may affect the information that *B* has about its choices.⁸⁷ For example, *A* may generate information about policy alternatives simply in determining its own choice. This information may then be recycled by other jurisdictions. Even if *A* does not generate information about success and failure, the decision by *A* to select policy alternative *X* rather than policy alternative *Y* sends a signal to other jurisdictions that alternative *X* is better than alternative *Y*. Thus, for example, the Scandinavian NTM-450 analog standard in mobile telephony, with roaming throughout Scandinavia, served effectively (and accidentally) as a model for the GSM standard, with roaming throughout the EU.⁸⁸

There are four concerns with respect to informational interdependence: (1) that information spreads as efficiently as possible; (2) that enough information be produced; (3) that the spread of information does not squelch heterogeneity in the system; and (4) that fads will be minimized.⁸⁹

1. Efficient Information Diffusion

Communication among jurisdictions is not necessarily structured so as to facilitate the overall spread of information among all jurisdictions.⁹⁰ Information networks may be characterized by a hub and spoke structure, where a few central actors get a lot of information, and peripheral actors little. Alternatively, there may be very good communication within small groups of jurisdictions, but poor communication between those groups. It is therefore possible that jurisdiction *A* has the answer to jurisdiction *B*'s problems — but jurisdiction *B* does not know it.⁹¹

87. See David Lazer, *How to Maintain Innovation.gov in a Networked World?*, Paper Presented at the Fourth Annual Visions of Governance for the Twenty-First Century Retreat (July 11-14, 1999) (on file with Journal) [hereinafter *Innovation.gov*].

88. See Pelkmans, *supra* note 72, at 437.

89. See *Innovation.gov*, *supra* note 87, at 2.

90. See *id.* at 2-6.

91. See *id.* at 3-5.

2. Information Production

If information flows freely, jurisdictions may underinvest in their policy decisions, relying on some other jurisdiction to make a decision. That is, ironically, if information is instantly public and easily accessible, then the production of information is a public good: While a jurisdiction might benefit from experimentation, other jurisdictions may benefit as much, without incurring the costs and risks associated with experimentation. A likely result is that jurisdictions will underinvest in their own policymaking process, as they wait for other jurisdictions to come up with solutions.⁹²

3. Preservation of Heterogeneity

Because of the information generated by experimentation, it may be beneficial for there to be a heterogeneity of policy approaches — even if some of them are “non-optimal” at the time, as different approaches may offer better solutions to future problems. A mimetic process by which the less successful imitate the more successful may eliminate (systemically) useful heterogeneity.

4. Prevention of Fads

If information flows freely, it is as possible that bad policy choices will spread as good policy choices. There is a substantial literature on “information cascades” that demonstrates that the contagion process often overwhelms the quality of an idea.⁹³ Bad policies may spread almost as easily as good policies.

These issues around information diffusion are, of course, not new to the information age. Jared Diamond, in his sweeping treatment of all of human (pre)history, for example, argues that the structure of information diffusion gave Europe a criti-

92. See Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980); Koleman S. Strumpf, *Does Government Decentralization Increase Policy Innovation?*, 4 J. PUB. ECON. THEORY 207 (2002).

93. See Sushil Bikhchandani et al., *Learning from the Behavior of Others: Conformity, Fads and Informational Cascades*, 12 J. ECON. PERSP. 151, 154 (1998).

cal advantage over the rest of the world.⁹⁴ His argument, in short, is that Europe, in contrast to the other continents, had a geography that was effective at diffusing innovations, but rugged enough to preserve heterogeneity.⁹⁵ What is new in the information age has been the progressive decoupling of virtual geography from real geography.⁹⁶ It may be, for example, easier to send information to the other side of the world than to one's neighbor. Virtual topography is certainly more malleable than the physical, and can be molded in a way that optimizes the flow of information.

Thus, while coordination and competition concerns have received the bulk of attention regarding telecommunication regulation, creating a capacity that allows policy makers to effectively build upon prior experience may, over the long run, be far more important than competitive and coordinative concerns.

D. Creating Governance Structures

The informational, coordinative and competitive modes of policy interdependence each pose governance challenges in decentralized regulatory systems. The key question in all of these modes is the extent that rule making should be centralized. The critical question is a structural one: Who should have responsibility for what pieces of regulatory policy — the central government, or the constituent jurisdictions?

In the foreground of the decision regarding how much to centralize policy making is the underlying heterogeneity of policy preferences of the set of jurisdictions. *Ceteris paribus*, the greater the heterogeneity, the less central authority should intervene. However, if the disfunctions resulting from policy interdependence are high enough, there should be some constraints on the policy choices of jurisdictions even in the presence of great heterogeneity.

If coordination is the major challenge to the system, then the key concerns are to prevent inefficient divergence, and non-accountable convergence. Inefficient divergence is most likely

94. See JARED DIAMOND, GUNS, GERMS AND STEEL: THE FATE OF HUMAN SOCIETIES 409-10 (1999).

95. *Id.* at 409-17.

96. See WILLIAM J. MITCHELL, E-TOPIA: OUR TOWN TOMORROW 4-7 (1999).

where market power is diffuse — a multitude of actors making an ad hoc agreement unlikely even where the benefits would be high. The benefits to centralized intervention would be maximized where interface benefits are high, and/or production cost savings outweigh (in present value) the value of the stranded assets devoted to producing multiple lines of a product (or a multi-standard product). Thus, the EU actions with respect to GSM would appear to be an effective use of a central authority as interface benefits were high, and switching costs (since there were minimal investments in a digital standard already) were low.

Accountability is a concern where the pressure to conform to an emerging regulatory framework is so great that there is a disconnect between the framework that emerges and the policy preferences of most of the population covered by the regulation. This is a particular danger where there is a large jurisdiction, whose regulatory choices automatically get such a head start on alternatives that they tend to become the de facto framework for the entire system. Accountability points to the need for central institutions to effectively include the policy desires of all of the members of the system, and to provide mechanisms to compensate losers.

The EU directive on telecom privacy⁹⁷ and the more general EU privacy directive⁹⁸ provide cases in point. Both were championed by Germany, who wanted its stringent national privacy laws to be reflected in similarly stringent EU-wide regulations.⁹⁹ After years of negotiations, consensus on the directives were finally reached during Germany's EU presidency, after the German government had expended significant political capital in persuading other Member States to agree.

In the absence of the EU as a forum for bargaining, it might well have been that German privacy laws would have become the de facto standard in Europe. However, as in the California emissions example, the costs of the standard would have been transferred in part to other jurisdictions that did not place such a value on privacy. Instead, Germany was forced to effectively

97. See Parliament and Council Directive 97/66, *supra* note 23.

98. See Parliament and Council Directive 95/46 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31.

99. See FRED H. CATE, *PRIVACY IN THE INFORMATION AGE* 42-43 (1997).

compensate other states in the bargaining process. The EU thus creates a hierarchy of accountability for its Member States, where the democratically elected governments of Member States may be held accountable for the bargains they agree to.

If competition is the major challenge to the system, the role of the central government will be to pre-empt harmful competition, i.e., race to the bottom effects and protection in the guise of technical rules, through constraints on the regulatory choices of constituent jurisdictions. At the same time, the central government should not constrain healthy jurisdictional competition to create a leaner and more effective regulatory system. Thus, for example, the EU has determined certain food safety standards to which all Member States must abide, since there will be a potential incentive for a race to the bottom in those markets otherwise.¹⁰⁰

If the interdependence is primarily informational, then the role of the center¹⁰¹ is first to subsidize experimentation and diversity. This will compensate for the informational externalities that experimentation generates. Second, it is to provide effective conduits for information. An effective "clearinghouse" will both pre-empt states from "reinventing" the wheel that some other state has already invented, and will provide data on success and failure of policies of other states, so that fads will not occur (i.e., a failed policy will not spread if it is known that it is a failure; it might if it is not known that it is a failure).¹⁰² Below, the Article examines the governance challenges that the EU faces in regulating telecommunications, and considers the match between the challenges and the governance structures of the EU.

100. For a discussion with respect to fish inspection, see *Regulatory Interdependence*, *supra* note 51, at 482.

101. "Center" is to be liberally interpreted in this context, since the coercive power of a central government is not necessary to disseminate information. Thus, for example, in the U.S. there are numerous voluntary intergovernmental associations, like the National Governor's Association and the National District Attorneys' Association that play this role. These organizations, however, do not have the capacity to perform the first function listed above.

102. See *Innovation.gov*, *supra* note 87, at 1.

IV. MULTIPLE MODES, MIXED CURES — THE EU TELECOM FRAMEWORK

As has been mentioned previously, the EU's framework regulating telecommunications combines centralizing and decentralizing strands with institutional mechanisms that deal with informational interdependencies. The decentralized tendency is most visible in the principle that telecom laws are still national laws.¹⁰³ The centralizing components of the EU framework are highlighted in the harmonized ONP framework.¹⁰⁴ Finally, the numerous meetings of the NRAs and national telecom policy makers on an EU-wide level foster exchange of information and provide ample signaling opportunities.¹⁰⁵ This confirms what the authors have asserted on a theoretical level: that no single governance model is optimal. Complex regulatory frameworks covering many different jurisdictions are, it seems, bound to blend together different governance approaches.

A. "Mutual Recognition": EU Standards and National Rules

The deregulation of the telecom terminal equipment market provides an illuminating example. When in the 1980's the EU was faced with the difficult task of liberalizing the terminal equipment market, every Member State had vastly different regulations and standards in place, intended to protect national manufacturers. New entrants had to design their equipment in accordance with these national standards, then go through a long and costly evaluation process before they could sell their equipment.¹⁰⁶ This extreme example of decentralized governance resulted in a failure to efficiently resolve the coordination and competitive interdependencies among these states. All states would have benefited from a degree of uniformity in their standards with resultant reductions in produc-

103. See Mayer-Schönberger & Strasser, *supra* note 2, at 576.

104. See Green Paper on Development, *supra* note 8, at 69-70; ONP Framework Directive, *supra* note 22, art. 3.

105. One place for such EU-wide information exchange is through the Independent Regulators Group at <http://irgis.icp.pt/site/en/index.asp> (last visited Apr. 22, 2002).

106. In numerous nations, not only the sale of non-compliant equipment but also its sheer use was prohibited and punishable by fines. See generally § 3 Fernmeldegesetz 1993 Bundesgesetzblatt [BGBl] 908/1993 (Aus.); FEV BGBl 712/1994 (Aus.).

tion costs by manufacturers and increased competition in home markets.

There was a clear need for the EU to impose a degree of uniformity. However, its original strategy to achieve uniformity — to impose comprehensive EU-wide standards combined with a centralized EU evaluation and testing center to certify compliant products — quickly overwhelmed the institution.¹⁰⁷ As the failure of this approach became apparent, the EU shifted to an approach that wove together strands of centralized and decentralized governance. First, rather than setting a comprehensive set of standards, it only determined a core set of standards for interoperability of terminal equipment — resolving the key interface concerns.¹⁰⁸ Second, through regulation, it forced Member States to recognize the approval of equipment of any other Member State.¹⁰⁹ The standards ensure necessary homogeneity, while the mandatory recognition adds possibly beneficial heterogeneity.¹¹⁰ This system creates a competition among regulatory systems — a competition arbitrated by consumers, who choose products manufactured under the rules of one system or another, and producers, who choose one system or another based on cost and anticipated responses of consumers. In short, this approach addresses the coordination challenges due to the interface issues inherent in telecommunications equipment, and the prisoner's dilemma resulting from the effective protection of home markets through regulation.

107. See Kalypso Nicolaidis, *Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects*, Jean Monnet Working Paper 7/97, <http://www.jeanmonnetprogram.org/papers/97/97-07.rtf> (last visited Apr. 21, 2002).

108. For an overview of this principle of mutual recognition (the so-called "new approach"), see EUROPEAN COMMISSION, GUIDE TO THE IMPLEMENTATION OF DIRECTIVES BASED ON THE NEW APPROACH AND THE GLOBAL A APPROACH (2000), available at http://europa.eu.int/comm/enterprise/newapproach/legislation/guide/document/1999_1282_en.pdf.

109. *Id.*

110. The system was started with Commission Directive 88/301 on Competition in the Markets in Telecommunications Terminal Equipment, 1988 O.J. (L 131) 73. Today the relevant legislative framework is provided by Parliament and Council Directive 99/5 on Radio Equipment and Telecommunications Terminal Equipment and the Mutual Recognition of Their Conformity, 1999 O.J. (L 91) 10.

The setup has proven to be hugely successful.¹¹¹ Not surprisingly, production consolidated around the standards of a few major markets (where the producers were already located). The resulting regulatory competition is no longer to create barriers that shelter domestic producers — rather, it is to attract and retain producers, whose motivation, in turn, will be to attract consumers and lower costs.¹¹² Production costs have decreased, and competition increased. In a handful of years, terminal equipment prices came down dramatically, yet interconnectivity has not been compromised.¹¹³ The combination of a uniform set of core standards and regulatory competition governed by mutual recognition is not the only example of the application of mixed governance models. In fact, “governance mixes” can be found in the very enactment and enforcement structures of the current regulatory framework.¹¹⁴

111. The terminal equipment market in the EU has reached annual revenues of \$30 billion euros in 2000. See *Radio & Telecommunications Terminal Equipment: Introduction to the R&ETTE Directive*, at <http://europa.eu.int/comm/enterprise/rtte/intr.htm> (last modified June 4, 2001). Annual growth rates have been 7-11% since liberalization in the late 1980's. See EITO, *Growth in Information Technology and Telecommunications Even Higher Than Expected*, at <http://www.eito.com/PAGES/EITO/ABSTRACT/Def-abst.htm> (Oct. 1998).

112. Whether this will result in a race to the bottom is contingent on the quality of information regarding the various regulatory systems. If terminal equipment manufactured according to the standards of a particular jurisdiction were perceived as shoddy, then manufacturers would not choose those standards. In short, a race to the bottom in cases like this is contingent on a market failure due to information asymmetries.

113. One of the authors himself remembers buying an answering machine in Austria in 1987 (pre-liberalization). It cost twenty times (!) as much as a similar model in the U.S. at that time. Less than five years later, in the wake of liberalization, prices had come down to the U.S. level.

114. See Abbott & Snidal, *supra* note 51, at 346 (arguing for the use of governance blends — in that context blending together the private-public dimension as well as the centralized-decentralized dimension).

B. Enactment: Structural Subsidiarity¹¹⁵ — Centralized Goals and National Transposition

The EU has a number of legal instruments to enact its decisions.¹¹⁶ By far its most widely used instrument — the directive — is the very embodiment of structurally blending centralized and decentralized governance. The directive, a set of rules addressed to the Member States, has to be transposed into national laws.¹¹⁷ This permits a certain flexibility, or heterogeneity of the means, while maintaining coherence and homogeneity of the goals.

Almost the entire EU telecom regulatory framework is in the form of directives, thus permitting “mixed governance.” But this does not guarantee an *optimal* mix in response to a particular policy challenge. Finding the appropriate level of generality or specificity is complex, and highly context specific. One of the authors has argued before that this structural subsidiarity in the enactment phase provided the foundation for the EU to successfully liberalize the telecom sector.¹¹⁸ Enactment, however, is not the only phase in which “governance mixes” are structurally possible.

C. Enforcement: Dual Track — Community Law and NRAs

As mentioned before, the EU’s telecom regulatory framework has two distinct tracks. One is based on EU competition law, the other on harmonization directives clustered around the principle of ONP.¹¹⁹ Enforcement of the former rests on the judicial system and ultimately with the ECJ.¹²⁰ This provides for a strong centralizing dimension as ultimately one European

115. See David Lazer & Viktor Mayer-Schönberger, *Blueprints for Change: Devolution and Subsidiarity in the United States and the European Union*, in THE FEDERAL VISION 118, 138-141 (Kalypso Nicolaidis & Robert Howse eds., 2001).

116. See ENCYCLOPEDIA OF THE EUROPEAN UNION 324 (Desmond Dinan ed., 2000).

117. See EC TREATY, *supra* note 12, art. 249 (“A directive shall be binding, as the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”).

118. Mayer-Schönberger & Strasser, *supra* note 2, at 583.

119. See Ungerer, *supra* note 11, at 10.

120. *Id.* at 14 n.22.

arbiter resolves the conflicts. Enforcement of the ONP directives is based on rational implementation.¹²¹ The directives foresee NRAs ultimately enforcing the goals of the directive through the regulatory frameworks they advance.¹²² In this sense, the forward-looking rules enacted by the NRAs themselves set up in accordance with a directive mandate, are enforcement of the directives' broader goals.¹²³ This provides for multiple flexibility and thus heterogeneity, creating the possibility of regulatory competition.¹²⁴

Furthermore, this governance mix binds the enforcement (or implementation) institutions to each other. Courts will closely follow the decisions taken by the NRAs, and wrestle with their substance when deciding claims stemming from competition law, keeping in mind that NRAs have both a wealth of knowledge and experience in the telecom sector and a strong regulatory agenda. NRAs, on the other hand, will closely watch court decisions, fully understanding that whatever they regulate, it may only be temporary if it cannot withstand judicial scrutiny based not on national, but EU competition law. Like the directive model in the enactment phase, the dual track model does not guarantee efficient results. But it provides a structural basis for governance mixes even in the implementation phase.

D. Institutionalizing Governance Mixes

As enumerated above, the EU has a number of powerful tools that implicitly include centralizing and decentralizing components. However, the availability of tools does not guarantee their balanced and effective use. The authors argue here that the very decision-making structure of the EU embeds and balances competing preferences for centralization and decentralization, where the Commission represents the preferences for centralization, and the Council the preferences for decentralization.

121. *Id.* at 7 n.10.

122. *Id.* at 17.

123. *Id.* at 15.

124. This implies, of course, that Member States do not coordinate among themselves to create a harmonized framework, yet one not envisioned by the directives. The involvement of national governments in drafting and enacting the directive, combined with the strong economic incentives to compete makes such an outcome impossible.

Institutional involvement in the EU's rule making depends on the matter to be regulated. Yet, in most instances the Council, representing the governments of the individual Member States, enacts legislation based on proposals from the Commission — the EU executive — with some involvement by the European Parliament.¹²⁵ This process in itself incorporates institutions pushing for heterogeneity and flexibility (usually represented by the Council) and harmonization (usually advanced by the Commission).

The Council can stall progress by refusing to enact proposed community legislation, for example, when it is of the impression that the proposed directive attempts too much coordination.¹²⁶ In competition matters, this power of the Council is countered by an equally heavy club of the Commission, as it is empowered by the EU Treaty to enact directives ensuring competitive markets without the consent of the Council.¹²⁷

This leaves the Commission, traditionally more supportive of centralized governance, and the Council, tendentiously more supportive of decentralized governance, in a double bind. The Council can also stall, centralizing a directive, but risks that the Commission may enact parts of it under the rubric of its competition powers.¹²⁸ At the same time, the Commission must use its competition threat carefully. Clubbing the Council has its political price, and the Commission's power to legislate is limited to the small area of competition matters, creating not enough of a power base to enact a full (de)regulatory framework.

During the "hot" phase of negotiating telecom liberalization, the Commission repeatedly threatened to enact deregulatory directives based on its competition powers, mainly to induce the Council to act faster and be bolder in its liberalization steps.¹²⁹ Yet, the Commission has come to terms with the Council every time, enacting competition directives in tandem

125. See EC TREATY, *supra* note 12, art. 202.

126. See ENCYCLOPEDIA OF THE EUROPEAN UNION, *supra* note 116, at 118-19.

127. See *generally* Case 41/83, Italian Republic v. Commission, 1985 E.C.R. 873 (1985).

128. See ENCYCLOPEDIA OF THE EUROPEAN UNION, *supra* note 116, at 103, 118-19.

129. See Herbert Burkert, *The Post Deregulatory Landscape in International Telecommunications Law: A Unique European Union Approach?*, 27 BROOK. J. INT'L L. 739, 755-56 (2002).

with the Council's related ONP harmonization directives (which in turn were proposed by the Commission).¹³⁰ The specific institutional setup within the EU that has granted overlapping, yet distinct powers to both the Commission and the Council forces rule-makers to more often, more innovatively and more effectively use the directive model and the dual track model — governance mixing tools the EU's regulatory structure readily provides. This approach therefore ensures a degree of heterogeneity and innovation among the constituent Member States of the EU.

E. Governing Information

As mentioned above, the NRAs provide for heterogeneity. In this sense they may foster regulatory competition. However, even if each Member State's choice did not directly affect the payoffs to the choices by other states, each NRA's regulatory setting also provides a test trial for all other NRAs to see what works and what does not. But such innovations will only spread if information about them is available and institutions exist to facilitate the spread of that information.

The EU-mandated creation of independent and, most importantly, *transparent* NRAs has greatly facilitated the flow of information. Most NRAs post their decisions on their websites and make available their regulatory framework.¹³¹ NRA watching organizations across Europe track the latest developments and provide additional informational links.¹³² But the most important informational link is provided by the NRAs themselves. They meet, not only at trade conferences, but also at informal regular meetings to exchange ideas and experi-

130. *Id.* at 759-60.

131. See, e.g., Office of Telecommunications (U.K.), at <http://www.oftel.gov.uk> (last visited Apr. 21, 2002); Autorité de Régulation des Télécommunications (France), at <http://www.art-telecom.fr> (last visited Apr. 21, 2002); Regulierungsbehörde für Telekommunikation und Post (Germany), at <http://www.regtp.de> (last visited Apr. 21, 2002).

132. For additional informational links, see TotalTelecom, at <http://www.totaltele.com> (last visited Apr. 21, 2002); European Network for Communication and Information Perspectives, at <http://www.encip.org> (last visited Apr. 21, 2002); and Information Society Directorate General, at http://europa.eu.int/comm/dgs/information_society/index_en.htm (last visited Apr. 21, 2002).

ences.¹³³ They have created an organization — the Independent Regulators Group — as a forum for information exchange.¹³⁴ This creates a trans-governmental network, in which NRA officials share their experience and create an entire dimension of informational exchange, directly affecting how they will regulate in their jurisdictions in the future.¹³⁵

Informational networks are also embedded within the EU rule-making process, as it pulls in the relevant career bureaucrats in the telecom ministries. While the Member States' Permanent Representatives to the EU formally keep negotiations going, the substantive work on bargaining a directive is often done by the very ministerial bureaucrats who later will have to transpose the act into national law.¹³⁶ They, too, form a trans-governmental network, and have continuous and intense interaction with their Commission counterparts.

In short, heterogeneity is a key part of the EU regulatory approach in telecommunications. This heterogeneity is often framed in terms of national sovereignty or (beneficial) regulatory competition.¹³⁷ However, the decision-making structures within the EU actually create a network that is highly effective at diffusing information. Heterogeneity results in experimentation, which creates information, which is then utilized throughout the EU because of the effective networks. Ironi-

133. See Independent Regulators Group, at <http://irgis.icp.pt/site/en/irg.asp> (last visited Apr. 21, 2002).

134. *Id.* The self-description of the Independent Regulators Group, drawn from its website:

The Independent Regulators Group — IRG — was established in 1997 as a group of European National Telecommunications Regulatory Authorities (NRAs) to share experiences and points of views among its members on issues of common interest such as interconnection, prices, universal service, and other important issues relating to the regulation and development of the European telecommunications market.

Id.

135. See Anne-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 199* (Gregory H. Fox & Brad R. Roth eds., 2000).

136. See DESMOND DINAN, *EVER CLOSER UNION?: AN INTRODUCTION TO EUROPEAN INTEGRATION* (2d ed. 1999).

137. See Mayer-Schönberger & Strasser, *supra* note 2, at 582.

cally, there is a greater Brandeis-type “laboratories of democracy” effect in the EU than there is in the U.S.¹³⁸

F. Comparisons to the U.S.

If we compare this mix of governance approaches to the United States post-1996 Act framework, a striking difference emerges. First, in the U.S., the crescendo of *market* and *competition* rhetoric surrounding the 1996 Act has not translated into a governance structure that actively attempts to induce regulatory decentralization (and thus some space for regulatory innovation). After decades of demarcated responsibility between the centralized FCC (for terminal equipment and long-distance, i.e., inter-jurisdictional services) and the state public utility commissions (“PUCs”), Congress opted to shift power towards the central authority.¹³⁹

This centralizing approach is not only in contrast with the EU’s emphasis on decentralized rule transposition and decentralized rule implementation, it also is surprising for a nation that generally champions the market ideal. The reasons are likely multi-faceted. Political support in Congress may have played a role. The negative experience with decentralized structures in the build-up of the mobile phone network may have weighed in. Finally, Congress may have mistrusted the PUCs to create and implement competitive structures after having overseen and worked with regional incumbents for many decades.

Decentralized rule implementation through NRAs bears some risk. NRAs may be more subject to regulatory capture. They may be incompetent.¹⁴⁰ Even if they are independent and competent, they still create regulatory heterogeneity, which produces transactional costs for inter-jurisdictional telecom providers and thus reduces their efficiency. Not surprisingly,

138. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

139. See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78 (1999).

140. Note that the U.S. and the EU have vastly different ratios of resources relative to their constituent units: the federal have far more resources than individual states; whereas the major states within the EU have far more resources than the EU does. A more decentralized governance approach may therefore be a better match given the existing capacities of governing institutions within Europe.

even in Europe not all experts favor the NRA structure. Instead, some powerful voices point to the U.S., the FCC and the 1996 Act in arguing for the abolition of the existing decentralized system and for the establishment of a European-wide regulatory authority.¹⁴¹

A centralized regulatory authority, however, creates a bottleneck in the decision-making process. Whoever wants to stall the deregulatory process only needs to stall the centralized authority. When the FCC, newly empowered by the 1996 Act, handed down its first important regulatory decision, its opponents immediately brought the case before court, hoping — rightly — that this would effectively delay the implementation of any decision for years.¹⁴² To be sure, stalling can happen in a decentralized system as well, but it is harder to do. In the EU, for instance, one would have to fight the decisions of all NRAs in all fifteen Member States to achieve the same result. Neither approach is perfect. Each one has its own advantages and flaws. What is surprising — at least to an extent — is to find a more traditional governance mix in the U.S., and a more innovative multi-dimensional mix in the EU.

V. CONCLUSION

Often, deregulation is equated with the introduction of markets in sectors with former monopolies. It is thus tempting for law makers to conclude that there should also be a market of regulatory structures, permitting competition. In this Article, the authors have shown that this is too simple a view. The authors identify three modes of regulatory interdependence: a competitive, a coordinative and an informational one. The benefits of centralized governance are that it will eliminate coordination challenges (interface, creating scale of production, accountability), and destructive competition among jurisdic-

141. See William Lehr & Thomas Kiessling, *Telecommunication Regulation in the United States and Europe: The Case for Centralized Authority*, in COMPETITION, REGULATION, AND CONVERGENCE: CURRENT TRENDS IN TELECOMMUNICATIONS POLICY RESEARCH 105, 112-16 (Sharon Eisner Gillett & Ingo Vogelsang eds., 1999); EUROSTRATEGIES/CULLEN INT'L, FINAL REPORT ON THE POSSIBLE ADDED VALUE OF EUROPEAN REGULATORY AUTHORITY FOR TELECOMMUNICATIONS (1999), available at <http://europa.eu.inte/ISPO/info-soc/telecompolicy/en/erafl12-99.pdf>.

142. See *Iowa Utils. Bd.*, 525 U.S. at 366.

tions (such as race to the bottom effects). However, centralized governance also eliminates much of the possibility of beneficial innovation from jurisdictional competition. An effective governance approach thus needs a multi-dimensional approach that mixes centralization and decentralization, while creating an informational network that leverages the benefits from innovation.

This examination of the EU regulatory framework suggests that it may be a good match for the governance challenges it faces in the telecommunications area. In fact, the regulatory tools at the disposal (at the enactment and enforcement stages) almost require a modulated approach to regulation — dividing up responsibility between the EU and Member States. This legal structure is mirrored in the institutional structure of the EU, where the Commission represents centralization, and the Council decentralization. Finally, the rule-making process within the EU pulls in key decision makers from the Member States, which has the incidental (but very important) consequence of creating an effective informational network. This analysis does not render a *winner* in telecom deregulation, or even compare substantive rule of telecom regulatory regimes. Instead, the authors have aimed to provide an evaluation method for the regulatory structure and its inter-jurisdictional interface, and to assist in answering the question why such a structure works well in a given context.

PANEL II: ICANN AND WIPO AT WORK: TOWARDS A PARADIGM OF INTERNATIONAL TELECOMMUNICATIONS GOVERNANCE?

PRINCIPAL PAPERS

THE MANAGING LAWMAKER IN CYBERSPACE: A POWER MODEL

*Tamar Frankel **

I. INTRODUCTION

This Article is about power — the ability to gain obedience whether by captivating followers, persuading skeptics or awarding and withdrawing economic benefits. The purpose of this Article is to analyze how the power of the Internet Corporation for Names and Numbers (“ICANN”) was created, augmented, strengthened and reined in. Many controversies surround ICANN, including the very foundation of its existence — the need for a single “root” in the Internet naming infrastructure — its organizational form and accountability, and the utterances, policies and actions of its management.

The purpose of this Article is not to argue and prescribe but to describe and explain. Description, however, is rarely, if ever, neutral. This Article is no exception. The author is biased in favor of the ICANN experiment. I hope it matures to become a

* Professor of Law, Boston University School of Law. I owe many of the clarifications in this Article to comments of David Johnson; Kenneth A. Cukier, a journalist who is currently writing a book about the Internet Corporation for Names and Numbers; and Professor Michael Meurer of Boston University School of Law.

model for a global organization — with a limited mission, grounded in a unique type of consensus, and operated in a special kind of balance of power environment. I hope that ICANN's processes and activities will reflect the spirit of the Internet that it influences. I hope that it will exercise its power only to address problems when they arise, and nurture innovation whenever possible. I hope that the Internet community and ICANN will follow the "rule of consensus" just as civil societies follow the rule of law. Events in the past month are perhaps bringing the issues to a head, but at this stage my crystal ball is dim and hope reigns supreme.

ICANN operates in a dual capacity: as a manager and a lawmaker. It provides high-level management of some of the Internet's operational infrastructure. I use the term management in a very broad sense. ICANN neither operates nor fully controls any of the actors that constitute the Internet's infrastructure. It has, however, power, in varied degrees, to direct these actors.¹ For lack of a better word, I call this direction "managing." In addition, ICANN establishes some of the Internet's constitutive rules that facilitate universal connectivity.² It has used its power to determine the process under which new top-level domain names ("TLDs") are allocated. To this extent it is a lawmaker.

The inquiry into ICANN is important because ICANN plays a significant role in the operation of the Internet. The inquiry is interesting because, like the Internet, ICANN has no precise analog.³ The inquiry is difficult because the location and iden-

1. ICANN's power over the Internet service providers ("ISPs") is minimal, and depends on their consensus of using a single root. Its power over the registries of most country code top-level domain names is limited, but it can exert more pressure on registries of generic top-level domain names. *See infra* Part II.A.1-2.

2. ICANN plays a lesser role with respect to ISPs. Large ISPs can decide whether to point at the ICANN root. They have no contractual obligation to follow ICANN's policies, or otherwise interact with ICANN except in connection with the allocation of intellectual property blocks.

3. Some international organizations, such as the International Olympic Commission and the Diamond Exchange, have arisen not by the support of governments or laws, but through the initiative of participants. Similar initiatives have given rise to national organizations, such as stock exchanges, trade organizations and professional associations. However, they differ from ICANN in a number of important aspects. They were organized directly by the interested parties; their purpose of organization was usually quite spe-

tity of ICANN's power is murky, contradictory and confusing. Its power structure is fashioned after a private not-for-profit corporation, but it does not operate an enterprise that such a corporation usually operates, like a museum, hospital or a membership organization of credit card issuers. ICANN's operations involve an enigma — the Internet — which defies a clear analogy. The Internet has been defined as: a new world community; the foundation of democracy; a communication system; a form of commerce; a network of networks; and a novel technology. Each definition brings an analogy to relationships and power structures. It has been suggested that new technologies undergo a process of chaos and finally settle at something close to familiar models, with some adjustments.⁴ I believe that this thesis is correct, and that what we see today is a stage in the evolutionary process of the Internet and its infrastructure. However, the road to the ultimate adjusted model may determine its choice. The road to ICANN's final model may be less bumpy if the model reflects the characteristics of the Internet. I believe that the Internet is closer to a market. Therefore, I analogize ICANN to a manager of a unique type of market.

The use of the market image for the Internet and its infrastructure may seem counterintuitive. More often, ICANN's image is drawn from the store of political metaphors as a global government, and its users as citizens; the relationship among users, service providers and ICANN is thereby grounded in a "social contract." Markets and political units share some features. Both require an infrastructure and an implicit agreement — a consensus — among most actors as to the fundamental "rules of the game." Mainly, these rules are born of a rule of consensus, which people follow even if they are free not to do so. A "social contract" governs many aspects of our lives, and so do the markets on which we draw for the essentials for living and for earning our livelihood. The distinction, therefore, between the two is not in impact but perhaps in the enforcement power. The markets' coercive powers are more limited. Yet concern for the integrity of the system (whether the politi-

cific (such as the Olympic games) or for the purpose of regulating their members, and most national organizations are regulated by governments, who serve as backup regulators.

4. See DEBORA L. SPAR, *RULING THE WAVES* 11-22 (2001).

cal or economic system) drives many dissenters on details to adhere to the general rules of the majority. It seems that the main difference is in the kinds of enforcement tools that markets can use. In that respect, ICANN's enforcement tools resemble those of the markets and not those of the political units.

I believe that even though ICANN's objectives and powers have not yet been fully defined, its analog is closer to the New York Stock Exchange, Inc. ("NYSE") than to a civil society. ICANN's foundation is grounded in technical and business practices, the objectives of its social contract are limited, and it lacks coercive state power. Therefore, I stick to my market model. But because the Internet affects social interaction, and because it is evolving, I admit to ICANN's political undertones.⁵

Perhaps because of ICANN's political aspects, the Internet market and ICANN differ from the securities markets and their managing lawmakers. ICANN and the actors constituting the infrastructure of the Internet are essentially unregulated.⁶ Their accountability to a "higher authority," such as the De-

5. I do not analogize ICANN to the United Nations or its organizations, first because UN membership is usually limited to political units, while ICANN was explicitly designed to exclude the control, though not the influence, of such units. In addition, the UN's decisions can be backed by force, while it is doubtful whether ICANN's will ever have such a backing. See NANCY C.M. HARTSOCK, *MONEY, SEX, AND POWER* 55 (1983) (dealing with economic markets, noting the disparities among the actors and arguing that the market model legitimizes domination by the strong actors over the weaker actors). ICANN can be analogized to the NYSE. Both institutions act as a focal point and as a synthesizer among the disparate parts that constitute the infrastructure of a system. Both pass rules affecting the infrastructure of the markets. ICANN deals with the domain name registries and the registrars, and to some extent influences the ISPs. The NYSE deals with the underwriters, brokers and dealers. Both Internet actors and securities market actors operate independently, some for profit and some not for profit. Both the NYSE and ICANN combine management and lawmaking. Both have a board of directors, officers and employees who carry out institutional functions. Both are in the public eye, for all to see and judge. Like the New York brokers who gathered on the curb in the late eighteenth century, ICANN's creators started by interacting and searching for a network communication unlimited by subject matter and purposes.

6. ICANN is a not-for-profit corporation incorporated under the laws of California. However, the regulatory scope of both laws and enforcers of laws is very limited. See ICANN, *ARTICLES OF INCORPORATION* (1998), available at <http://www.icann.org/general/articles.htm> [hereinafter ARTS. OF INCORPORATION].

partment of Commerce ("DOC"), is unclear. Even the authority of the DOC is subject to queries. Moreover, ICANN functions partly as a policy setting institution, partly as a platform for negotiation and mediation. ICANN has not yet reached maturity, and is likely to operate in a state of flexible adjustment for some time to come. Recent events suggest that the state of flux may also turn into a state of shocks, counter shocks, restructure and substitution.

ICANN poses a number of puzzles. First, it is essentially an unregulated and undemocratic natural monopoly. It is managing and making rules for a hierarchical system that, in the view of experts, cannot be governed by two entities efficiently. Yet ICANN's power at its inception was quite weak. How can a monopoly be weak? Is not a weak monopoly a contradiction in terms?

Part II of this Article addresses this query. After a brief description of the basic structure of the Internet naming and numbering system relevant to ICANN's power, Part II describes the unique circumstances under which ICANN was created to explain its weak initial existence. ICANN's power was and remains a default power. There were many candidates for managing and controlling ICANN's functions. All vied for the position. But no candidate agreed that any of the others would take control of the entity. ICANN's power stemmed from the consensus by the parties that none of them would control. ICANN was not vested with power. It came into being by the grace of powerful constituencies that refrained from asserting their power. Hence, ICANN's weakness.

A second puzzle follows. While ICANN started weak, it has managed to become far stronger. How could this weak monopoly become stronger with time? Part III of this Article offers an answer. ICANN has maintained and strengthened its following by [strongly](#) supporting the stability of the Internet (standardizing the infrastructure). This prime directive of maintaining stability is of great concern to almost everyone around the globe. In addition, ICANN's staff has taken special care to ensure that none of the potential claimants to ICANN's control would be sufficiently displeased to attempt to wrench control over it. The staff solved problems through mediation. Other events and external parties helped. ICANN has flexed its muscles in exercising the powers clearly vested in it, that is, allocating the valuable right to operate TLDs. ICANN has aug-

mented its power through a stable and able management, including the preparation of its contracts, which contain significant powers. This staff has steered ICANN through the turbulent waters of complex international and national laws, supervised its statements and negotiated on its behalf. Part III of this Article offers a few examples that demonstrate ICANN's rising power.

However, in the past month, ICANN's staff proposed to restructure the institution. The new structure would eliminate some of the constraints under which the staff was operating, expand the staff and offer more powerful positions to constituents that would finance ICANN and its expansion.⁷ The proposal would establish tighter control and greater power for ICANN and its staff, a self-perpetuating board representing the strong constituencies with vested interests in the Internet and lower input by the unorganized public.

The proposal seems to have been approved by some constituencies, but has prompted protests by others and raised questions in Congress (although ICANN's restructure is not one of the main topics in Congress today). The result of these protests is unclear. Short-term, the staff may ignore them: the proposal may be a basis for negotiation and some "softening." Long-term, if controls tighten and public input shrinks, some predict a cessation of some parts of the infrastructure and perhaps a temporary split of the Internet.⁸ These developments support the explanation of ICANN's rising powers.

A third puzzle that ICANN poses relates to its current status. While it has flexed its muscles and become stronger, its exercise of power has been fairly contained. Since ICANN is a natural monopoly that has become stronger with time, what has prevented it in the past, and what prevents it today, from taking a far more high-handed and extensive ruling posture?

Part IV of this Article deals with this question. The emergence of ICANN, its staying power, and the limitations on the exercise of its power can be partly explained by an analogy to

7. See ICANN, PRESIDENT'S REPORT: ICANN – THE CASE FOR REFORM (2002), at <http://www.icann.org/general/lynn-reform-proposal-24feb02.htm> [hereinafter PRESIDENT'S REPORT].

8. See A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 181-82 (2000) [hereinafter *Wrong Turn*].

the economic theory of “contestable markets.”⁹ The theory deals with price. I equate price to power. High prices denote a high level of power. Low prices denote a lower level of power. The theory of contestable markets suggests that in some cases a monopolist (or an oligopolist) will charge the low price it would have charged had the market been competitive. These are the cases in which the monopolist is more efficient than its potential competitors, and can therefore sell or service at lower prices. At these prices, the less efficient competitors would not enter the market.¹⁰

9. See WILLIAM J. BAUMOL ET AL., CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE 5 (1982). The authors state:

We define a perfectly contestable market as one that is accessible to potential entrants and has the following two properties: First, the potential entrants can, without restriction, serve the same market demands and use the same productive techniques as those available to the incumbent firms. Thus, there are no entry barriers in the sense of the term used by Stigler. Second, the potential entrants evaluate the profitability of entry at the incumbent firms’ pre-entry prices. That is, although the potential entrants recognize that an expansion of industry outputs leads to lower prices — in accord with the market demand curves — the entrants nevertheless assume that if they undercut incumbents’ prices they can sell as much of the corresponding good as the quantity demanded by the market at their own prices.

Id. “Stigler defines an entry barrier to be present when the potential entrants face costs greater than those incurred [by the incumbent].” *Id.*

10. For example, if one airline provides an optimal service between two towns (e.g., twice a week), and charges a price that allows it minimal profits, no competing airline will choose the same route. Another example is traditional securities underwriting, which involves high risks and requires very high investment and a distribution system. Smaller broker-dealers did not enter this market because they could not compete with the very large underwriters on price and reliable performance. Among the underwriters there exists an apex structure. In 1983, the structure was predicted to continue, and it seems in 2001 that it has. See SAMUEL L. HAYES III ET AL., COMPETITION IN THE INVESTMENT BANKING INDUSTRY 72-73, 76 (1983). The authors note research which suggests that “investment banking has long tended to assume a pyramidal competitive structure, with a few preeminent firms providing leadership in both financing and collateral services” and a tendency towards increased concentration. *Id.* at 78. Nonetheless, the authors argue that this structure “masks a competitive structure” because the markets are segmented. *Id.* “[C]ertain types of clients and industries tend to gravitate towards [certain types of investment bankers].” *Id.* at 79.

Yet the monopolist will not raise the prices in contestable markets. In these markets, entry costs for potential competitors would not be higher than the entry costs for the monopolist.¹¹ For example, the cost of airplanes for two airlines will be close, if not identical. In addition, the exit costs for competitors would be zero or close to zero.¹² Thus, the theory predicts that competitors will not enter the market only so long as they cannot afford to charge the monopolist's low prices. If, however, the monopolist charges higher prices, competitors will enter the market to offer the same service at the same prices or lower. When prices fall, these competitors will pocket their profits and exit the markets. This theory suggests that the "potential or threatened competition of possible new competitors" presents a great constraining force.¹³ Potential competition will "extend the beneficent sway of the invisible hand" that leads the market.¹⁴

The theory of contestable markets highlights a special "balance of power" and its restraining effect. I believe that a similar idea of a contestable market helps understand ICANN's environment. To be sure, while its institutional structure is still evolving, ICANN's existence and activities are based on a consensus among numerous power holders. More importantly, the large Internet service providers' ("ISPs") consensus to use a single root constitutes the foundation of ICANN's power. Most importantly, the tugging pressure of "path dependence" in the case of ICANN is very great. It costs to change legacy-systems. A move by some and not by other participants of the infrastruc-

11. See BAUMOL, *supra* note 9, at 7 (stating the airline industry as an example).

12. For example, an airline can exit a route with little cost by redirecting its planes to another route.

13. BAUMOL, *supra* note 9, at 13.

14. The theory of contestable markets has led to the deregulation of the airlines, among others. Deregulation, however, demonstrated the flaws in the theory's predictions. The *correct* monopolistic or competitive price absent actual competition is controversial. Entry barriers defined as "sunken costs" are difficult to determine. It was discovered that exit involves transaction costs. Further, there is a price lag that provides insufficient after-entry profits for the entering competitors during the "hit-and-run" period. All these issues require correction, but judicial or government correction increases costs, and small corrections may result in far larger deviations. Thus, application of the theory is far from perfect. See WILLIAM B. TYE, *THE THEORY OF CONTESTABLE MARKETS* (1990) (listing a number of flaws in the theory).

ture may endanger the universality and integrity of the Internet. Even a slight move may generate a slippery slope towards disorder and unpredictability. The beneficent principle of “the devil you know” engenders an almost knee-jerk reaction in this case. Nonetheless, I believe that the need for one guiding hand — a natural monopoly, on the one hand, and the ability of some players to overthrow ICANN or particular actions of ICANN, as illuminated by the theory of contestable markets — limits ICANN’s exercise of power.

The recent proposal to restructure ICANN supports the thesis of this Article.¹⁵ Under the proposal, public representation on ICANN’s board has been eliminated. Five of the nine directors’ seats reserved for representatives of the public were allocated to representatives of governments — each seat to be occupied by a representative of a world region.¹⁶ Arguably, the governments are the effective representatives of the people.¹⁷ Each of the other representations will be selected by a particular powerful constituency. One reason for the change seems to be ICANN’s management’s concern with ICANN’s financing. Specifically, the management desired to finance the expansion of ICANN’s activities and its staff. The governments will finance, but obtain a stronger voice in ICANN’s governing body. It seems that the European Union will also gain ICANN’s support for its new country code top-level domain name (“ccTLD”), “.eu,” as an exception to the practice that only United Nations-recognized countries be awarded this type of name. Thus, the potential competitors of ICANN joined it and presumably would compete or negotiate inside rather than outside the organization. A consensus among the constituents will make ICANN a very strong monopoly because the ranks of the constraining outside forces will dwindle. That development may ultimately pose a danger to the integrity of the Internet. A strong and authoritarian ICANN may become a true regulator that departs from the spirit and loose structure of the Internet. That may press dissidents to combine, build and offer an alternative, which is technically feasible even today. Today, such an

15. See PRESIDENT’S REPORT, *supra* note 7.

16. *Id.*

17. Governments were excluded from the board under the current structure. They did, however, participate as an advisory committee. The proposed restructure would include government representatives as directors.

alternative does not draw members of the infrastructure. If ICANN tightens the reins sufficiently to strengthen the dissidents, an alternative will gain followers, or the dissidents may gain control, “capture” ICANN, and the experiment will continue.

A less prominent aspect of the contestable markets theory is the interest of all competing parties in maintaining a viable market. If competition drives the consumers away altogether, or destroys the market structure, the competitors have nothing to compete for.¹⁸ One of the main objectives of the parties interested in the Internet is to ensure a thriving Internet. Control by itself is insufficient unless the Internet is preserved. The binding force of all parties today is the belief that the Internet will not survive unless it has a single root. Parties with a stake in the continued operation of the Internet are very reluctant to enter into a competing structure that may endanger the Internet’s inter-operability. This is the glue that holds all participants together. On this issue the rule of consensus is imperative. But if a new technology develops in which one or more alternative roots do not disrupt the smooth operation of the Internet, then ICANN’s power will become meaningless or far weaker than its controllers currently aim. They will then grasp at nothing, just as they cannot grasp today at some parts of the Internet’s infrastructure that are not dependent on the single root concept. Even though the probability that this alternative will be effective seems very low, its effect is drastic. Therefore, pressure to develop and build alternatives to the single root may be another constraining element in the Internet power market.

This Article concludes that ICANN’s power is still being shaped. It could emerge along a market model, as a central catalyst for consensus building among parties with different interests. ICANN would address problems as they arise. This model would also be closer to the model that the technical community follows, although money is not its mover. In a previous draft of this Article, I suggested that “[a]lternatively, ICANN could also move towards a more regulatory model

18. Thus, competitors will not use violence to compete (plant bombs at each other’s shops) because the marketplace becomes too dangerous to visit and consumers will avoid all shops.

based on the consensus of powerful constituencies who have a significant stake in ICANN.” It seems that the current restructuring attempt of ICANN’s management moves toward this model. Or ICANN can combine the two models to form a more structured market and more flexible regulatory body. Or none of these governance models would make a difference. A new ICANN, an alternative system or no system may rise by a technology that is today a mere twinkle in someone’s eye.

II. A PUZZLE: HOW CAN A NATURAL MONOPOLY BE WEAK?

A. ICANN Manages a Hierarchical System that Is a Natural Monopoly

As everyone knows, the Internet can be viewed as a network of networks free of central control and led by an “invisible hand.” That is true to an extent, just as markets can be viewed as interactions among individuals and groups free of central control. To this extent, both systems are led by an invisible hand. Both, however, cannot function without an infrastructure.¹⁹ Put in biblical terms, without a common language, both systems can become a dysfunctional Tower of Babel. The current Internet network structure requires that each receiver and sender of messages will have a unique one-of-a-kind designation, and that each computer message will have a unique number so that the “packages” of transported information will reach their destination.²⁰ The design further requires that transmissions be governed by acceptable protocols. If receivers, senders or spaces do not have unique designations and if the actors serving as the infrastructure do not follow the protocols, messages will miss their destinations. The Internet will become the Tower of Babel.²¹

19. See Tamar Frankel, *The Legal Infrastructure of Markets: The Role of Contract and Property Law*, 73 B.U. L. REV. 389 (1993).

20. See, e.g., Milton Mueller, *Technology and Institutional Innovation: Internet Domain Names*, 5 INT’L J. COMM. L. & POL’Y 1 (2000), available at LEXIS, Lawrev Library, Allrev File.

21. See INTERNET ARCHITECTURE BOARD, TECHNICAL COMMENT ON THE UNIQUE DNS ROOT (1999), at <http://www.icann.org/correspondence/iab-tech-comment-27sept99.htm> (stating that information emphasizing the current one root should remain intact to avoid confusion within the Internet community); James Middleton, *Icann Tackles “Alternative” Domain Names*, VNUNET.COM (June 1, 2001), at <http://www.vnunet.com/News/1122310> (The

1. The Feudal Structure of the Naming and Numbering System

With a view to preventing chaos and ensuring stability, the Internet naming and numbering system was designed in a hierarchical mode. Each level contains a signifier, under which names and numbers within its sphere of influence are recorded. The single root or dot (".") is in fact a database for two letter country code domain names such as ".uk" (United Kingdom) or ".fr" (France). The single root zone also contains generic top-level domain names ("gTLDs"), such as ".com," ".org," ".gov" and ".edu."²² That system ensures, for example, that no other ".edu" exists. Listed under the ".edu" umbrella are Boston University and other educational institutions. No other Boston University can be listed. Under the name of each institution, other lower level domain names can be listed and managed, such as "tfrankel." No other "tfrankel" can be listed.

There is a general belief that the inter-connectivity of the Internet depends on the integrity and maintenance of this hierarchical structure, and that unless the message senders and transferors comply with the same rules, or protocols, confusion will reign. Hence, like market standards of weights and measures and prohibitions on fraud, the Internet is governed by a structure of names, numbers and protocols.²³

author notes "rogue domains" and that "ICANN plans to set up an oversight panel to take a firm stance against the alternative movement, claiming that there are 'solid technical grounds for a single authoritative root.'" The report describes the arguments and explanations for the emergence of these rogue alternative roots. See InterNIC, *The Domain Name System: A Non-Technical Explanation — Why Universal Resolvability Is Important*, at <http://www.internic.net/faqs/authoritative-dns.html> (last visited Apr. 21, 2002).

22. JON POSTEL, DOMAIN NAME SYSTEM STRUCTURE AND DELEGATION 1 (1994), at <ftp://ftp.isi.edu/in-notes/rfc1591.txt> (describing the domain name system). On the arguments on whether new gTLDs should be added, see ICANN, REPORT (PART ONE) OF WORKING GROUP C (NEW gTLDs) PRESENTED TO NAMES COUNCIL (2000), at <http://www.icann.org/dns/wgc-report-21mar00.htm>; ICANN, SUPPLEMENTAL REPORT TO NAMES COUNCIL CONCERNING WORKING GROUP C (2000), at <http://www.icann.org/dns/wgc-supp-report-17apr00.htm>; ICANN, CONSIDERATION OF INTRODUCING NEW GENERIC TOP-LEVEL DOMAINS (2000), at <http://www.icann.org/dns/gtld-topic-20apr00.htm>.

23. To be sure, there are networks, and very large networks, that have different names, numbers and protocols. But if they are to interconnect with

The intermediaries that form the Internet infrastructure are the ISPs, registries and registrars. ISPs receive and transfer messages usually to other ISPs and through them to the final destination.²⁴ Registries manage the database of the names under their umbrella in the pyramid. Thus, the “root registry” registers the ccTLDs and gTLDs.²⁵ Registries manage and publish the zone files of ccTLDs and gTLDs. Registrars manage names under specific gTLDs. The current uniform practice among the large ISPs is to follow the single root structure. Some people question the necessity of one root and maintain that dual roots will not necessarily disrupt the connectivity of the Internet.²⁶ But no one has made a serious attempt to experiment with two roots for fear of disrupting the smooth operation of the Internet.

2. The Power of Bestowing Internet Names and Numbers

An Internet “domain name” differs in value and function from a name in real space.²⁷ A domain name is the spark that breathes life and the very existence on the Internet. The loss of a name on the Internet is death without a trace. In fact, when reassigned, the name breathes life into another being. Our Internet names must be unique to us. More than in real space, the Internet name system deprives us of the freedom to use the names allocated to others. While in real space people with the same name can be distinguished by other means, on the Internet there is little distinguishing information about people.

the global network, they must fit within the naming, numbering and protocols of the global Internet.

24. In addition, there are services that do not actually transfer the messages but facilitate the search for particular sites on the Internet, such as America Online.

25. DOMAIN NAME SERVICES ORGANIZATION, ROOT LEVEL REGISTRY RULES, THE MANNER OF ADDING NEW gTLDs TO THE INTERNET (1999), at <http://www.dnso.net/mhsc-tld.htm> (“The function of the root registry is to register and advertise TLDs.”).

26. See Kieren McCarthy, *The Insider’s Guide to the ICANN Meeting*, REGISTER (Sept. 21, 2001), at <http://theregister.co.uk/content/6/21533.html> (noting that “some within ICANN” have supported multiple roots).

27. See Tamar Frankel, *The Common Law and Cyberspace* (2001) (unpublished manuscript, on file with Journal).

Names are the only means of recognition.²⁸ Therefore, name allocation and withdrawal can be a source of power and wealth.

Like the naming system, the management of the system is hierarchical, and so is the power to allocate names. Since all names derive from one source, that source reigns supreme, and like the vassals in the feudal system, each vassal source derives its power from the lord above it, until it reaches the pinnacle — the king. That king is ICANN.

3. Enter ICANN

ICANN was established to achieve a number of objectives. The foremost objective was to ensure the Internet stability and expand its capacity. ICANN was also required to increase the number of gTLDs and registries, to facilitate competition among them,²⁹ and to help establish a dispute settlement mechanism between holders of domain names and holders of registered trademarks.³⁰ The precise nature of ICANN's authority was not spelled out. Some viewed it as a forum for de-

28. Because short names help memory, they are in short supply. Although we view the Internet as a source of new and more information, often the details are lost on Internet communications. For example, we can receive information quickly from all over the globe. But information about the senders and receivers is more limited than in face-to-face or even telephone interaction. As one dog in front of the computer says to another in a cartoon in the *New Yorker*: "On the Internet, nobody knows you're a dog." Peter Steiner, *NEW YORKER*, July 5, 1993, at 61, 61.

29. See *ICANN Announces Decision on .com/.net/.org Domains*, *COMPUTER & INTERNET LAW.*, June 2001, at 31 (describing the revised agreement between ICANN and the registry of ".com," ".org" and ".net," that VeriSign had acquired the registry and that Network Solutions, Inc. has been split, thus facilitating competition on the registry level); Sandra Dillich, *Network Solutions Loses .com, .net and .org*, *COMPUTER DEALER NEWS*, Feb. 25, 2000, at 42 (describing the negotiations that led to the agreement, and the history and summary of the agreement).

30. See ICANN Watch, *ICANN for Beginners*, at <http://www.icannwatch.org/icann4beginners.php> (last visited Apr. 21, 2002); Improvement of Technical Management of Internet Names and Addresses, 63 Fed. Reg. 8826 (Feb. 20, 1998) (to be codified at 15 C.F.R. ch. 13) (proposing a rule to improve the management of the Internet Domain Name System, and describing the infrastructure of the Internet). This rule was not passed. Instead, the DOC issued a Statement of Policy in the form of a White Paper, which stated the main objectives contained in the proposed rule. See Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (June 10, 1998).

veloping policy by building a consensus. Some viewed it as a far more proactive manager of a technology-based market, designed to monitor and evaluate the infrastructure actors of the naming and numbering system and its performance, as well as to prevent transgressions that endanger the system.

ICANN's lawmaking functions include allocation and regulation of some, though not all, lucrative infrastructure services, such as the registries and registrars,³¹ and setting the qualifications of these actors.³² ICANN can therefore create such businesses and limit entry into such businesses. Unlike governments, ICANN's mission is limited to its enterprise. The enterprise, however, affects many areas of human lives — business, culture, politics, community, public morals and private rights. Its reach is global. In that sense as well, ICANN is a lawmaker.

ICANN's structure is unique, and I may say, unwieldy. It consists of a board, a president and staff, and three "supporting organizations," the most problematic of which is the Domain Name Supporting Organization ("DNSO").³³ Each organization nominates three board members, while nine board members are elected by users. Elections by millions of people over the globe have not yet been achieved. ICANN's processes required

31. See Dillich, *supra* note 29 (noting that registry services "became a huge revenue maker"). As to ISPs, aside from contracting with Regional Internet Registries for some policy-making intellectual property address block allocation, which involves little policy making, there are no qualifications or other regulation of ISPs.

32. See Saroja Ginshankar, *Internet Domain Name Registry Up for Bids*, INTERNETWEEK, Feb. 15, 1999, LEXIS, News Library, News Group File. The monitoring and evaluation is to be determined by a committee of third parties. See ICANN, PRELIMINARY REPORT, MEETING OF THE ICANN BOARD IN STOCKHOLM (2001), at <http://www.icann.org/minutes/prelim-report-04jun01.htm> ("Whereas in resolution 01.60, the [ICANN] Board directed 'the President to prepare and present to the Board . . . a proposal to form a committee to recommend processes for monitoring the implementation of the new TLDs and evaluating the new TLD program, including any ongoing adjustments of agreements with operators or sponsors of new TLDs.'").

33. ICANN, *Domain Name Supporting Organization (DNSO)*, at <http://www.icann.org/dns0/dns0.htm> (last visited Apr. 20, 2002). The DNSO structure does not contain a working group which deals with issues concerning the ccTLDs. For a chart of the ICANN organization, see ICANN Watch, *The ICANN-GAC Organization*, at <http://www.icannwatch.org/archive/orgchart.gif> (last visited Apr. 21, 2002) (ICANN organization chart by Tony Rutkowski).

transparency and public participation. This requirement has not been entirely met. Further, it is unclear whether ICANN was expected to establish policies or merely to approve policies established by its three supporting organizations. The DNSO did not succeed in reaching a consensus on proposed policies.³⁴ In its proposal to restructure ICANN, the staff has declared the current structure and constraints a failure, and proposed to simplify the structure.³⁵ Five directors representing the governments of each global region would substitute for the nine publicly elected directors. No review panel would be established to determine the board's policy authority. ICANN will move towards a corporate model of the traditional not-for-profit corporation vintage.

B. ICANN Emerged as a Weak Monopoly Because of the Circumstances Surrounding Its Creation

Two views explain the creation of ICANN. One view describes ICANN's creation as the expression of a consensus on a specific agenda among parties with different interests and views.³⁶ The other view on the creation of ICANN is also consensus-based.³⁷ But the consensus was about something else. The interested parties, such as the technical communities, the large business interests, Network Solutions, Inc. ("NSI") (that managed the root zone and the gTLDs ".com," ".net" and ".org"), the various governments, the large ISPs, the small ISPs and the small businesses that use the Internet, had very different

34. See *infra* Part III.B.4. describing the disaffection of the ccTLD registries.

35. See PRESIDENT'S REPORT, *supra* note 7.

36. In 1998, prior to ICANN's creation, the author chaired meetings entitled the International Forum on the White Paper. These meetings were held in Reston, Virginia, on July 1-2, 1998; Geneva, Switzerland, on July 24-25, 1998; Singapore, on August 11-13, 1998; and Buenos Aires, Argentina, on August 20-21, 1998. The author spoke to the group in Buenos Aires but did not chair that meeting. The participants represented many different stakeholders. The purpose of the meetings was to reach a rough consensus regarding the structure, governance and participation of the company that was to take over the management of the naming and numbering system of the Internet. The consensus achieved in these meetings contributed to the establishment of ICANN. See Domain Name Handbook, *International Forum on the White Paper (IFWP)*, at <http://www.domainhandbook.com/ifwp.html> (last visited Apr. 20, 2002).

37. *Id.*

views of what the Internet infrastructure should be and how it should be managed. Most importantly, they disagreed on who should have the power to manage the naming system. They were also very concerned about the possible “capture” of the naming and numbering system by one interest group. Therefore, their consensus on the issues was reached at a very high level of generality. The devil of the details was left to be resolved.

1. Power by Default: “I Will Not Claim Control if You Do Not Claim Control”³⁸

A review of ICANN’s creation and emerging power suggests that different interest groups agreed *not to claim control* if everyone else would not claim control of the naming and numbering system. ICANN’s power was therefore created by default. No one interest group has agreed to put another interest group on the throne to manage and regulate the infrastructure of the Internet, and each group was anxious about capture by another.

There were many candidates for the job: (1) the United States and other governments; (2) the established technical communities headed by Dr. Jon Postel, who designed the system and managed it for over twenty years; (3) the large businesses; (4) the professionals who sought to participate in the infrastructure for profit; (5) people who claimed to represent the consumers or users; and (6) international communication organizations.

The United States, which triggered the emergence of the Internet, and the U.S. administration, which exercised the management power over the Internet naming and numbering system, did not seek to continue its hegemony. The administration was hard pressed by a number of countries to de-Americanize the Internet. Other difficult political issues have arisen that the U.S. wished to avoid. For example, how to define a country entitled to a ccTLD, and how to convert into competition the monopoly position of registries, notably NSI (now VeriSign), that managed “.com,” “.org” and “.net.” The U.S. administration was not interested in mediating disputes

38. *Id.*

between the business communities and the technical communities, since the solutions involved costs in dollars and time.

The U.S. administration was ready to offer the Internet to the world, but with strings attached. To de-Americanize the management and regulation of the Internet infrastructure without severing its American umbilical cord, the administration considered different avenues. Since the interested groups did not reach a consensus, the administration conducted meetings and produced a policy paper that seemed, at a high level, to represent a consensus not only between the U.S. groups, but also with foreign governments.³⁹

While different governments demanded the de-Americanization of the Internet, none claimed to be the sole governor of the Internet infrastructure. It was recognized that none would succeed in realizing such a demand, and the only country which in fact controlled the infrastructure, namely the U.S., was unlikely to relinquish control to another country. Neither was the UN an acceptable alternative. Control over the Internet infrastructure required a nimble guiding management and sensitive rulemaking. The UN and its various organizations were considered too slow and inflexible to respond to the kaleidoscopic, fast-changing demands of the Internet.

The technical community, especially the Internet Assigned Numbers Authority ("IANA"), led by Dr. Postel, was a natural candidate for the management of the infrastructure of the Internet. It had been managing the infrastructure since the Internet's inception. Many members of the communities were in fact the ISPs and registries. They also commanded support of some European governments. These communities wanted to undertake the management and regulatory function. However, the U.S. business community and NSI did not agree to a transfer of control to the technical communities, and demanded a voice, even a decisive voice, in decisions concerning the Internet infrastructure. Therefore, a compromise between these two interest groups and their different visions of the Internet had to be reached before a private corporation could be established.

The conflict between the technical communities and the business communities was complicated because many had members in each camp. Some "techies" were employed by large

39. *Id.*

business organizations such as MCI (now WorldCom, Inc.), AT&T Corp. and IBM Corp. These persons were also involved in the Internet service providing activities. Thus, not all parts of the business communities necessarily objected to influence of the technical groups. On the other side of the coin were the registries, and especially NSI, that were publicly owned and operated as businesses rather than as volunteer or scientific enterprises. Thus, it would be more accurate to describe the conflict as a conflict between two philosophies and cultures. The one viewed the Internet as a tool for business development or as a source of profit from servicing. The other, rejecting the view of the Internet as a tool for “making money,” viewed the Internet as the product of technological creativity, whose purpose was to continue to contribute to science, national society and the global community.⁴⁰

The small business interests and those who claimed to represent the users and “net citizens” were not candidates for controlling the infrastructure, but demanded participation in the control.⁴¹ They, too, were divided. Some aligned with technical communities and some with different clusters of interest, but many did not align with anyone.

It was recognized that technical decisions concerning the infrastructure could no longer be made by technology criteria alone. Political and business consequences of technical decisions mattered. The future body that would guide the infrastructure of the Internet had to consider all three criteria (technical, business and political), mediate among them and balance them correctly. This conclusion brought about the idea of an entirely new organization to meet the new demands.

The route to establishing the entity that would manage and regulate the Internet infrastructure had to be foggy. The U.S. administration wished to avoid “establishing” and “acquiring” a private corporation because such a corporation must be established under an act of Congress.⁴² There was concern that if the

40. *Id.*

41. *Id.*

42. Under federal law, the executive branch may establish and control a private sector corporation only under a statute. *See* Government Corporation Control Act of 1945, 31 U.S.C. § 9102 (1994) [hereinafter GCCA]. *See also* A. Michael Fromkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543 (1995) [hereinafter *Reinventing Government*]. Arguably, because the

matter came before Congress it might become a problematic “political football.” To avoid the required act, the administration had to avoid the “establishment” or “acquisition” of such a corporation. From the point of view of the administration and some members of Congress, the solution was to help create a private corporation, grounded in market principles, and an Internet infrastructure moved by competition. This creation would be an entity that no one established, but just came into being. In fact, that is the closest description of the emergence of ICANN. Not one invisible hand, but many invisible hands, brought it about. Had only one hand, as invisible as it might have been, propelled the entity into existence, other powerful hands would have been raised in protest. The flurry of negotiations, promises, some broken, some re-negotiated or abandoned, and alliances formed and reformed brought about an equilibrium that allowed the entity to emerge. The driving force of the negotiation and consensus seems to have been the recognition that no better alternative was available. ICANN was therefore born by default.⁴³

2. ICANN's Initial Power Was Weak

In addition to ICANN's default creation, it was not very powerful either. The circumstances of its birth did not inspire much confidence or legitimacy. ICANN had no blessing of an authorizing statute.⁴⁴ It did not have the benefit of the invisible hand of the free market or the citizens' votes in a democratic regime. In fact, it emerged as a result of negotiations among interest groups with the service of go-betweens. Its great leadership weakness was the image of secret negotiations, behind the

executive neither “established” nor “acquired” ICANN, the statute did not apply to it. ICANN has been operating on the basis of an agreement with the DOC. The DOC asserts its authority to enter into such agreements, but questions persist.

43. Congress was merely apprised of the emergence of ICANN. The ccTLD registries are currently paying ICANN a fee for services that they used to receive free from the U.S. government. It was suggested that they are willing to do so in order to “pry the Internet naming system from the U.S. government.” *Revolt Threatens ICANN's Budget*, USA TODAY (Nov. 20, 2000), at <http://www.usatoday.com/life/cyber/tech/cti821.htm>.

44. Under federal law, the executive branch may establish and control a private sector corporation only under a statute. See GCCA, 31 U.S.C. § 9102. See also *Wrong Turn*, *supra* note 8, at 22-23.

scenes agreements, and mistrust of “outsiders.” Mistrust breeds mistrust.

In addition, ICANN’s mandate was general. Some of its missions posed conflicts between technological, business and political views. ICANN was required to establish additional gTLDs. But the largest corporations with the most famous brand names objected to any such addition because it imposed heavy costs on them in protecting their trademarks.⁴⁵ ICANN was required to create competition among registries, and especially to break up NSI’s monopoly. Yet that monopoly was in part based on the infrastructure of the Internet that required registries to maintain a central database to avoid duplications of the names and the numbers. In addition, the “ownership” or other form of entitlement of the names and the databases was not established. To create competition among registries and registrars required portability of the names, and demand for names coupled with the vision of a free market in the names gave the names the features of property with attendant unanticipated consequences, such as cybersquatting. Thus, ICANN’s management decisions could have far reaching consequences, and at the same time conflict with the desires of one or more of its supporting interest groups.

ICANN received the mantle of Dr. Postel as the manager of the naming and numbering system. But not quite. It did not have his authority nor the adoration of his followers, which had grown with twenty-five years of devoted service and good judgment. It did, however, have a contract with the DOC, but a conditional contract at that.⁴⁶ To become fully vested with the powers of the United States (whatever these are) over the systems, ICANN had to meet additional conditions under a certain deadline.⁴⁷ These involved the heart of its control structure —

45. See *Reinventing Government*, *supra* note 42, at 547.

46. Memorandum of Understanding Between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (n.d.), available at <http://www.icann.org/general/icann-mou-25nov98.htm> (last updated Dec. 31, 1999).

47. ICANN did not meet the requirements of the DOC and was therefore not fully vested with the authority over the root. However, the DOC has averred its intention to make the transfer, and retreated from a clear intent. The question of ICANN’s legal status was discussed in a General Accounting Office report of 2000. See OFFICE OF THE GEN. COUNSEL, U.S. GEN. ACCOUNTING OFFICE, DEP’T OF COMMERCE: RELATIONSHIP WITH THE INTERNET

public participation in its decision making and in its board. These conditions were precisely the ones that some of ICANN's promoters rejected. Elections are antithetical to self-perpetuating boards. Elections endanger the position of the existing controlling group and open the doors to capture of the institution.

In sum, when ICANN emerged, its mission and power were not clearly defined. Its strength lay in the lack of better alternatives. ICANN's power was strengthened at the outset by the highly reputable persons who populated its first board, and by a dedicated expert staff with significant knowledge of the Internet, its organizations and its history. This knowledge complemented the expertise of the board members. Needless to say, ICANN was not strong. The world sat back, folded its arms, and took a wait-and-see attitude. ICANN was not powerless, however. It was backed by a number of power centers: (1) the technical communities; (2) the large business communities, including the large ISPs; (3) NSI; and (4) the involved governments. This was ICANN's power base, and it was quite broad.⁴⁸

III. PUZZLE: HOW DOES A WEAK MONOPOLY AUGMENT ITS POWER?

A. Consolidating the Power

1. Constitutional Documents: The Articles and Bylaws

ICANN's articles of incorporation and bylaws have the potential of providing the entity with significant power.⁴⁹ However, the entity's structure is also very complex, and the division of power among the different groups, such as the board on the one hand and the supporting organizations on the other hand, is not spelled out in the document. That is also because there was no clear consensus on the division of the power. Supporting

CORPORATION FOR ASSIGNED NAMES AND NUMBERS (2000), *available at* <http://www.gao.gov/new.items/0g00033r.pdf> [hereinafter GAO REPORT].

48. This power base did not include recognized consumer representatives, except to the extent that national governments may be deemed to represent the interests of their citizens and residents.

49. See ICANN, BYLAWS (2002), *available at* <http://www.icann.org/general/bylaws.htm>; ARTS. OF INCORPORATION, *supra* note 6.

organizations could designate their candidates to the board and could propose policies to the board. Although it seems to have been the consensus that the board could not reject the candidates, it was not clear whether the board had to accept the policy proposals and whether the board could initiate its own proposals. It was also not clear whether initiation would be limited to non-technical policies, and whether one could distinguish between technical, political and business considerations. Thus, the vagueness of the documents could provide ICANN with power, or rob it of power, depending on the implementation of its policies and solutions to the problems with which it would be presented.

2. The Contracts with Internet Service Providers and Registries

An important part of ICANN's power base is grounded in the contracts that ICANN negotiated with the Internet infrastructure operators, the registries and registrars. These contracts should rightly be added as part of ICANN's constitution. Said ICANN's President, Mike Roberts: "ICANN had to take the very informal handshake world of [Internet founder] Jon Postel and turn that into language that can be written down and form the basis of a legal arrangement."⁵⁰ ICANN sought to formalize its relationship with the government, the registries and the service providers through the mechanism of contracts.⁵¹

The contracts contain features that empower ICANN. For example, the parties to the contract are obligated to abide by ICANN's policies if these policies command consensus. A review board (to be established) has the authority to make a finding of the existence or absence of a consensus. The importance of these contracts cannot be exaggerated (because the definition of policy decision is vague). Thus, so long as ICANN's pol-

50. Maureen Sirhal, *Net Governance: ICANN Makes Progress on Sticky Issue of Domains*, NAT'L J. TECH. DAILY, Feb. 6, 2001, LEXIS, News Library, News Group File [hereinafter *Sticky Issues*]. Such agreements have not yet materialized with most registries, let alone been standardized. See Maureen Sirhal, *Net Governance: European Domains Want ICANN's Attention*, NAT'L J. TECH. DAILY, Dec. 7, 2000, LEXIS, News Library, News Group File [hereinafter *European Domains Want ICANN's Attention*].

51. See Mark Sableman, *ICANN Faces Major Challenge with Country Codes*, NAT'L L.J., Dec. 18, 2000, at C10.

icy decisions command a consensus they are binding on the signatories of the contracts, that is, on the actors in the Internet infrastructure.⁵²

Some economists have suggested the use of contracts as a response to the failures of the contestable markets theory, especially in the deregulation period. "The ultimate objective is to replace transitory regulation with the contracts that would have been in effect had they not been superseded by regulatory institutions."⁵³ Therefore, lawmakers should negotiate laws in the market, and pass laws that are as close as possible to the negotiated result had there been a market. The visible regulators' hand should be led by the visible hand of the parties. The contestable market theory and the use of contracts are proposed as alternatives to heavy-handed inefficient government regulation. ICANN is using contracts as a negotiated regulatory device.⁵⁴

3. General Support for ICANN's Prime Directive: To Maintain the Stability of the Internet

ICANN's primary directive has had the support of many, if not all, powerful stakeholders. Both governments and businesses that invest millions in Internet commerce and in persuading their customers to use this new medium put a high premium on stability and operability of the Internet. Blackouts and other mishaps, even short lived, can cause heavy losses and terminate client relationships.

The prime directive of ICANN could be interpreted in different ways, some of which allow for more flexibility and experimentation than others. Many questions can be differently determined depending on this interpretation. For example, does stability require one root at all costs? Can a multitude of roots

52. In the proposed restructure of ICANN, the review board is eliminated. Conflict on whether a policy commands consensus is then likely to be determined among the parties, a court or other mechanism which the parties will establish at the time of dispute.

53. TYE, *supra* note 14, at 121 (suggesting that contracts can be viewed as an extension of the Coase theorem).

54. See David Johnson & David Post, *And How Shall the Net Be Governed?: A Meditation on the Relative Virtues of Decentralized, Emergent Law*, in COORDINATING THE INTERNET 62 (Brian Kahin & James H. Keller eds., 1997).

be designed in a way that would support stability and increased scope? Should experiments at the fringe of the Internet be encouraged, and if so, how can they be implemented once proven not to endanger the stability? Should these experiments be left to the regulation of the market? If experiments are allowed, to what extent, if any, should enterprises that invested heavily in existing technology and structure have control over these experiments? Should these issues be raised now, or should they be raised when the existing structure is well established? Or, should they be raised when the experiments are launched, or when problems arise?

With respect to stability of the Internet, ICANN has taken a conservative attitude, in line with the interpretation of its stakeholders and many governments. It sought to standardize the Internet infrastructure. This interpretation strengthens ICANN's power. One root creates a natural monopoly that, by definition, vests decision and lawmaking power in the manager of the system. Any additional root weakens or completely undermines this power. So long as the main stakeholders view the prime directive as crucial to their own interests, ICANN must be endowed with sufficient power to implement this prime objective. That was and has remained a significant basis of ICANN's power.

4. Indirect Help From Congress

I believe that even though some members of Congress would have preferred to deal with Internet governance by legislation rather than mere monitoring, most members of the House of Representatives committees that dealt with the Internet were willing to take the "wait-and-see" attitude towards ICANN.⁵⁵ However, whether unwittingly or by design, Congress has also helped ICANN perform a task that seemed impossibly conflicted: creating additional gTLDs and facilitating greater competition among registries. The task met strong opposition from a large, important stakeholder constituency of ICANN: the owners of famous trademarks.⁵⁶ These stakeholders have been

55. The doubts about the legality of ICANN persisted, and Congress requested the General Accounting Office to inquire how ICANN came into existence. See GAO REPORT, *supra* note 47, at 1.

56. See *Wrong Turn*, *supra* note 8, at 22-23.

protecting their trademarks at great cost, and additional gTLDs could increase these costs because each new gTLD can breed trademark violations under its cap.

Congress responded to the trademark owners in a way that reduced their objections to additional gTLDs. Congress passed a law to protect famous trademarks from dilution.⁵⁷ This was a fundamental change in trademark law, which was based on protection of consumers from confusion. In addition, ICANN established an option of less expensive resolution of disputes between trademark owners and domain name owners. The new statute and the less costly process by which trademark owners could protect their trademarks against competing domain names reduced the objection of the large corporations to the creation of new gTLDs.

In addition, congressional monitoring has helped ICANN by offering accurate information, criticism and a sense of the limits on ICANN's actions. For example, when ICANN proposed to levy a \$1 charge on all registrars world-wide for every domain name registration, the protest, which was aired also in Congress, caused ICANN to back off.⁵⁸ Some would consider this a failure. I consider this event a success. Congress helps ICANN evaluate its trial and error attempts at expanding its power.

5. Help From the Courts

A recent decision regarding a domain name indirectly supports ICANN's power.⁵⁹ This case involves a claim by a national government. The government of South Africa sued an American enterprise that used the words "South Africa" in its domain names.⁶⁰ The government of South Africa maintained that the name is its property.⁶¹ The District Court for the Southern District of New York denied jurisdiction and referred the parties to arbitration in accordance with ICANN's procedures.⁶² The deci-

57. Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, §§ 3001-3010, 113 Stat. 1501, 1501A-521 to -552 (1999) (codified in scattered sections of 15, 16 & 28 U.S.C.).

58. See Sableman, *supra* note 51.

59. See *Virtual Countries, Inc. v. Republic of South Africa*, 148 F. Supp. 2d 256 (S.D.N.Y. 2001).

60. *Id.* at 259.

61. *Id.*

62. *Id.* at 268.

sion indirectly supports ICANN's power. Courts are unlikely to entertain claims of sovereign powers to ccTLDs, and the issue is designed to be resolved in accordance with the process established by ICANN. It is unlikely that any and all uses of a state's name will be barred by the arbitration tribunal. Thus, ICANN will be freed of making difficult decisions. It seems that the government of South Africa and some other governments have determined to protect their names by internal legislation.⁶³ This approach as well relieves ICANN from the burden of determining the issue and exposing a weakness if it cannot implement its decision.

6. Mediation and Negotiations with and Among Stakeholders

ICANN has chosen appropriate methods for consolidating power. Before decisions were made public, the governments and other large stakeholders were consulted and a consensus was obtained. Only then would the results be published. Further, ICANN has not always insisted on exerting authority. It deals with powerful constituencies by negotiation rather than ruling. However, every agreement with any such constituency helps build precedents for agreements with others, thereby helping to establish future customary rules. Moreover, when a conflict arose among powerful stakeholders, ICANN was often inclined to play the role of a mediator rather than an arbitrator. It has provided an effective forum for negotiation and a face-saving intermediary service. That increased its value to those participants. Repeat requests to ICANN augmented its power.

However, consensus-building negotiations make it harder to gain public support and broad leadership. The process is far from public and the method limits ICANN's freedom to factor in public comments. Therefore, the solicitation of public comments and input seems to be a sham. To some extent it is. That may explain why ICANN's power rests primarily on its constituencies and far less on public support and leadership.

63. See *Bill on Internet Due Soon*, AFRICA NEWS, Oct. 4, 2001, LEXIS, News Library, News Group File; *Cyber Cops to Ensure Safe Surfing*, AFRICA NEWS, Mar. 22, 2002, LEXIS, News Library, News Group File (noting that the bill was tabled in March 2002).

B. Demonstrating ICANN's Rising Power

Recent events concerning ccTLDs demonstrate that ICANN's power is on the rise. ICANN's interaction with ccTLD registries has increased in recent years. The context and substance of these interactions differ, but all indicate the nature and level of ICANN's power.

1. Country Code Top-Level Domain Names

ccTLDs are two-letter names designed to inform about the physical location of name holders. They are on the same level as gTLDs. With the rise of the value of gTLDs, such as ".com," the value of ccTLDs has risen as well. That is because under a ccTLD, one can create many new (and sometimes known) gTLDs under its umbrella. ccTLDs are similar to TLDs except that they are limited to existing political real entities (countries), regardless of how we define them.⁶⁴

When the value and importance of names and their management was not accompanied by political or economic values, ccTLDs and their registries — delegates of the power to manage the database of the domain names under their authority — were recognized generously.⁶⁵ For example, IANA, which preceded ICANN, recognized the delegation of a ccTLD to Palestine, and thereafter confirmed a reassignment of the delegation to other registries.⁶⁶

64. The argument of whether a country can assert exclusive right to its name was raised in a United States court. *See Virtual Countries*, 148 F. Supp. 2d at 256. The district court did not assert jurisdiction and suggested that the parties resort to the international arbitration system provided for disputes concerning domain names. *Id.* at 268.

65. *See* JOHN C. KLENSIN, INTERNET ENGINEERING TASK FORCE, REFLECTIONS ON THE DNS, RFC 1591, AND CATEGORIES OF DOMAINS (2000), at <http://public.research.mimesweeper.com/standards/IETF/Draft/draft-klensin-1591-reflections-02.txt> (describing ccTLDs and gTLDs and the controversies involving their delegation).

66. To avoid making a political decision, IANA followed a list by ISO 3166 Maintenance Agency, and agreed to the re-delegation of Palestine when Palestine was accorded the status of "Occupied Palestine Territory." IANA, IANA REPORT ON REQUEST FOR DELEGATION OF THE .PS TOP LEVEL DOMAIN (2000), at <http://www.icann.org/general/ps-report-22mar00.htm> (containing IANA's report and analysis which led to the recommendation to approve the re-delegation). *See also* International Organization for Standardization, *ISO 3166 Maintenance Agency (ISO 3166/MA)*, at <http://www.din.de/gremien/nas/nabd/iso3166ma> (last visited Apr. 20, 2002)

The use of ccTLDs varies. In some countries, they are used as gTLDs that have a similar name as the country's name. In other countries, they represent a political geography.⁶⁷ Some countries have privatized (sold) their ccTLDs, as the U.S. government is considering doing.⁶⁸ Other countries deem the registries of ccTLDs to be the delegates of the governments and under their control.

2. The Dispute over ccTLD “.au” Between the Registry and the Australian Government

In 1986, Professor Robert Elz received from Dr. Postel the delegated authority over the registry of Australia's ccTLD — “.au.” Even though the registry had the power to create second-level domains, such as “.com.au” and “.net.au,”⁶⁹ Professor Elz seemed to believe that the main Internet services should not be commercial.⁷⁰ No commercial use also meant no value for the

(describing the complete list of country names and ISO 3166-1 Alpha-2 code elements — the ISO country code used on the Internet).

67. See POSTEL, *supra* note 22, at 1. Part of this description has changed with the years. The principles, however, remained the same. See ICANN, ICP-1: INTERNET DOMAIN NAME SYSTEM STRUCTURE AND DELEGATION (1999), at <http://www.icann.org/icp/icp-1.htm> [hereinafter ICP-1] (describing ICANN's administration practices, and noting that IANA has remained the overall authority for day-to-day administration of the naming system, intellectual property addresses, autonomous system numbers and TLDs, and other aspects of the system). The document includes the source where the “procedures to be followed in requesting TLD delegations or changes” can be found. *Id.* The document contains the qualification requirements for TLD managers. *Id.*

68. See NAT'L TELECOMMS. AND INFO. ADMIN., THE DIGITAL OPPORTUNITY TRUST: THE DOT IN .US, at <http://www.ntia.doc.gov/ntiahome/domainname/usrfc2/comments.html> (last visited Apr. 21, 2002) (proposing an elaborate plan to manage “.us” for the benefit of all U.S. citizens); *Commerce Department Poised to Accept Bids for .us*, NAT'L J. TECH. DAILY, June 1, 2001, LEXIS, News Library, News Group File. See also ICANN Watch, *More on the .us Solicitation*, at <http://www.icannwatch.org/article.php?sid=208> (June 14, 2001).

69. See Kate Mackenzie, *Domains Taken from Elz*, AUSTRALIAN, Feb. 5, 2002, at 29; *Multimedia Seeks .au Registry*, AUSTRALIAN FIN. REV., Dec. 3, 2001, at 42 (Professor Elz assigned the “.au” rights to a “commercial spin-off” of Melbourne University – Melbourne IT) [hereinafter *Domains Taken from Elz*].

70. It seems that Professor Elz controlled more than the database containing the current domain name holders. See Kirsty Needham, *Australian Government to Take Over Domain Names*, SYDNEY MORNING HERALD, Jan. 22,

names. Consequently, "Australia has never had a cybersquatting problem like the United States has."⁷¹ No one compiles names for sale.

The government of Australia, however, has different priorities, planning a far more aggressive commercial development of the Internet,⁷² as well as tighter government control over domestic Internet use.⁷³ It established the authority "auDA,"⁷⁴ and required Professor Elz to re-delegate the registry's functions to this authority. The re-delegation of the ".au" space would also affect the sub-domains.⁷⁵ Professor Elz agreed to re-delegate, but it appeared unlikely that he would do so until certain conditions had been met.⁷⁶ A year later, the re-delegation had still not taken place.⁷⁷ On June 13, 2001, a news headline stated: *Internet's Reclusive Pioneer Hangs on to Keys to Web*.⁷⁸ Interestingly, Professor Elz was deemed *not to have*

2001, at 35 (noting that the government agency bought a database of all domain names registered in Australia).

71. Kirsty Needham, *Internet's Reclusive Pioneer Hangs on to Keys to Web*, SYDNEY MORNING HERALD, June 13, 2001, at 25, available at <http://old.smh.com.au/news/0106/13/biztech/biztech3.html> [hereinafter *Internet's Reclusive Pioneer*].

72. National Office for the Information Economy, *Reforming .au Domain Name Administration*, at <http://www.noie.gov.au/projects/information%5Feconomy/domains%5Fau/index.htm> (last visited Apr. 21, 2002) (The website notes that government recognition of "effective administration of the .au domain space" is "important to the development of ecommerce in Australia.").

73. See ICANN Watch, *AUDA Seeks ICANN's Help to Force .au Redlegation*, at <http://www.icannwatch.org/article.php?sid=197> (June 6, 2001) [hereinafter *ICANN's Help*] (the Australian authority suggests that Professor Elz's administration had been slow, but did not allege any wrongdoing).

74. James Riley, *New Board Set Up for Domain Rule*, AUSTRALIAN, Apr. 27, 1999, at 49, 49.

75. See *Push for Name Controls*, AGE (Melbourne), Mar. 7, 2000, at 1 ("The policy and administration of the .au domain would affect the sub-domains.").

76. *Dot.au Domain Name Registration Gets Nasty*, BUS. REV. WEEKLY (Australia), May 19, 2000, at 44 (The article states that it was "unlikely Elz [would] relinquish his authority until auDA [had] secured the confidence of the industry and [was] endorsed by the National Office for the Information Economy.").

77. For a precedent by which IANA redelegated a ccTLD of an island of forty-nine residents, with the support of all but two of its adult inhabitants, see Jeri Clausing, *Pacific Islands Seek Control of Internet Designations*, N.Y. TIMES, Feb. 14, 2000, at C1. See also Sableman, *supra* note 51.

78. *Internet's Reclusive Pioneer*, *supra* note 71, at 25 ("[Professor Elz] refused to relinquish his historic guardianship, flatly ignoring requests from

responded to the government's request — “just not doing anything” — rather than *refused the request*.⁷⁹ The government viewed this distinction as “relatively important.”⁸⁰ In September 2001, ICANN announced that it had awarded control of the “.au” domain to auDA.⁸¹ However, Elz refused to release the “.org.au” and “.id.au” second-level domains, and they were seized from him in February 2002.⁸²

The power relationship between a sovereign country, the registry of its name and ICANN is unclear. ICANN and IANA published the relevant information in 1999,⁸³ yet the power relationship is being established by actions rather than by words and rules. Arguably, a country should be entitled to its own name. But if the name has been assigned by a private body and used by a private individual, then presumably it cannot be the property of a government.⁸⁴ The entitlement to the names is a subject worthy of a separate paper.⁸⁵ The important and interesting point for the purpose of this Article is the fact that the government of Australia approached ICANN for help.⁸⁶ Af-

the Federal Government to pass control of the country's Internet addressing system to a new regulatory body. . . . The clash is one of the last stand-offs between the old school of the Internet and the commercial interests that now dominate it.”).

79. *Id.*

80. Kate Mackenzie, *Tough Call on Names for ICANN*, AUSTRALIAN, June 26, 2001, at 33, 33.

81. See Kevin Murphy, *ICANN Hands .au Domain to Aussie Non-Profit*, COMPUTER WIRE, Sept. 5, 2001, LEXIS, News Library, News Group File.

82. See *Domains Taken from Elz*, *supra* note 69, at 29.

83. ICP-1, *supra* note 67. On transfer and disputes over delegation of TLDs, IANA should receive communications from both parties. It takes no action until the parties agree, noting that “it is far better when the parties can reach an agreement” because of the time it would otherwise take and that “it is appropriate for interested parties to have a voice in the selection of the designated manager.” *Id.*

84. See Kate Mackenzie, *Domain Standoff Tests ICANN*, AUSTRALIAN IT (June 21, 2001) (on file with Journal) [hereinafter *Domain Standoff*].

85. See *id.* (suggesting that sovereign countries should have control over their names and over the registries, but if the names are used as gTLDs, with the consent of the governments, the names should be treated as such).

86. See *Internet's Reclusive Pioneer*, *supra* note 71 (The representative of the government “has written to the Internet's governing body, the International [sic] Corporation for Assigned Names and Numbers, requesting his organisation be recognised as the peak Internet body in Australia, not Mr Elz.”); *Domain Standoff*, *supra* note 84 (noting that such an application is

ter all, Professor Elz was an Australian resident and perhaps an Australian citizen. The government could have introduced a bill that would have required the redelegation. It perhaps could have imposed a fine by law or used eminent domain over the ccTLD to requisition the name and appoint its own delegate. It took none of these steps. Instead it sought ICANN's intervention in the matter.⁸⁷ Other countries have taken another route. They have asserted their power over the management of their ccTLD, and passed laws to give the assertion real teeth.⁸⁸ These steps, however, do not weaken ICANN, though they do not strengthen it either.

3. The Rebellion of the ccTLD Registries

The registries of ccTLDs relate in various ways to the governments of the countries to which they provide access, and these differences are reflected in relationships between the ccTLD registries and ICANN. A number of small countries have allowed registries, for a fee, to use their ccTLDs for commercial purposes, like gTLDs.⁸⁹ These registries act and relate

“virtually unprecedented” in that the delegate is refusing the redelegation and that the other application for redelegation involved Pitcairn Island).

87. See *ICANN's Help*, *supra* note 73 (administrators of ccTLDs who have not been “designated managers” in the database of IANA have sought ICANN's redelegation but were denied the request, except for Canada). What would prevent the government of the Ukraine from taking such steps if the registry were stationed in the Ukraine? See Julia Barton, *Ukraine's Domain in Dot-Dispute*, WIRED NEWS (June 22, 2001), at <http://www.wired.com/news/politics/0,1283,44012,00.html>.

88. Early in March 2002, the South African government proposed legislation, the Electronic Communications and Transactions Bill, which would nationalize the administration of its ccTLD “.za.” If enacted, the law would prohibit any organization from continuing its operation as a “.za” administrator. See *Bill on Internet Due Soon*, *supra* note 63; *Cyber Cops to Ensure Safe Surfing*, *supra* note 63 (noting that the bill was tabled in March 2002). The government of Ireland has also taken steps to assert its jurisdiction over the administration of its ccTLD. See Denis Kelleher, *Cybersquatters' Rights Go West Under New Laws*, IRISH TIMES, May 15, 2000, at 8 (noting that legislation would allow the Minister of Public Enterprise to control rules governing domain name registration in Ireland); Karlin Lillington, *Digital Gesture by President Makes History*, IRISH TIMES, July 11, 2000, at 16 (noting passage of legislation).

89. See, e.g., IANA, IANA REPORT ON REQUEST FOR REDELEGATION OF THE .PN TOP-LEVEL DOMAIN (2000), available at <http://www.icann.org/general/pn-report-11feb00.htm> (Pitcairn Island); ICANN Watch, *VeriSign Buzzes with*

to the system and to ICANN as registries of gTLDs do. They have signed contracts with ICANN as required, and pay registration fees. But these registries are a minuscule minority of the 240 ccTLD registries. The others, such as those serving France, Germany and the U.K., are generally the designates of the governments of those countries, and the governments assert the right to re-delegate the management of the ccTLDs to others. Generally, as between the registries and the governments this is not an issue, and the registries consider themselves as an arm of their governments to further their governments' political and social policies.

Although these registries have been paying ICANN dues that cover about a third of ICANN's budget, many have not signed ICANN's contracts. Because they are not uniform in their functions and relationships to their governments, and because ICANN does not service all registries, a standard contract does not fit all of them. The text of these contracts has been negotiated for some time, and a number of contract models have been developed both for those registries that ICANN services and those that it does not.⁹⁰ In the process, feathers have been ruffled. In one case, ICANN has written to their governments, and this letter has raised the ire of the registries because some have interpreted the language to invite a review of the registries' performance.⁹¹ In sum, ICANN's relationship with many

the .bz Biz(ness), at <http://www.icannwatch.org/article.php?sid=185> (May 31, 2001); *.NU, .NU Domain /IUS-N Mission*, at <http://www.nunames.nu/about/about.cfm> (last visited Apr. 20, 2002); The .tv Corporation, *About Us*, at http://www.tv/en-def-e9763cedc23f/en/about/about_company_overview.shtml?Hhotype=content6/20/01 (last visited Apr. 20, 2002).

90. For a draft of a contract between ICANN and ccTLD registries, see ICANN, *CENTR Draft Contract for Services*, at <http://www.icann.org/cctlds/centr-7th-draft-contract-20sep00.htm> (last visited Apr. 20, 2002). For a draft of a proposed unsponsored TLD agreement with ICANN, dated September 21, 2001, see ICANN, *Proposed Unsponsored TLD Agreement*, at <http://www.icann.org/tlds/agreements/unsponsored/registry-agmt-26apr01.htm> (Apr. 26, 2001). For a discussion draft of a ccTLD Manager-ICANN "Status Quo" Agreement, see ICANN, *Discussion Draft of ccTLD Manager-ICANN "Status-Quo" Agreement*, at <http://www.icann.org/yokohama/draft-cctld-status-quo-agreement-05jul00.htm> (July 5, 2000); William New, *Net Governance: ICANN Nears Deal on Country-Specific Domains*, NAT'L J. TECH. DAILY, Mar. 12, 2001, LEXIS, News Library, News Group File. See also *Revolt Threatens ICANN's Budget*, supra note 43.

91. See ICANN, *Discussion Draft of Letter to Governments Regarding ccTLD Managers*, at <http://www.icann.org/cctlds/draft-letter-to-govts->

of these registries has not yet been formalized, and the task is formidable.⁹²

Historically, both ICANN and the ccTLD registries have adopted a “hands off” approach towards each other’s activities. That has changed as ICANN sought to formalize its relationship with these registries — establishing controlling measures over them — and the registries demanded a greater role in ICANN and its policy decision making.⁹³ This is significant. The registries did not repudiate or question ICANN’s authority. On the contrary, they demanded a greater voice in its power structure, that is, they demanded membership on its board.⁹⁴ The latest proposed structure of ICANN might resolve the issue. ccTLDs or their governments will pay dues to ICANN. The governments will occupy a board seat, however, and that might satisfy the demand for a greater voice in ICANN’s government. ICANN’s power as an entity will then be augmented by further support and money.

4. The Three Events Demonstrate ICANN’s Increasing Power

The three events described above differ. One involves a dispute between a sovereign state and a registry of its ccTLD. The second is a dispute is between ccTLD registries, the DNSO and

12nov00.htm (Nov. 12, 2000); Mark Ward, *Name Row Threatens the Net*, BBC NEWS (Nov. 28, 2000), at http://news.bbc.co.uk/hi/english/sci/tech/newsid_1043000/1043509.stm.

92. See *Sticky Issues*, *supra* note 50; Sableman, *supra* note 51.

93. Juliana Gruenwald, *Domain Group Revolts Against ICANN*, at <http://www.zdnet.com/zdnn/stories/news/0,4586,2767690.html> (May 31, 2001); Andrew Orlovski, *Country Domain Chiefs Prefer Jaw-Jaw to War-War*, REGISTER (June 14, 2001), at <http://www.theregister.co.uk/content/6/19712.html>.

94. ICANN’s relationship to the registry of “.us” is unclear, as is the fate of the ccTLD. It is likely, however, that whoever wins the bid on this ccTLD will have to conform to ICANN’s policies. See ICANN Watch, *More on the .us Solicitation*, at <http://www.icannwatch.org/article.php?sid=208> (last visited Apr. 21, 2002). But see Brian Kahin, *Making Policy by Solicitation: The Outsourcing of .us*, at <http://icannwatch.org/essays/kahin.htm> (July 16, 2001) (suggesting that the winning contractor will determine policies and criticizing the current proposal to auction “.us”). While prior to 1999, IANA determined policy and NSI acted as a registry and performed the registration, after 1999, the policy function shifted to ICANN. NSI continued as a registry and registration became competitive, supervised by ICANN. It seems that under this plan, if ICANN is not the supervisor of the contract operator, it would be losing some of its hegemony.

ICANN. The third case represents a disagreement between ICANN and an aspiring ccTLD registry. All three events demonstrate recognition of ICANN's power to determine the existence and nature of ccTLDs, and the power to affect, at least by qualifications and imposition of fees, the identity and functions of the registries of these ccTLDs. The Australian government applied to ICANN to determine its dispute with the existing registry of its ccTLD.⁹⁵ Professor Elz may have implied ICANN's power to select or qualify registries because indirectly he based his rights on Dr. Postel's appointment rather than on the appointment by his government. The ccTLD registries felt that the DNSO, to which these registries belonged, did not represent the registries' interests. Therefore, the registries left the DNSO, but did not leave ICANN. Instead they demanded a more prominent place in its organization: a separate supporting organization and the right to appoint, select or recommend directors to its board.⁹⁶ The registries were critical of ICANN's operating practices but not of ICANN "as an organization."⁹⁷ The registries argued that there should be "no taxation without representation."⁹⁸ The use of these words is revealing. The power to tax is governmental; the right to representation is that of the citizen. It is unclear, however, whether the registries placed themselves in the position of citizens and ICANN — in the position of a government. That is because the registries viewed their payments as fees for specific services and not

95. See *ICANN's Help*, *supra* note 73.

96. See Laura Rohde, *Defections at ICANN's Support Organization*, INDUSTRY STANDARD.COM, June 4, 2001, LEXIS, News Library, News Group File [hereinafter *Defections*]; *European Domains Want ICANN's Attention*, *supra* note 50. For the language of the registries' resolution, see WorldWide Alliance of Top Level Domain Names, *Executive Summary of ccTLD Stockholm Meeting on 31 May and 1 June 2001*, at http://www.wwtld.org/meetings/ccTld/Stockholm2001/Executive_summary_01June2001.html (last visited Apr. 21, 2002). Arguably, not all registries were of the same mind. Of the over 250 registries, only thirty-one voted to make the demand and take the action. However, the others did not object nor abstain, but simply did not take part in the process. See Ward, *supra* note 91.

97. *Defections*, *supra* note 96.

98. *Id.* See also Mark Ward, *Net Groups in World Wide Wrangle*, BBC NEWS (July 4, 2000), at http://news.bbc.co.uk/hi/english/sci/tech/newsid_817000/817657.stm (stating that the registries believe that the costs levied on them stem from legal costs of ICANN's dealing with NSI, and refuse to pay for costs over which they had no control).

as financing the operations of ICANN generally. But perhaps they only meant that if they financed ICANN's operations they ought to have a say about the way the money is spent. In any event, the registries recognized ICANN as the regulator of the ccTLDs, both by explicitly mentioning their recognition and by demanding greater power in the organization.

5. The Position of the U.S. Department of Commerce

On June 25, 2001, the DOC responded to a request by Mr. William H. Bode on behalf of Atlantic Root Network, Inc. ("Atlantic"). Atlantic was concerned about ICANN's process in selecting new TLDs. The DOC stated in part:

In July 1998, the Department of Commerce made it clear that it would not participate in the selection process of new TLDs as set forth in the Statement of Policy, entitled Management of Internet Names and Addresses. . . . In the Statement of Policy, the Department recognized that the selection of new TLDs should be conducted by the private sector through a not-for-profit organization, globally representative of the Internet stakeholder community. The Department recognized ICANN as that organization in November 1998 through a Memorandum of Understanding.

We note that at its May 2001 board of directors meeting, ICANN approved the establishment of a New TLD Evaluation Process Planning Task Force (Task Force) to [sic] monitor the implementation process and to evaluate the selection process of the new TLDs. The ICANN board resolution stated that the Task Force will make recommendations to the ICANN board and the Internet community regarding the selection process. It is our understanding that the Task Force will allow public input when formulating its recommendations. We encourage you to participate in this opportunity. In a recent letter to ICANN, the Department encouraged ICANN to move forward in the selection of new TLDs in order to increase competition in the domain name space.

Again, we encourage you to direct Atlantic Root Network's concern regarding ICANN's selection process directly to ICANN.

Sincerely,
[Signed]
John F. Sopko
Acting Assistant Secretary for

Communications and Information⁹⁹

The letter speaks for itself, making it clear that the U.S. supports ICANN in this matter, and recognizes ICANN's power most explicitly. The government encouraged the complainant to apply to ICANN. It is not surprising that the only party that did not concede ICANN's power was the aspiring rejected registry.

6. The Latest Move to Restructure

The latest move of ICANN's staff to restructure demonstrates how the institution is reaching for power. The proposal would greatly minimize constraints over the board and the staff. It would eliminate nine publicly elected directors and substitute for them fewer — (five) — representatives of governments reflecting the five regions of the globe.¹⁰⁰ Thus, each of ICANN's board members will represent specific identified interests, and will be selected by these interests. Governments will presumably ensure that ICANN will be better endowed and staffed. If this proposal is put into effect and if it works, ICANN will become stronger. At the same time, if its members contain each other's claims to hegemony, its overall powers may remain in check.

IV. BOUNDARIES OF POWER

A. *Contestable Markets Theory*

The introduction to this Article describes the theory of contestable markets. ICANN's circumstances (from its first birthday to its third birthday) bring to mind this theory and help explain ICANN's evolution. In fact, the inadequacies of the theory in the markets context are less pronounced in the context of power. I assume that the stability of the Internet requires the existence of a single root. I further assume that if

99. Letter from John F. Sopko, Acting Assistant Secretary for Communications and Information, U.S. Department of Commerce, to William H. Bode, Partner, Bode & Beckman, LLP (June 25, 2001), *quoted in* ICANN Watch, *Commerce Dept: We Don't Do TLDs*, at <http://www.icannwatch.org/article.php?sid=237&mode=nested&order=0> (July 8, 2001).

100. See PRESIDENT'S REPORT, *supra* note 7.

more than one manager manages the root, the financial and social costs of the Internet would rise. The two cooks will spoil the broth. Therefore, the structure of the Internet naming and numbering system mandates a single manager — a natural monopolist. I assume further that there is no superpower that regulates ICANN. The question is whether this monopoly will result in an excessive exercise of power, similar to excessive charges that a monopolist would extort from consumers.

B. The Nature of the Market for Power

The market that is discussed here is the *market for managing the numbering and naming system*. While in the business market competitors seek rents represented mostly by money, the rents from the power of ICANN are varied. These rents include the ability of the power holder to ensure the stability of the Internet and the integrity of the naming and numbering system. The power holder can guard over the technical integrity of the system, or maintain and expand the value of its investments in the current system as registry or ISP. The power holder can control the system for political reasons or protect one's trademarks by freezing or reducing the number of additional upper-level domain names.

Potential competitors may be interested in social benefits, and the stronger they are as potential competitors, the greater is ICANN's constraint on its power to conflict with these social benefits. These self-interested goals cannot be achieved unilaterally because the Internet is dependent on the support and actions of many others with other agendas (e.g., governments, legislatures and different ISPs). They must all agree to the management's edicts. By their consent to ICANN they can achieve their own self-interested objectives, at least to an acceptable degree.¹⁰¹ It is the management power and its law-making capabilities that are the product in this market.¹⁰²

101. ICANN's power and the power of money are similar. Both are a store of value through which other objectives can be achieved. In fact, these are two different aspects of freedom and coercion. It is important to note that the *purpose* for which power is held is not the topic here. Power, like money, can be obtained voluntarily by consent from others, and usually in an exchange. Power, like money, can also be obtained from others by violence and extortion. The use of money, however, is generally more limited than the use of power. Money can be used coercively if it is necessary to obtain values (as-

The power for which there is a market in this case is of two kinds. One relates to particular actions in the exercise of management and lawmaking — “specific power.” The other is the power to take over all the managerial and lawmaking activities — “general power.” Firms that produce a number of related products can “cross-subsidize” their products and thereby block market entry to competitors that produce only one type of product. Arguably, like business corporations, ICANN can cross-subsidize one type of special power by another type of special power. For example, it can subsidize qualification requirements for other less stringent contract terms. However, many of ICANN’s potential competitors, such as governments, are also multi-product firms in this sense. They too can subsidize one special power by another. The difference between these potential competitors and ICANN is in their institutional structure. As compared to ICANN, they have limited powers outside their territories but greater power within their territories. Even ISPs have some multi-product capabilities and can cross-subsidize. Thus, ICANN’s competitors seem to be stronger than one-product business competitors.

C. The Competitors that Present a Constraining Force to the Monopolist

Under the contestable markets theory, competitors who can constrain the monopolist are those whose sunken costs are similar to the monopolist’s sunken costs. Sunken costs for a general power are the costs of establishing a broad supporting coalition to take over ICANN’s general power or at least to create a credible threat of such a possible takeover. Thus, if the members of ICANN’s current supporting coalition were dissatisfied with the existing ICANN and had sufficient power to ~~establish a different entity, they would present a formidable~~ sets) which other persons want. The person who has bread and would not part with it except through money has power over the hungry person. Yet this power is based on the possession of the bread, not the money.

102. ICANN’s power can be analogized to the power of other managers and the market for chief executive officers. They compete for the position of managers by obtaining the consent (or at least the passive non-intervention) of shareholders, nominators, existing top management, unions and perhaps others that wield power in the corporation. Or they may only receive the support of the nominators. They do, however, have competitors. Their market is small, though not a monopoly. But it may be sufficiently small to resemble a contestable market.

establish a different entity, they would present a formidable threat to ICANN's existence, and could force it to restructure or comply in other ways.

Alternatively, if a coalition of other competitors is sufficiently strong to convince the actors in the Internet infrastructure to cease following ICANN's instruction and the single root, the possibility and existence of such a coalition would deter ICANN from exercising any power in a way that would displease this coalition. In February 2002, I believed that this scenario is unlikely. Today, that may not be the case. As the management of ICANN proposed a new structure, Dr. David Farber, a respected academic who was involved in the design of the naming and numbering system, and others have raised the possibility of removing the powers of ICANN to another technical organization. In fact, the proposal would resurrect some of Dr. Postel's hegemony.¹⁰³

Another scenario that is unique to the Internet is the possible addition of new names through existing ISPs. I consider this scenario a threat of competitors of specific power, not general power. The competitors' investment or sunken costs in the market for specific power are the costs of establishing a coalition aimed at the specific power, or a credible threat to the exercise (or non-exercise) of that specific power. As in the case of the commercial markets, the market for power, in which ICANN operates, is populated by different actors with different entry costs. They may exert political power, form coalitions or offer rich revenues. Their sunken costs need not be higher than ICANN's entry costs, or may be lower, especially in the case of special powers.

The exit costs of such competitors should be close to zero if their investments can be used elsewhere. However, once a power structure is established, the very loss of the power is not a zero loss even if the coalition can continue to exist and flex its muscle, for example, by entering ICANN's power structure. The investment in creating a competitor to ICANN may be high, because the powerful interests that are potential competitors conflict, and the competitors would be successful only if they find a better way to complement their interests than the one

103. See ICANN "A Failure" Says ICANN, NEWSWIRE (VNU), Mar. 19, 2002, LEXIS, News Library, News Group File.

found by ICANN.¹⁰⁴ Otherwise, potential competitors would enter the market only if ICANN exerts a higher degree of power than they would together. If ICANN increases or extends its power, competitors may invest in entering the market to enjoy the benefits of the greater power until it will dilute by the mere existence of the competition. Then they will exit, as the exit costs are not high for them.

D. Differences Between Business and Power Markets

One difference between the business market and the power market is that potential competitors can constrain ICANN's power exercise not only by threatening to assert their own claims to power, but also by withdrawing their support of ICANN. A monopolist in the business market does not need the support of its competitors — he receives the support from the consumers. A monopolist in the power market may need that support, and ICANN needs it. Withdrawal involves no direct cost to competitors, but it may be very costly if it undermines ICANN and produces a worse alternative.¹⁰⁵

Further, while in the business market competitors threaten to offer a competing product, in the power market competitors can threaten to exert power with respect to one special “power product.” If ICANN attempts to exercise power that competitors deem to provide “higher rents,” these competitors may enter the market, but only in the area requiring low — or no — investment (they already have the power), and where exit is costless (they will exercise the power elsewhere), while the benefit from entry provides high rents. It is harder in the power market to calculate a quantifiable price in terms of power that a monopolist should “charge.” Even in the business

104. While outsiders who wish to get into the ISP and registry business and increase the number of domain names may try to form such a coalition, they will have to overcome the power of the governments and those who would oppose the extension, as well as those who would be concerned about the stability of the Internet. Thus, it may well be that those who wish to enter the field with two roots will have higher costs than those who would wish to replace ICANN with one root only.

105. ICANN may refrain from exercising its power, for example, to establish additional domain names opening the doors to new businesses. Potential competitors may form coalitions to overcome the inaction, and ICANN may take steps to stymie their efforts.

market this determination has raised a debate. In the power market one can only speculate.

E. When Competitors Will Cooperate

The contestable market theory is not helpful to predict ICANN's evolution if its competitors cooperate, and this possibility is not negligible. Presumably, cooperation among the competitors should be encouraged. It is then renamed a consensus. In fact, the proposed restructure of ICANN seems to be heading towards such a coalition and power sharing. A broad-based participation within ICANN signifying a broad-based consensus could lend ICANN legitimacy. Its monopoly power will be constrained from within, as the different interests negotiate. To this extent, ICANN may resemble a policy-making legislative body.

However, legislatures are elected. ICANN is a not-for-profit organization. The power of elected bodies is bestowed on them by the votes. Therefore, elected members must account for their actions to those who bestowed the power on them — the voters. The assets of a not-for-profit corporation are donated usually by its directors (or the directors' designates). They exercise their management power with a sense of entitlement that their donations give them. Theirs is not a legal duty to account to others; theirs is a duty to account to their conscience. This is ICANN's deepest and most serious dilemma.

V. CONCLUSION

This Article focused on balance of power and structure. It said very little about the crucial component of legitimacy. An organization that lacks clear support of law in a country, lacks a vote of a democratic body politic, lacks a theoretical following of professionals and lacks a popular trust is vulnerable. It is unclear whether political strategies and machinations will sustain it for long. What this Article discusses is another form of sustenance that does not depend on legitimacy but on raw containment of power. Such containment may not be long-term because the actions of the participants are based on self-interest rather than self-governing principles. Its power does not rest on the rule of consensus except the consensus to rule. Whether this base will be sufficient for longevity remains to be seen. On the other hand, if ICANN becomes a platform for ne-

gotiations among the interested parties, and in time facilitates the development of acceptable rules and consensus, it will have become a most impressive and unique success.

In a very insightful book, *Ruling the Waves*, Debora L. Spar suggests that significant innovations pass through four stages.¹⁰⁶ They first introduce chaos.¹⁰⁷ Next, from the chaos there emerge rules and some patterns of behavior.¹⁰⁸ Eventually, these patterns form institutions.¹⁰⁹ Finally, and surprisingly, the institutions begin to look and behave as familiar institutions serving the same purposes through and with the aid of the new technology.¹¹⁰ ICANN may be a very good test case for this prediction. The naming and numbering system has passed through a chaotic stage, emerging as ICANN with rules that are resisted in part, and evolving into an institution. The last stage of “globalization” and the Internet naming system may be grounded in the states or federations of states representing the political systems. Accountability, community values and public interest will return to their rightful position. Business and technical interests will find their voice, but it will not be the dominant voice. We may thus return to the basic form of civic organization, adding to it the Internet service with sufficient links to the rest of the world. Then we could say that there is nothing new under the sun.

106. See SPAR, *supra* note 4, at 11-22.

107. See *id.* at 11-12.

108. See *id.* at 12-15.

109. See *id.* at 15-18.

110. See *id.* at 18-22.

FAIR.COM?: AN EXAMINATION OF THE ALLEGATIONS OF SYSTEMIC UNFAIRNESS IN THE ICANN UDRP[†]

Michael Geist^{*}

“There should be a general parity between the appeal rights of complainants and domain name holders.”¹

I. INTRODUCTION

In just over two years, the Internet Corporation for Assigned Names and Numbers’ (“ICANN”) Uniform Domain Name Dispute Resolution Policy (“UDRP”)² has resolved over 4000 disputes involving almost 8000 domain names.³ With its global reach, fast turnaround and inexpensive fees, the UDRP is touted as a shining example of the potential of online alterna-

[†] The author publicly released a working draft of this Article under the same title in August 2001. This final version adds to the previous draft with updated statistical data and conclusions.

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1. ICANN, *Internet Corporation for Assigned Names and Numbers Minutes of Meeting, Board Resolution 99.83*, at <http://www.icann.org/minutes/minutes-26august99.htm> (Aug. 26, 1999).

2. ICANN, UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY (1999), at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> [hereinafter ICANN POLICY].

3. ICANN reports that as of April 11, 2002, there were 4550 case dispositions involving 7879 domain names. The total number of proceedings equaled 4936 cases involving 8495 domain names. ICANN, *Statistical Summary of Proceedings Under Uniform Domain Name Dispute Resolution Policy as of Apr. 11, 2002*, at <http://www.icann.org/udrp/proceedings-stat.htm> (last visited Apr. 21, 2002).

tive dispute resolution with supporters suggesting that it can be used as a model for other e-commerce legal disputes.⁴

Despite its substantial caseload and some positive reviews, the UDRP also has its share of critics. There are some who suggest that the system does not go far enough to protect trademark holders.⁵ The South African government, for example, has argued that the policy should better protect country names and has urged the World Intellectual Property Organization ("WIPO") to formulate amendments that might be incorporated into a revised version of the UDRP.⁶ WIPO, in fact, recently concluded a public consultation on a series of potential amendments that considered expanding the scope of the UDRP to explicitly include personal names, geographic designations and trade names.⁷

4. For example, Masanobu Katoh, Chairman of the Internet Law & Policy Forum ("ILPF") and an ICANN board member, remarked at an ILPF conference in September 2000 that:

I have extensive experience with both Japanese and the U.S. court systems, as well as Alternative Dispute Resolution Proceedings. Never, and I mean never, have I seen a dispute resolution mechanism work so well. In less than a year, over 1,000 arbitrations have been initiated under the UDRP.

In more than two thirds of those cases, there already have been a disposition. These cases have been handled quickly, inexpensively, and most important of all, fairly. Without question, the UDRP is an important model for Dispute Resolution in other e-Commerce areas.

INTERNET LAW AND POLICY FORUM, INTERNET LAW AND POLICY FORUM 2000 ANNUAL CONFERENCE 19 (2000), at <http://www.ilpf.org/events/jurisdiction2/conf00d1.pdf>.

5. Some critics have bemoaned the absence of a discovery process and the increasing sophistication of cybersquatters. See Mitchell J. Matorin & M. Boudett, *Domain Name Disputes: Cases Illustrate Limitations of ICANN Policy*, 45 BOSTON B.J. 4 (2001). Others have lamented complainants' inability to obtain damages. See M.E. Searing, *What's in a Domain Name? A Critical Analysis of the National and International Impact on Domain Name Cybersquatting*, 40 WASHBURN L.J. 110 (2000).

6. See REPUBLIC OF SOUTH AFRICA, SUBMISSION BY REPUBLIC OF SOUTH AFRICA IN RESPONSE TO WIPO2 RFC-2, available at <http://wipo2.wipo.int/process2/rfc/rfc2-comments/2000/msg00059/wipo2-submission.doc> (last visited Apr. 21, 2002).

7. See WIPO, THE RECOGNITION OF RIGHTS AND THE USE OF NAMES IN THE INTERNET DOMAIN NAME SYSTEM (2001), at <http://wipo2.wipo.int/process2/rfc/rfc3/pdf/report.pdf>.

Another vocal group of UDRP critics has also emerged, concerned that the system promotes forum shopping and is systematically biased in favor of trademark holders, who are invariably the complainants in domain name disputes.⁸ These concerns, which were expressed during the initial drafting of the UDRP,⁹ have grown louder as the policy has been put into practice and data begins to emerge.¹⁰

The right of complainants to pick which arbitration provider handles their dispute has been the target of particularly vociferous criticism.¹¹ Although ICANN initially accredited three arbitration providers in order to foster a competitive environment, many commentators anticipated that complainants would engage in forum shopping by rationally selecting arbitration providers who tended to rule in their favor. Those fears were realized almost immediately. The two ICANN-accredited

8. See MILTON MUELLER, DIGITAL CONVERGENCE CTR., ROUGH JUSTICE: AN ANALYSIS OF ICANN'S UNIFORM DISPUTE RESOLUTION POLICY (2000), at <http://dcc.syr.edu/roughjustice.htm>; Michael Geist, *WIPO Wipes Out Domain Name Rights*, GLOBE TECHNOLOGY.COM (Aug. 24, 2000), at <http://www.globetechnology.com/servlet/GAMArticleHTMLTemplate?tf=globetechnology/TGAM/EBusinessFullStory.html&cf=globetechnology/tech-config-neutral&slug=TWGEIS&date=20000824>.

9. See A. Michael Froomkin, *A Commentary on WIPO's "The Management of Internet Names and Addresses: Intellectual Property Issues,"* at <http://personal.law.miami.edu/~amf/commentary.htm> (May 19, 1999); A. Michael Froomkin, *Comments on ICANN Uniform Dispute Policy*, at <http://personal.law.miami.edu/~amf/icann-udp.htm> (Oct. 13, 1999).

10. See Marcelo Halpern & Ajay K. Mehrota, *Exploring Legal Boundaries Within Cyberspace: What Law Controls in a Global Marketplace?*, 21 U. PA. J. INT'L ECON. L. 523, 558 (2000) ("[T]he bias toward trademark owners may have far-reaching and unsettling repercussions."); A. Michael Froomkin & David Post, *Froomkin and Post Send Letter to ICANN Board*, at http://www.icannwatch.org/archive/post_froomkin_udrp_letter.htm (Jan. 26, 2000). Froomkin and Post state:

Complainant choice has the useful property of promoting price competition. Unfortunately, economic theory suggests that it also will tend to promote other types of competition, including competition among dispute resolution service providers to be perceived as being most "complainant-friendly" in order to capture all, or a disproportionate share, of the market. We consider this to be a very serious issue, as even the appearance of partiality would so taint the UDRP as to call the entire enterprise into question.

Id.

11. See Froomkin & Post, *supra* note 10.

providers with the most favorable outcomes for complainants (WIPO and the National Arbitration Forum (“NAF”)) quickly captured the lion’s share of the caseload at the expense of eResolution, the least complainant-friendly of the major ICANN-accredited providers.¹² Furthermore, forum shopping has continued to increase over time. In February 2001, for example, only three new cases were launched with eResolution, compared with 268 cases with WIPO and 143 cases with the NAF.¹³ Faced with an ever-shrinking caseload, eResolution shut down its operations in December 2001.¹⁴

Although the existence of forum shopping has become common knowledge among those involved with the UDRP, a critical question remains unanswered. While there is clearly an incentive for arbitration providers to curry favor with potential complainants in order to attract future cases, how, if at all, do they do so? The more obvious sources of provider differentiation have only occurred on a fairly small scale. For example, price competition, one clear method of distinguishing providers, has thus far been rather limited. Among the three main providers,¹⁵ the cost for a single domain, single panelist case starts

12. See MUELLER, *supra* note 8. Louis Touton, ICANN’s general counsel has also expressed concern over forum shopping, noting that: “Forum shopping is clearly a problem and if it is occurring it suggests that justice is being bought and sold.” Oscar S. Cisneros, *What to Do with Domain Disputes?*, WIRED NEWS (Nov. 13, 2000), at <http://www.wired.com/news/print/0,1294,39992,00.html>.

13. ICANN, *List of Proceedings Under Uniform Domain Name Dispute Resolution Policy*, at <http://www.icann.org/udrp/proceedings-list.htm> (last visited Apr. 21, 2002).

14. See Steven Bonisteel, *Arbitration Firm Quits Domain-Dispute Business*, NEWSBYTES (Dec. 3, 2001), at <http://www.newsbytes.com/news/01/172619.html>.

15. The Center for Public Resources (“CPR”) Institute for Dispute Resolution, which received accreditation as an ICANN dispute resolution provider in May 2000, has thus far been a non-factor in the UDRP. As of February 18, 2002, the provider had only been involved in a total of thirty-one cases. See CPR Institute for Dispute Resolution, at <http://www.cpradr.org> (last visited Apr. 21, 2002). Given the small number, the CPR data is excluded from most analysis in this Article. A fifth provider, the Asian Domain Name Dispute Resolution Centre, was approved as an ICANN accredited provider effective February 28, 2002. It had rendered no decisions as of the date data was collected for this study. *Id.*

from a low of \$950 (NAF) to a high of \$1500 (WIPO).¹⁶ When the legal costs associated with a UDRP action are factored into the equation, the difference in filing fees is relatively unimportant.

Other differences, such as panelist rosters and language capabilities are even less pronounced. Although initially there were considerable differences in panelist roster composition, prior to eResolution ceasing operations, the rosters of the three providers looked increasingly alike. WIPO's roster was once characterized primarily as being comprised of a global group of trademark attorneys and law professors,¹⁷ while the NAF's roster was described as retired American judges,¹⁸ and eResolution's roster was perceived as international law professors.¹⁹ With a growing number of panelists cross-listed with multiple providers, it is now more difficult to distinguish between provider panelist rosters.²⁰ Moreover, the NAF and eResolution have increased the international component of their panelist rosters, narrowing the gap with WIPO and improving their ability to address cases in foreign languages and with non-U.S. parties.

Marketing techniques clearly illustrate one area of differentiation between providers, with the NAF adopting a far more aggressive approach than the other providers in the marketing of its services. Unlike both WIPO and eResolution, the NAF regularly distributed press releases heralding recent decisions. The releases took on a distinctly *pro-complainant* tone in the

16. Three-member panel, single domain cases are even closer in cost. Fees start at a low of \$2500 with the NAF and increase to a high of \$3000 with WIPO. See WIPO, *Schedule of Fees Under the ICANN Policy*, at <http://arbiter.wipo.int/domains/fees/index.html> (last visited Apr. 20, 2002); National Arbitration Forum, *Code of Procedure, Appendix C: Fee Schedule*, at http://www.arb-forum.com/arbitration/NAF/Code_linked/apdx_c.htm (last visited Apr. 20, 2002); eRESOLUTION, eRESOLUTION SUPPLEMENTAL RULES ¶19 (1999), available at http://www.eresolution.com/services/dnd/p_r/supprules.htm [hereinafter eRESOLUTION RULES].

17. See Stacey H. King, *The "Law That It Deems Applicable": ICANN, Dispute Resolution, and the Problem of Cybersquatting*, 22 HASTINGS COMM. & ENT. L.J. 453, 477 (2000).

18. See Tamara Loomis, *Domain Name Disputes Get Swift Resolution Under UDRP*, 224 N.Y. L.J. 5 (2000).

19. See King, *supra* note 17, at 479.

20. For a complete list of cross-listed panelists as of July 31, 2001, see Annex A.

months prior to the August 2001 public release of a draft of this study.²¹ The author, who is on the NAF's media distribution list, received eleven press releases from May through August 2001, ten of which promoted a complainant win. Featuring headlines such as *Arbitrator Delivers Internet Order for Fingerhut*²² and *May the Registrant of magiceightball.com Keep the Domain . . . Not Likely*,²³ the releases do little to engender confidence in the neutrality of the NAF.²⁴

The providers' supplemental rules also provide a point of difference. For example, each provider takes a slightly different approach to respondents' response rights. WIPO does not provide any supplemental rules on responses. It relies instead on the *ICANN Rules for Uniform Domain Name Dispute Resolution Policy* ("ICANN Rules"), which outline that responses must be filed within twenty days²⁵ and that extensions may be granted either in exceptional cases or if the parties mutually agree to an extension.²⁶ eResolution similarly relied on the ICANN Rules for respondent submissions, but included an ad-

21. The release of a working draft of this study generated considerable interest among those involved in the ICANN UDRP process as well as with the media. See Julia Angwin, *Are Domain Panels the Hanging Judges of Cyberspace Court?*, WALL ST. J., Aug. 20, 2001, at B1; Steven Bonisteel, *Law Expert Charges Bias in Domain-Dispute Arbitrations*, NEWSBYTES, Aug. 20, 2001, 2001 WL 23417533; Patrick Brethour, *Web Arbitration Biased: Study*, GLOBE AND MAIL, Aug. 20, 2001, at B4; *Domain Disputes Don't Get Fair Hearing Says Study*, DOW JONES REUTERS BUS., Aug. 21, 2001, 2001 WL 17928390; Gwendolyn Mariano, *Web Address Disputes Deemed Unfair*, CNET NEWS.COM (Dec. 4, 2001), at <http://news.com.com/2100-1023-276607.html?legacy=cnet>; Joe Salkowski, *Big Guys Usually Win Best Addresses*, CHI. TRIB., Dec. 3, 2001, at 5.

22. Press Release, National Arbitration Forum, *Arbitrator Delivers Internet Order for Fingerhut* (May 4, 2001) (on file with Journal).

23. Press Release, National Arbitration Forum, *May the Registrant of magiceightball.com Keep the Domain . . . Not Likely* (Aug. 10, 2001) (on file with Journal).

24. See Press Release, National Arbitration Forum, *Kevin Spacey Prevails Against Usual Suspect in Domain Name Case* (May 11, 2001) (on file with Journal); Press Release, National Arbitration Forum, *Holder of Beatles Domain Names Must "Get Back"* (June 8, 2001) (on file with Journal); Press Release, National Arbitration Forum, *Skateboard Magazine Thrashes Spanish Double* (June 21, 2001) (on file with Journal).

25. ICANN, RULES FOR UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY § 5(a) (1999), available at <http://www.icann.org/udrp/udrp-rules-24oct99.htm> [hereinafter ICANN RULES].

26. *Id.* § 5(d).

ditional provision that granted a respondent five calendar days to correct any deficiencies in its submission once so notified by the provider.²⁷ The NAF, meanwhile, contains the most detailed and onerous requirements for an extension. *Restrictions Dispute Resolution for Domain Names ("RDRP") Supplemental Rules* ("NAF Supplemental Rules") paragraph 6(a) states that:

Paragraph 5(d) of the Rules provides that the Respondent may request additional time to submit a Response, or may be given additional time if the parties stipulate to an extension and the Forum approves. Any request by the Respondent for an extension or any joint request by the parties for an extension shall:

- (i) be submitted after the parties have first conferred with each other to see if they could reach an agreement concerning the requested extension;
- (ii) be submitted in writing to the Forum and the parties within the time for the Response to be submitted;
- (iii) state the exceptional circumstances warranting the request for an extension;
- (iv) state the length of the extension being requested (no more than twenty (20) additional days); and
- (v) be accompanied by an extension fee of \$100.²⁸

The NAF Supplemental Rules, which were added in May 2000, clearly place an additional burden on a respondent seeking an extension and has been characterized by some commentators as "worrisome" and "extremely biased."²⁹ At a minimum, the NAF Supplemental Rules distinguish the NAF from its competitors.

Since most of the differentiating factors are somewhat benign, the most prominent difference between providers remains case outcome. Simply put, complainants win more frequently with WIPO and the NAF than with eResolution. The author conducted a statistical analysis of all ICANN UDRP decisions through February 18, 2002, the results of which are discussed

27. ERESOLUTION RULES ¶ (7)(c)(ii)(2).

28. NATIONAL ARBITRATION FORUM, RESTRICTIONS DISPUTE RESOLUTION FOR DOMAIN NAMES ("RDRP") SUPPLEMENTAL RULES § 6(a) (2002), available at http://www.arbforum.com/domains/RDRP/RDRP_supp_Rules.rtf (last visited Apr. 20, 2002) [hereinafter NAF RULES].

29. King, *supra* note 17, at 498.

throughout the Article.³⁰ The statistical data, which has remained consistent since the introduction of the UDRP, shows that complainants win 80.6% of the time with WIPO, 83.3% of the time with the NAF, but only 61.1% of the time with eResolution.³¹ Since outcome is what matters most to complainants, they have rewarded WIPO and the NAF with an overwhelming share of the UDRP caseload. Despite the highest fees, neutral rules and low-key marketing, WIPO commands 59.2% of the UDRP caseload, compared with 34.5% for the NAF and a paltry 5.6% for eResolution.³²

With the statistical evidence leaving little doubt that forum shopping is part of the UDRP, this study takes the next step by determining whether bias may exist within the system and, if so, how it manifests itself. With differences such as fees, marketing and supplemental rules between providers transparent to all, the starting point for a deeper analysis into case outcomes must be to focus on aspects of the UDRP that are not transparent. The primary focus of this Article is therefore on panelist allocation.

Although the ICANN Rules and provider supplemental rules indicate how panelists are selected,³³ little is known about how providers determine precisely which panelists serve on what cases. Panelist allocation has become particularly important as the providers' panelist rosters have converged. As noted above, each provider's roster now features an impressive contingent of international panelists capable of addressing disputes between litigants in different languages and legal systems. Moreover, a growing number of panelists are cross-listed — that is, they are featured on the roster of more than one provider.³⁴ The multi-

30. All UDRP statistical data has been compiled by the author and reflects all decisions released as of February 18, 2002. As discussed above, the author released an earlier version of this study in August 2001 that covered all decisions as of July 7, 2001. Unless otherwise noted, this Article cites to the more updated data. See Michael Geist, *UDRPinfo.com*, at <http://www.udrpinfo.com/bjil> (last modified Mar. 2002) [hereinafter Geist-Database].

31. *Id.*

32. *Id.*

33. See ICANN RULES § 6(b)-(e).

34. As of July 31, 2001, sixty-three panelists were listed on the roster of at least two providers. See *infra* Annex A for a complete list of cross-listed panelists.

provider phenomenon was particularly common with WIPO and eResolution, where despite markedly different case outcomes, twenty-eight of the panelists were featured on both rosters as of August 2001.³⁵

The existence of multi-provider panelists complicates the bias question considerably. If each of the providers' panel rosters were distinctly different, differences in case outcomes could be attributed to the varying composition of provider panels. In such a scenario, one might expect differences in case outcomes since providers could staff their panelist rosters with the panelists most likely to deliver the desired outcomes. Since many of the same panelists decide cases for multiple providers, however, it seems unlikely that the composition of a provider's panelist roster alone would explain differences in case outcomes. Accordingly, if many of the same panelists are deciding cases for multiple providers, how is it that complainants win over 80% of the time with WIPO and NAF, and only 61% of the time with eResolution?

Following a review of over 4000 cases, the answer becomes clear. The critical issue does not rest with the roster of panelists per se, but rather with how the roster is deployed. Analysis of all UDRP cases decided as of February 18, 2002 reveals several striking trends that provide new insight into how the UDRP decision-making process functions in practice. The study finds that influence over panel composition is likely the most important controlling factor in determining case outcomes.³⁶ The data shows that when providers control who decides a case, which they do for all single panel cases, complainants win just over 83% of the time.³⁷ When provider influence over panelists diminishes — which occurs in three-member panel cases, as in these cases both the complainant and respondent choose one of the panelists as well as exercise some influence over the choice of the third member of the panel —

35. Geist-Database, *supra* note 30.

36. This should not be taken to suggest that the merits of the case are unimportant. The strength of the bad faith claim and complainant rights in the domain are, of course, crucial. The data suggests, however, that panelist allocation is a significant determinant of case outcome, particularly for those cases that are not clear-cut cases of cybersquatting or do not fall squarely within a strict interpretation of the UDRP.

37. Geist-Database, *supra* note 30.

the complainant winning percentage drops to 60%.³⁸ Moreover, this differential remains consistent when examining both uncontested cases, frequently referred to as defaults, as well as contested cases.³⁹

In addition to the dramatic difference in outcome between single and three-member panels, the study finds that case allocation appears to be heavily biased toward ensuring that a majority of cases are steered toward complainant-friendly panelists. Most troubling is data which suggests that, despite claims of impartial random case allocation as well as a large roster of 135 panelists,⁴⁰ the majority of the NAF single panel cases are actually assigned to little more than a handful of panelists.⁴¹ As of February 18, 2002, an astonishing 56% of all NAF single panel cases — 778 of 1379 — were decided by only six people.⁴² The complainant winning percentage in those cases was an astounding 95%.⁴³ Although default cases constitute a portion of those cases, the skewed caseload is unique to the NAF with neither WIPO nor eResolution presenting a similar caseload imbalance.⁴⁴

The NAF is not alone on the issue of caseload allocation bias, as WIPO's track record also raises concerns. A review of all WIPO panelists who have decided five or more single panel cases (and thus have a track record) finds that there are 121 such panelists, all of whom have a complainant win percentage that is higher than at least two respondent-friendly WIPO panelists who have never been selected for sole panelist duty.⁴⁵ In fact, all of the 121 panelists have a complainant winning percentage of 50% or better.⁴⁶

38. *Id.*

39. *Id.*

40. E-mail from Timothy Cole, Assistant Director of Arbitration, National Arbitration Forum, to Michael Geist, Associate Professor of Law, University of Ottawa, Faculty of Law (July 19, 2001, 08:29:51 EST) (on file with Journal) [hereinafter Cole E-mail].

41. Geist-Database, *supra* note 30.

42. *Id.*

43. *Id.*

44. The six busiest WIPO panelists constitute 17.1% of that provider's single panel caseload; the six busiest eResolution panelists constitute 20.5% of that provider's single panel caseload. *Id.*

45. *Id.*

46. *Id.*

Following a brief historical review of the development of the UDRP and an introduction to its rules in Part II of this Article, Part III examines these numbers in greater detail. The Article concludes in Part IV with recommendations for changes to the UDRP designed to instill greater fairness and confidence in the process.

II. THE DEVELOPMENT OF THE UDRP

The Internet Assigned Numbers Authority (“IANA”), headed by the late Jon Postel, initially managed the Domain Name System (“DNS”).⁴⁷ Growing demand from businesses and individuals, however, together with the increasing administrative burden of maintaining the system resulted in changes to the system in 1992.⁴⁸ That year, the United States government granted Network Solutions, Inc. (“NSI”) the exclusive right to register three generic top-level domain names (“TLDs”) — “.com,” “.net” and “.org.”⁴⁹ As part of the registration right, which was initially scheduled to last five years, NSI was charged with managerial responsibility for the maintenance of the DNS.⁵⁰

With the first agreement set to expire in 1997, the U.S. Department of Commerce (“DOC”) granted NSI a two-year extension.⁵¹ In return, NSI agreed to create a Shared Registry System that would allow competing companies to register “.com,” “.org” and “.net” domains.⁵² Moreover, once a competitive registrar system was established, NSI agreed to apply for accreditation through the same process as other registrars, thereby

47. See King, *supra* note 17, at 459-60.

48. See *id.* at 460.

49. See *id.*

50. See Kevin Eng, *Breaking Through the Looking Glass: An Analysis of Trademark Rights in Domain Names Across Top Level Domains*, 6 B.U. J. SCI. & TECH. L. 7 (2000).

51. See Courtney Macavinta, *Deal Extends NSI Domain Control*, CNET NEWS.COM (Oct. 6, 1998), at <http://news.com.com/2100-1023-216367.html>; Network Solutions, Inc., *US Government Extends Network Solutions Cooperative Agreement Through September 2000*, at http://corporate.verisign.com/news/1998/pr_19981006.html (last visited Apr. 20, 2002).

52. See Luke A. Walker, *ICANN's Uniform Domain Name Dispute Resolution Policy*, 15 BERKELEY TECH. L.J. 289, 293-94 (2000).

relinquishing its competitive advantage over the domain name registry market.⁵³

NSI did not have a formal dispute resolution mechanism to address domain name disputes when it took over the registry responsibilities from IANA.⁵⁴ As disputes began to mount, NSI recognized the need for a dispute resolution policy.⁵⁵ Early efforts, however, became a source of frustration for trademark owners and domain name registrants alike since the dispute policies focused primarily on protecting NSI from liability.⁵⁶

Prior to 1995, NSI maintained that domain name registrants bore the responsibility for ensuring that their domain name did not infringe upon any trademark rights, but did not otherwise provide a formal dispute resolution policy.⁵⁷ NSI released its first formal domain name dispute policy in July 1995.⁵⁸ It allowed trademark owners to challenge the registration of a domain name by presenting NSI with evidence that the domain name infringed upon their trademark rights.⁵⁹ The policy required the trademark holder to present evidence that their trademark was identical to the registered domain name.⁶⁰ The domain name registrant could successfully defend their right to the domain by presenting a valid trademark of its own.⁶¹ If the trademark holder was unable to produce evidence of a registered trademark, NSI would allow the domain name registrant to retain the domain for ninety days as part of a transition process.⁶² If the domain name registrant refused to accept an alternative domain, NSI would place the domain "on hold" so that neither party could use it.⁶³

53. *Id.* at 294.

54. *Id.* at 295.

55. *See Eng, supra* note 50, at 8.

56. *Id.* at 8-9.

57. *See Walker, supra* note 52, at 295.

58. *See* NETWORK SOLUTIONS, INC., DOMAIN DISPUTE RESOLUTION POLICY STATEMENT (July 1995).

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.*

NSI issued its first amendment to the policy in November 1995.⁶⁴ The revised policy addressed situations where the domain name registration pre-dated the issuance of a trademark.⁶⁵ In those situations, the domain name registrant was entitled to keep the domain, provided that it agreed to post a bond to indemnify NSI from any liability.⁶⁶

NSI revised its dispute resolution policy yet again in September 1996.⁶⁷ The new policy required trademark owners to notify domain name registrants of their legal claim before commencing a dispute resolution action.⁶⁸ Moreover, the policy established limitations on the domain name registrants' defense of a competing trademark by requiring that the trademark be issued prior to the commencement of the dispute resolution action.⁶⁹ This latter change was needed after domain name registrants began obtaining quick trademark registrations from Tunisia.⁷⁰

NSI revised its dispute resolution policy for the final time in February 1998.⁷¹ That revision allowed trademark owners to immediately place domain names "on hold" pending the resolution of the dispute.⁷² The domain name registrant, if challenged, could prevent the domain name from being placed on hold by submitting evidence which established that the domain name was registered before the complainant's trademark or the domain name holder owned a competing trademark in the domain name.⁷³

Predictably, neither domain name registrants nor trademark holders were satisfied with the NSI policies. Domain name registrants argued that the policy was too broad, placing them

64. See NETWORK SOLUTIONS, INC., DOMAIN DISPUTE RESOLUTION POLICY STATEMENT (Nov. 1995).

65. See *id.*

66. See *id.*

67. See NETWORK SOLUTIONS, INC., DOMAIN DISPUTE RESOLUTION POLICY STATEMENT (1996).

68. See *id.*

69. See *id.*

70. See G. Peter Albert, *Eminent Domain Names: The Struggle to Gain Control of the Internet Domain Name System*, 16 J. MARSHALL J. COMPUTER & INFO. L. 781, 790 (1998).

71. See NETWORK SOLUTIONS, INC., DOMAIN DISPUTE RESOLUTION POLICY STATEMENT (1998).

72. Walker, *supra* note 52, at 295.

73. *Id.*

at a disadvantage because trademark owners could invoke the dispute resolution policy and place a domain name on hold, even if the domain name registration was for products or services bearing no similarity to the trademark use.⁷⁴ Trademark owners, meanwhile, found the policy lacking because it could only be invoked where a domain name was identical to a registered trademark and because placing the domain on hold was not an effective remedy where a domain name transfer was desired.⁷⁵

As the number of domain name lawsuits mushroomed and concerns over the stability of the DNS increased, the National Telecommunications and Information Administration ("NTIA"), an agency of the DOC, issued a draft discussion paper in February 1998, titled Improvement of Technical Management of Internet Names and Addresses ("Green Paper").⁷⁶ The Green Paper's stated goals were privatization and international participation in the DNS as well as increased competition in registry services.⁷⁷ Following the Green Paper consultation, the NTIA published a final report, the Management of Internet Names and Addresses ("White Paper") in June 1998.⁷⁸ A key concern expressed during the Green Paper public consultations was the fear that the U.S. would seek to impose U.S. trademark law on the Internet for the resolution of domain name disputes.⁷⁹

In an attempt to alleviate this concern, the White Paper committed to a WIPO-led international process to develop recommendations for a uniform approach to resolving trademark and domain name disputes.⁸⁰ A balanced process that included both trademark holders and members of the Internet community was envisioned. The White Paper was also careful to establish limitations on the new dispute resolution mechanism by specifying that it was only to address cybersquatting and/or

74. *Id.* at 296.

75. *Id.*

76. Improvement of Technical Management of Internet Names and Addresses, 63 Fed. Reg. 8826 (Feb. 20, 1998) (to be codified at 15 C.F.R. ch. 23).

77. *Id.* at 8826.

78. Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (June 10, 1998).

79. *See id.* at 31,746-47.

80. *See id.* at 31,747.

cyberpiracy disputes.⁸¹ Other domain name disputes, such as competing trademark interests, were left to be settled by the courts.⁸²

Pursuant to the White Paper recommendation, the U.S. government approved the creation of ICANN, granting the new non-profit corporation the responsibility for centralizing the management of the DNS.⁸³ Meanwhile, in consultation with WIPO, the beginning of a new dispute resolution policy began to emerge. WIPO published its first Request for Comments ("RFC-1") in July 1998,⁸⁴ followed soon after by two further Requests ("RFC-2"⁸⁵ and "RFC-3"⁸⁶) calling for public consultation. Public comments raised numerous criticisms, including: (1) the perception that the proposed policy was unfairly biased in favor of trademark holders; (2) the policy's broad scope; (3) the mandatory nature of the dispute resolution proceedings; (4) the policy's impact on freedom of expression; (5) the expense of the process; (6) the impact of the proceedings on subsequent litigation; (7) choice of law issues; (8) treatment of famous marks; (9) procedural concerns; and (10) the possibility that future technological change might render the proposed policy obsolete.⁸⁷ WIPO released its final report, *The Management of Internet Names and Addresses: Intellectual Property Issues* ("Final Report") in April 1999, addressing some, though not all, of the concerns.⁸⁸

Using the WIPO Final Report and the White Paper as its guide, ICANN moved quickly to draft a policy to address cyber-

81. *See id.*

82. *See id.*

83. *See id.* at 31,749.

84. WIPO, *WIPO RFC-1: Request for Comments on Terms of Reference, Procedures and Timetable for the WIPO Internet Domain Name Process*, at <http://wipo2.wipo.int/process1/rfc/1/index.html> (last visited Apr. 20, 2002).

85. WIPO, *WIPO RFC-2: Request for Comments on Issues Addressed in the Second WIPO Internet Domain Name Process*, at <http://wipo2.wipo.int/process1/rfc/2/index.htm> (last visited Apr. 20, 2002).

86. WIPO, *Interim Report of the WIPO Internet Domain Name Process*, at <http://wipo2.wipo.int/process1/rfc/3/index.htm> (last visited Apr. 20, 2002).

87. *See* WIPO, *First WIPO Process-Request for Comments*, at <http://wipo2.wipo.int/process1/rfc/index.html> (last visited Apr. 20, 2002).

88. *See* WIPO, *THE MANAGEMENT OF INTERNET NAMES AND ADDRESSES: INTELLECTUAL PROPERTY ISSUES* (1999), available at <http://wipo2.wipo.int/process1/report/doc/report.doc>. For a summary of the recommendations found in the Final Report, see King, *supra* note 17, at 464-67.

squatting and related issues.⁸⁹ Only months after the completion of the WIPO consultation, the ICANN board of directors approved the UDRP and its accompanying rules on October 24, 1999.⁹⁰ The UDRP differs from the NSI dispute resolution policy in three material respects: (1) trademark owners are no longer able to place a hold on domain names during the dispute-resolution process; (2) trademark owners can only invoke a UDRP proceeding if the domain name was registered and is being used in bad faith; and (3) the administrative dispute resolution proceeding is mandatory for all domain name registrants.⁹¹

Registrants are required to submit to a mandatory administrative proceeding conducted by a dispute resolution service provider, approved by ICANN, where a complainant asserts that:

(1) the domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights;

(2) the registrant has no rights or legitimate interests in respect to the domain name; and

(3) the domain name has been registered and is being used in bad faith.⁹²

To succeed, the complainant must prove that all three elements are present.⁹³ The policy also provides some guidance as to what constitutes evidence of bad faith registration and use of a domain name.⁹⁴ They include:

(1) circumstances indicating that the registrant has acquired the domain name primarily for the purpose of selling, renting or otherwise transferring it to the complainant who is the owner of the trademark or service mark, or to a competitor of the complainant, for valuable consideration in excess of "out-of-pocket" costs directly related to the domain name;⁹⁵

89. See King, *supra* note 17, at 468.

90. See ICANN, *Internet Corporation for Assigned Names and Numbers Minutes of Meeting, Board Resolution 99.81*, at <http://www.icann.org/minutes/minutes-26aug99.htm> (Aug. 26, 1999).

91. See Walker, *supra* note 52, at 299-300.

92. See ICANN POLICY § 4(a)(i)-(iii).

93. *Id.*

94. See *id.* § 4(b).

95. *Id.* § (i).

(2) the registrant has registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that a pattern of such conduct is evidenced;⁹⁶

(3) the domain name has been registered primarily for the purpose of disrupting the business of a competitor;⁹⁷ or

(4) the domain name has been registered primarily for commercial gain through creating a likelihood of confusion.⁹⁸

A respondent can demonstrate rights or a legitimate interest in a domain name by presenting evidence that:

(1) before any notice to the respondent of the dispute, the respondent used or prepared to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services;

(2) the respondent has been commonly known by the domain name, even if no trademark or service mark rights have been acquired; and

(3) legitimate non-commercial or fair use of the domain name, without intent to divert consumers or tarnish the trademark or service mark for commercial gain, is being made.⁹⁹

A proceeding commences when the complainant submits a complaint to an ICANN approved dispute resolution service provider of its choosing. The complainant must specify whether the dispute is to be decided by a single-member or three-member panel.¹⁰⁰ The fee for a single-member panel is paid entirely by the complainant.¹⁰¹ In the event that a three-member panel is requested, the complainant must submit names and contacts of three candidates from a roster of any ICANN-approved provider to serve as one of the panelists.¹⁰² Following a compliance review, the provider forwards the complaint to the respondent.¹⁰³ The respondent must submit a response to the provider within twenty days of commencement of

96. *Id.* § 4(b)(ii).

97. *Id.* § 4(b)(iii).

98. ICANN POLICY § 4(b)(iv).

99. *Id.* § 4(c)(i)-(iii).

100. *See* ICANN RULES § 3(b)(iv).

101. *Id.* § 6(b).

102. *Id.* § 4(b)(iv).

103. *Id.* § 4(a).

the proceeding.¹⁰⁴ If no response is submitted, the panel decides the case based solely upon the evidence furnished by the complainant.¹⁰⁵

Even if the complainant has requested a single-member panel, the respondent has the right to have the dispute decided by a three-member panel instead.¹⁰⁶ If either the complainant or respondent requests a three-member panel, the respondent must provide the names and contact details of three candidates to serve as one of the panelists, which can also be drawn from any ICANN-approved provider's roster.¹⁰⁷ Where the complainant has elected to have the dispute decided by a single-member panel and the respondent requests a three-member panel, the respondent is required to pay one-half of the applicable fee for a three-member panel.¹⁰⁸

If the complainant requests a single-member panel and the respondent does not object, the provider alone assigns a single panelist from its roster to the case.¹⁰⁹ If a three-member panel is selected, one panelist each is selected from the list of candidates provided by both the complainant and the respondent.¹¹⁰ The third panelist is appointed by the provider from a list of five candidates submitted by the provider to the parties, the selection from among the five being "made in a manner that reasonably balances the preferences of both Parties."¹¹¹ The typical approach is to allow each party to strike out up to two names from the list of five.¹¹² ICANN policy provides that panelists should be "impartial and independent" and must disclose any circumstances that may give rise to justifiable doubt as to the panelist's impartiality or independence.¹¹³ Parties must be treated with equality by the panel, with each party accorded a fair opportunity to present its case.¹¹⁴

104. *Id.* § 5(a).

105. *Id.* § 5(e).

106. *See* ICANN RULES § 5(b)(iv).

107. *Id.* § 5(b)(v).

108. *Id.* § 5(c).

109. *Id.* § 6(b).

110. *Id.* § 6(e).

111. *Id.*

112. Cole E-mail, *supra* note 40.

113. *See* ICANN RULES § 7.

114. *Id.* § 10(b).

III. THE STUDY

A. Methodology and Basic Findings

The study was initially designed to analyze all UDRP decisions through early July 2001, though it was updated prior to publication to include all UDRP decisions as of February 18, 2002. It commenced in early May 2001 with a case-by-case review of each decision. Each case was reviewed for contested domain name, proceeding number, panelist, arbitration provider, commencement date, panel type (single or three-member panel) and outcome. Since the current search functionality supported by ICANN and the arbitration providers is limited to identifying particular cases, the data was culled directly from the cases themselves, which are posted on each provider's website.¹¹⁵ In the update to the study, the author re-examined all cases to verify the accuracy of the initial data, collected information related to contested and uncontested cases, as well as added all new decisions since July 2001.

The data was initially entered into a Microsoft Excel spreadsheet, grouped by panelist and later transferred onto a web-based database. Data analysis was conducted on a range of issues including overall provider and panelist outcomes, single versus three-member panel outcomes, panelist caseload, multi-provider panelist outcomes and data on panelists serving only on three-member panels.

Basic information on the initial round of collected data included:

- Four thousand three hundred and thirty-two cases were examined, of which 2565 were WIPO cases, 1493 were NAF cases, 244 were eResolution cases and thirty-one were CPR cases.¹¹⁶

115. See WIPO, at <http://arbiter.wipo.int/domains/cases/index.html> (last visited Apr. 20, 2002); National Arbitration Forum, at <http://www.arbforum.com/domains/decisions.asp> (last visited Apr. 20, 2002); eResolution, at <http://www.eresolution.ca/services/dnd/decisions.htm> (last visited Apr. 20, 2002).

116. Michael Geist, Microsoft Excel Spreadsheet (2001) (unpublished research data, on file with Journal) [hereinafter Geist-Spreadsheet].

- Three thousand eight hundred and eighty-one (89.6%) of the cases were single panel cases; 417 (9.6%) featured three-member panels.¹¹⁷
- Thirty-one panelists participated exclusively in three-member panels. These panelists were involved in ninety-eight cases.¹¹⁸

B. Key Findings

1. The Dramatic Effect of Three-Member Panels

Although little attention was accorded to the possible differences between single and three-member panels during the public discussion of the UDRP, by far the most important finding of this study is the dramatic difference in case outcomes in single versus three-member panel cases. Single panel cases constitute just over 90% of the total UDRP caseload, while three-member panels comprise the remaining 10%, with 417 such cases decided as of February 18, 2002.¹¹⁹ Across all providers, complainants win 83% of the time where only a single panelist determines the outcome, compared with 58% when a three-member panel is responsible for the decision.¹²⁰

Three-member panel complainant win percentages remain roughly consistent across all providers. The NAF has the largest differential (37.4%) between single and three-member panels; complainants win 86% of the time in single-member panel cases but only 48.6% of the time in three-member panel cases.¹²¹ The WIPO differential is somewhat smaller at 20.8% (complainant single-member panel win percentage of 82.9%; three-member panel win percentage of 62.1%), while eResolution, unsurprisingly, has the smallest differential of 11.8% (complainant single-member panel win percentage of 61.8%; three-member panel win percentage of 50%).¹²²

One might expect that the difference between a single and three-member panel is attributable to substantively stronger respondent cases in three-member panel cases. That theory

117. *Id.*

118. *Id.*

119. Geist-Database, *supra* note 30.

120. *Id.*

121. *Id.*

122. *Id.*

would posit that respondents are willing to incur the additional expense involved in a three-member panel in order to protect their domain name when they have a particularly strong argument. Moreover, unlike single-member panel cases, where respondents sometimes fail to submit a response and thus further decrease their chances of retaining their domain name, one might expect that three-member panel cases would rarely involve a non-response or “default.”¹²³

The data conclusively finds otherwise, however. Contrary to expectations, complainants actually request three-member panels more frequently than do respondents. Although the data is somewhat incomplete since some decisions do not disclose which party requested the three-member panel, the author was able to ascertain this information for 238 of the 292 three-member panel cases as of July 7, 2001.¹²⁴ In that sample, complainants requested the three-member panel 62% of the time (148 of 238 cases).¹²⁵

Furthermore, three-member panel cases actually do include a significant number of defaults. Of the 417 three-member panel cases as of February 18, 2002, the respondent failed to provide a response 24.5% of the time (102 of 417).¹²⁶ Complainants won all but one of those cases.¹²⁷ In fact, when default cases are excluded from the three-member panel case outcomes, complainants win only 46% of the time.¹²⁸

Interestingly, differences between single and three-member panels remain very consistent for both contested and uncontested cases. When the sample size is limited solely to contested (non-default) cases, complainants win 68% of the time (1109 of 1639) in single panel cases, but only 46% of the time

123. In fact, the NAF Supplemental Rules explicitly encourage avoiding three-member panel default cases by providing complainants with the option of switching to a single panelist where the respondent fails to submit a response. The NAF provides the complainant with a refund of the difference in panel cost. See NAF RULES § 9(c).

124. Geist-Spreadsheet, *supra* note 116. Data was obtained from the cases where available. Where unavailable, panelists were asked directly if they could recall which party requested the three-member panel. The author thanks the many panelists who responded to the request.

125. *Id.*

126. Geist-Database, *supra* note 30.

127. *Id.*

128. *Id.*

(forty-five of 314) in three-member panel cases, a 22% differential that compares quite favorably to the 25% differential when all cases are considered.¹²⁹ In fact, the differential between providers remains the same as well with complainants winning 70% and 69% of the time in single-member panel cases with WIPO (636 of 914) and NAF (400 of 579) respectively, but only 50% of the time with eResolution (sixty-five of 131).¹³⁰ The three-member panel outcomes by provider show complainants winning 48% of contested cases with WIPO (ninety-eight of 203), 42% with NAF (thirty-nine of ninety-three), and 47% with eResolution (seven of fifteen).¹³¹

This data points to two conclusions. First, the inclusion of uncontested cases is largely immaterial in determining provider differences in complainant win percentages (19 to 22% difference between WIPO/NAF and eResolution when all cases are included; 19 to 20% difference between WIPO/NAF and eResolution for non-default cases only). Second, the inclusion of defaults does not affect the difference in complainant win percentage when comparing single and three-member panels (23% difference for all cases; 22% difference for non-default cases).

This data begs several questions. First, if strength of respondent case and uncontested cases are not the reason behind the single versus three-member panel outcome differential, why the dramatic difference? Second, what motivates complainants to select the three-member panel option, when the data suggests that single-member panels rule overwhelmingly in their favor?

A partial answer to both questions may well be the number of inconsistent, wrongly decided and poorly reasoned UDRP decisions. While every adjudicative system will have its share of bad decisions, the UDRP has come under heavy criticism for inconsistent decisions,¹³² decisions lacking virtually any rea-

129. *Id.*

130. *Id.*

131. *Id.*

132. *Compare, e.g.,* Guerlain S.A. v. HI Investments, WIPO Arbitration and Mediation Center, Case No. D2000-0494 (2000) (Glas, Arb.), available at <http://www.arbiter.wipo.int/domains/decisions/html/2000/d2000-0494.html> (dispute over the buyguerlain.com domain), with Sporoptic Pouilloux S.A. v. William H. Wilson, WIPO Arbitration and Mediation Center, Case No. D2000-0265 (2000), (Introvigne, Arb.), available at

soning¹³³ and decisions that have clearly misinterpreted the UDRP.¹³⁴ Inconsistent and poorly reasoned decisions diminish both respondent and complainant confidence in the system. Respondents are concerned by the over 80% complainant success rate and may see the entire system as unfair. Complainants, while unquestionably pleased with an over 80% likelihood of winning, may still be unhappy, particularly if they have a strong case since they may fear that the single panelist assigned to their case may be the one that misinterprets the policy. The UDRP is therefore perceived by some complainants to be a gamble with very good odds. While that may be fine for some complainants, for those with cases that they believe are unquestionably instances of bad faith cybersquatting, it may be a gamble they are unwilling to take. Both respondents and complainants therefore turn to the three-member panel as a method of hedging against bias and bad decisions.

At least three factors contribute to the greater confidence in the three-member panel. First, this panel configuration eliminates the possibility that a single panelist may simply misinterpret the UDRP and render the wrong decision. Second, the three-member panel forces panelists to more carefully consider their decisions by justifying it before their counterparts on the panel. For example, at least one well-known panelist, who has participated in several three-member panel cases, advised the

<http://www.arbiter.wipo.int/domains/decisions/html/2000/d2000-0265.html>. Although WIPO panelists decided both cases with similar facts, the outcomes were markedly different as *buyguerlain.com* was transferred to the complainant, while the registrant retained the rights to *buyvuarnetsunglasses.com*.

133. See, e.g., *Rockport Boat Line, Ltd. v. Gananoque Boat Line, Ltd.*, National Arbitration Forum, Forum File No. FA0004000094653 (2000) (Karem, Arb.), available at <http://www.arbforum.com/domains/decisions/94653.htm> (dispute over the *rockportboatline.com* domain). Rockport brought the action against Gananoque Boat Line, the domain name registrant and its competitor across the river. In a peculiar decision, not only did the panelist rule in favor of the registrant and refuse to transfer the domain, but did so without providing much analytical reasoning. See *id.*

134. See, e.g., *Reg Vardy Plc v. David Wilkinson*, WIPO Arbitration and Mediation Center, Case No. D2001-0593 (2001) (Thorne, Arb.), available at <http://www.arbiter.wipo.int/domains/decisions/html/2001/d2001-0593.html> (dispute over the *reg-varidy.com* domain). The WIPO panelist openly admitted that the case did not meet with the requirements needed for transfer, yet proceeded to transfer to the domain notwithstanding that admission. See *id.*

author that he successfully persuaded his fellow panelists to change their votes on more than one occasion.

Third, and most importantly, the three-member panel completely alters the panelist selection process. In a single-member panel case, the arbitration provider is exclusively responsible for allocating the case to a panelist.¹³⁵ Conversely, in a three-member panel case, the arbitration provider wields comparatively little influence over the selection process. Both the complainant and respondent are typically allowed to select one of the three panel members by submitting a list of three or five acceptable candidates from which the provider will select one.¹³⁶ The provider selects the third member of the panel, but only after it has provided both the complainant and respondent with the opportunity to indicate which panelist it prefers.¹³⁷

Furthermore, the roster of available panelists changes dramatically in a three-member panel. Unlike a single-member panel case, in which the provider selects a single panelist from amongst its roster, the complainant and respondent are under no such limitation in a three-member panel case. In those cases, the ICANN Rules allow parties to nominate any panelist from any ICANN-accredited provider's roster.¹³⁸ This rule more than doubles the number of available panelists and ensures that both parties can seek out panelists they view as favorable to their case without regard to the provider.

Although the benefit of broadening the panelist field was apparent to many, the importance of removing much of the provider's responsibility for case allocation was less apparent since all providers maintain that case allocation occurs on a random basis. If that were the case, panelist selection would not be a matter for concern. A close examination of the data suggests, however, that single panelist selection may be anything but random.

2. Suggestions of Bias Within UDRP Caseload Allocation

As noted above, the UDRP Rules refer only briefly to the issue of single-member panel selection. Article 6(b) specifies that

135. See ICANN RULES § 6(b).

136. *Id.* § 6(e).

137. *Id.*

138. *Id.* § 6(d).

providers shall select a panelist from their roster with the cost to be paid entirely by the complainant.¹³⁹ The providers' supplemental rules similarly include scant information on the issue, with most focused on the three-member panel selection process.¹⁴⁰ Neither WIPO nor the NAF provide any additional rules on single panelist selections. Alone among the three major providers, the *eResolution Supplemental Rules* provide that "[w]hen appointing a Panelist, the Clerk's office shall take into account the Panelist's nationality, place of residence and any links he or she may have with the Parties' countries of origin."¹⁴¹ In correspondence with the author, an eResolution representative confirmed that where the complainant and respondent reside in different jurisdictions, eResolution endeavors to assign a panelist from a neutral third country.¹⁴²

Examining information that can be easily extracted from UDRP case search facilities maintained by ICANN and the providers are also of little help in shedding light into panelist allocation. The current search functionality is very limited, with the database searchable primarily by case name. Moreover, culling information directly from the cases is time-consuming since UDRP decisions are not consistently reported.

The lack of transparency on issues such as panelist allocation is particularly worrisome since the data suggests that there is a significant difference in outcome when panelists are allocated exclusively by the provider in a single-member panelist case and when both parties influence the composition of the panel,

139. *Id.* § 6(b).

140. See NAF RULES § 9; ERESOLUTION RULES ¶ 8; WIPO, at www.wipo.int/index.html.en (last visited Apr. 20, 2002).

141. ERESOLUTION RULES § 8(i).

142. E-mail from Joëlle Thibault, Vice President, Professional Services, eResolution, to Michael Geist, Associate Professor, University of Ottawa, Faculty of Law (Aug. 1, 2001, 09:19:08 EST) (on file with Journal) [hereinafter Thibault E-mail]. A review of eResolution's case allocation confirms that this is the typical practice. Through July 7, 2001, there were sixty eResolution single panel cases involving parties from different jurisdictions. In fifty-five of those cases, the single panelist was a resident of neither the complainant's nor the respondent's jurisdiction. Although not explicitly provided in its rules, it would appear that a similar policy is followed by WIPO. A review of its caseload of single-member panel cases involving parties from different jurisdictions yielded 784 cases, of which 736 involved a single panelist who was not a resident of either the complainant's or the respondent's jurisdiction.

as in a three-member panelist case.¹⁴³ Furthermore, with a growing number of panelists cross-listed on two or more provider rosters, differences in outcomes between providers cannot be easily attributed to the different composition of the provider rosters.

A review of the 3881 single-member panel cases as of February 18, 2002 indicates that single panel cases may not be allocated in an entirely random manner.¹⁴⁴ Most disturbing are the case allocation trends at the NAF. Of the NAF's 1379 single-member panel cases, only six panelists decided an astonishing 56.4% (778 of 1379) of the cases.¹⁴⁵ The sheer number of cases assigned to only six people alone is surprising. The 778 cases represent 20% of the entire UDRP single panelist caseload.¹⁴⁶

The NAF caseload allocation data is particularly noteworthy since it stands in stark contrast to the other providers, whose numbers are nearly identical. The six busiest single-member panelists at WIPO account for 17.1% of the WIPO single panelist caseload, while the six busiest single panel panelists at eResolution account for 20.5% of their total caseload.¹⁴⁷ Although WIPO's overall caseload is considerably larger than the NAF's, the raw numbers still indicate a significant difference. The 17.1% caseload at WIPO represents a total of 385 cases, just under half of the NAF total of 778.¹⁴⁸

More troubling than the NAF caseload data alone is the fact that complainants have won 95.1% of those cases.¹⁴⁹ This figure is remarkably higher than virtually any other point of comparison, including overall complainant winning percentage or complainant winning percentage by provider. Moreover, when contrasted with 46% complainant win rate in NAF three-member panel cases, the impact of provider panelist selection becomes glaringly apparent.

143. Geist-Database, *supra* note 30.

144. *Id.*

145. *Id.* The six panelists, in order of caseload, are: James A. Carmody, Carolyn Marks Johnson, James P. Buchele, Ralph Yachnin, Harold Kalina and John J. Upchurch. *Id.*

146. *Id.*

147. *Id.*

148. Geist-Database, *supra* note 30. With its smaller caseload, the comparable eResolution total is only forty-seven cases.

149. *Id.*

The large number of default cases decided by NAF's six busiest panelists might admittedly be partially responsible for skewing the complainant win percentage upward. Default cases, do not, however, explain the failure to randomly allocate caseload because the vast majority of the NAF panelists hear default cases. Since the majority of the NAF panelists are willing to decide default cases, random case allocation would suggest that the caseloads should be distributed more evenly. Moreover, the default track records of some of NAF's busiest panelists might lead observers to conclude that the ICANN UDRP has reversed the traditional maxim of innocent until proven guilty. The Honorable Carolyn Marks Johnson, James P. Buchele and Harold Kalina have *never* ruled in favor of a respondent in a default case, with complainants winning 324 of 324 cases between the three panelists.¹⁵⁰ Not far behind sit Ralph Yachnin and John J. Upchurch, who have a combined complainant win record in default cases of 184 in 187 cases.¹⁵¹

The NAF caseload data is not the only example of UDRP panel selection bias. A second source of data is a review of which panelists have never been selected for single panel duty. There are thirty-one such panelists, who have participated in at least one UDRP case, but never as a single panelist.¹⁵² Nearly 60% of the panelists (eighteen of thirty-one) have only participated in one UDRP case and therefore have no track record.¹⁵³ WIPO's panelist roster contains two panelists who stand out, however.

G. Gervaise Davis III, a California attorney, and Professor Milton Mueller of Syracuse University, the author of the UDRP study, *Rough Justice: An Analysis of ICANN's Dispute Resolution Policy*,¹⁵⁴ have together participated in a total of forty cases, yet neither has ever participated as a sole panelist.¹⁵⁵ That Davis and Mueller would be popular among respondents seeking a panelist for a three-member panel comes as little

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. MUELLER, *supra* note 8.

155. Professor A. Michael Froomkin, a well-known ICANN critic, has also participated in twelve UDRP cases, though never as a single panelist. Professor Froomkin was featured on the eResolution panelist roster.

surprise. The complainant has won only nine of the twenty-four cases in which Davis has appeared as a panelist.¹⁵⁶ Similarly, the complainant has won only four of the sixteen cases in which Mueller has appeared as a panelist.¹⁵⁷

Given their records, it seems unlikely that a complainant would select either panelist if given a choice. Assuming random caseload allocation, however, it also seems unlikely that among the 2565 WIPO single panel cases, neither Davis nor Mueller's name would surface even once. In fact, a review of all WIPO panelists that have decided five or more single-member panel cases (and thus have a track record) provides further evidence that this omission is not mere happenstance. There have been 121 panelists selected by WIPO five or more times to decide single-member panel cases — all 121 panelists have a complainant win percentage that is higher than that of Davis or Mueller and that is at least 50%.¹⁵⁸

IV. UDRP REFORM RECOMMENDATIONS

A. Mandatory Three-Member Panels

Calls for reform to the UDRP have been voiced since its inception. Concerns regarding forum shopping have cast doubt on the fairness of the process. A plethora of inconsistent and clearly incorrect decisions have left both trademark holders and domain name registrants alike uncomfortable with the uncertainty of the process. Add to these concerns the suggestion of provider bias in the determination of who decides what case.

Professor Mueller raised several possibilities for reform in *Rough Justice*, including random selection of panelists, the development of an appellate process and a greater tie between provider and registrar.¹⁵⁹ Random selection was seen as problematic since it might eliminate a competitive provider environment and leave ICANN with a much larger dispute resolution regulatory function than is presently the case.¹⁶⁰ Although the appellate process might reduce the number of bad decisions, Mueller points out that it is also likely to delay the reso-

156. Geist-Database, *supra* note 30.

157. *Id.*

158. *Id.*

159. See MUELLER, *supra* note 8, at pt. 4.

160. See *id.*

lution of domain name disputes and render the process more like global law than a form of alternative dispute resolution.¹⁶¹

Professor Mueller ultimately favored a registrar selection process, in which registrars would contract with one or more accredited dispute resolution providers to handle all the disputes raised by their registrations.¹⁶² Under this system, the complainant would no longer select the provider, yet a competitive provider system would remain in place.¹⁶³ Alternative suggestions have included a new ICANN accreditation scheme that would accredit panelists rather than providers,¹⁶⁴ the use of juries to resolve disputes¹⁶⁵ and respondent selection of provider.¹⁶⁶

This Article suggests that although each of these proposals for reform may have a positive effect on the problematic aspects of the UDRP, they ultimately will not address the root of the problem. Rather than focusing on provider selection as a means of solving the forum shopping issue, ICANN must turn its attention to panelist selection. If providers continue to maintain exclusive and unchecked authority over the selection of panelists in 90% of all UDRP cases, no reforms to the rules or how a provider is selected will remove the potential for bias in panelist allocation. The author submits that the solution to the forum shopping issue, and with it the concerns about bias and inconsistency within the UDRP, is surprisingly simple — all contested UDRP actions should involve three-member panels. Establishing the three-member panel as the default would remove most provider influence over panelist selection and ensure better quality decisions by forcing panelists to justify their reasoning to their colleagues on the panel. As with the current system, both parties would play a role in selecting one panelist, who may be part of any ICANN-accredited provider's roster,

161. *See id.*

162. *See id.*

163. *See id.*

164. *See* John Berryhill, *The UDRP Provides Disputable Resolution Incentives*, at http://www.icannwatch.org/archive/udrp_and_incentives.htm (Apr. 4, 2000).

165. *See* D. G. Post, *Juries and the UDRP*, at http://www.icannwatch.org/archive/juries_and_the_udrp.htm (Sept. 6, 2000).

166. *See* Rose Communications, S.L., *Domain Name Dispute Procedure and Related Issues*, at <http://www.rose.es/udrpenglish.htm> (May 2001).

while the provider would select the third panelist from among a list that both parties have reviewed and accepted.

The dramatic difference in single versus three-member panel outcomes should not be viewed as shifting the balance toward domain name registrants, but rather as shifting the balance toward greater fairness. Although analysts have argued over what the *right* complainant win percentage ought to be, the 60% complainant win rate in three-member panels indicates that the best considered decisions place the percentage much lower than the current overall rate of 82%.¹⁶⁷

Unlike the current system, the complainant would be required to cover the full cost of the three-member panel. Although this requirement will double the cost of a UDRP action for many complainants, the cost will remain low in comparison with traditional litigation. Moreover, the fact that complainants already select a three-member panel more frequently than do respondents indicates that concern over the quality of decisions is currently an issue for both trademark holders and domain name registrants. Provider caseloads also indicate that complainants are relatively cost-insensitive since WIPO, the most expensive of the three main providers, enjoys a commanding 59% share of all UDRP cases.¹⁶⁸

One further method of reducing complainant costs would be to combine the mandatory three-member panel rule for contested cases with the NAF Supplemental Rule on respondent defaults.¹⁶⁹ That rule allows a complainant to move from a three-member panel to a single panelist where the respondent fails to provide a response.¹⁷⁰ In doing so, the complainant is refunded the difference in cost between a single-member and three-member panel.¹⁷¹ Adopting that supplemental rule would allow complainants to reduce their costs during default cases, while maintaining the benefits of three-member panels for contested cases.

Forcing complainants to shoulder the full cost of a three-member panel should not be regarded as providing respondents with a free ride. The costs inherent in launching or defending

167. See Geist-Database, *supra* note 30.

168. *Id.*

169. See NAF RULES § 9(c).

170. *Id.* § (i).

171. *Id.* § 9(c)(iv).

a UDRP action extend well beyond the provider fees. Legal and administrative costs can be several times as much as the provider fee, and the current rules do not contain any provision for costs. Accordingly, defending a UDRP action remains an expensive proposition for all registrants, even if the requirement to contribute to the cost of a three-member panel is eliminated.

Interestingly, this approach has met with approval at the country code TLD level. In November 2001, the Canadian Internet Registration Authority ("CIRA"), which administers the ".ca" domain, approved the Canadian Domain Name Resolution Policy ("CDRP").¹⁷² Although the CDRP is modeled after the ICANN UDRP, it differs in several material respects. Most important for the current purposes, the *CIRA Domain Name Dispute Resolution Rules*, which govern the CDRP, provide that all contested cases will be decided by three-member panels to be paid for by the complainant.¹⁷³ Where the respondent fails to respond, the complainant has the option of requesting a less costly one-person panel.¹⁷⁴

B. Caseload Minimums and Maximums

Several additional smaller reforms may prove effective in conjunction with the adoption of the three-member panel as the standard approach. The establishment of caseload minimums and maximums would help ensure that this study's findings — huge caseloads assigned to a small number of panelists as well as the failure to select some panelists for dispute resolution duty — are eliminated.

If all contested UDRP cases featured three-member panels, chosen, by and large, by the complainant and respondent, providers would be unable to ensure that panelists met either caseload minimums or maximums. However, providers will still play a role in naming the panel's third panelist as well as in respondent default cases that revert to a single panelist.

172. See CIRA, at <http://www.cira.ca/en/home.html> (last visited Apr. 20, 2002). In the interests of full disclosure, it should be noted that the author is an elected member of CIRA's board of directors.

173. CIRA, CIRA DOMAIN NAME DISPUTE RESOLUTION RULES ¶ 6.4 (2001), available at http://www.cira.ca/officialdoc/96.rules_final_November_29_2001_en.pdf.

174. *Id.* ¶ 6.5.

Accordingly, it would be beneficial to create new limits that ensure that all panelists are afforded the opportunity to preside over a roughly equivalent number of cases and that no panelist gets *too many* cases. The minimum cases would likely be expressed by a raw number, perhaps no less than three cases per year. The maximum caseload would likely be expressed as a percentage, perhaps no more than 3% of a provider's total caseload. Establishing these caseload minimums and maximums would reduce provider influence over panelist selection, increase the assurance of random case allocation and enhance the public perception of the UDRP's fairness.

C. New Quality Control Mechanisms

Although eResolution did not publicize the fact on its website, it engaged in an annual quality control review of its panelists.¹⁷⁵ In 2000, ten panelists were removed from its roster due to quality control problems such as unreasonable delays in the release of decisions or failures to abide by the ICANN Rules.¹⁷⁶ Similar quality control mechanisms should become standard at all ICANN-accredited providers. Complainants and respondents alike will agree that the quality of individual panelists varies greatly. While this is not unexpected, all providers should play an active role in seeking to ensure that only the best panelists participate in the UDRP. The annual reviews should be conducted in public, with solicitations of comments from the public and the public release of those persons removed from each provider's roster.

D. Greater Transparency

One of the greatest challenges in conducting this study was the lack of readily available data. Although all UDRP cases are posted and freely available, case reports vary in quality since there is no standard approach. Moreover, the current search functionality on both the ICANN and provider sites lack the functionality necessary to search by panelist and panel type — two critical considerations. As a result of this shortcoming, the author intends to post the data collected during

175. See Thibault E-mail, *supra* note 142.

176. *Id.*

this study on a publicly available website.¹⁷⁷ In addition, the UDRP Publishing Protocol Project, hosted by Cornell Law School, plans to support the development of greater reporting standards.¹⁷⁸ ICANN, in conjunction with the providers, should make the availability of greater and more useful UDRP data a priority. Increased transparency in the entire process, from panelist selection to decision-making process, will only enhance public confidence in the system.

V. CONCLUSION

The Domain Name Supporting Organization Names Council engaged in a study of the ICANN UDRP, though the future of that study was in doubt as of April 2002, due to an initiative to reform ICANN's governance structure.¹⁷⁹ Part II of this Article, which reviewed the development of a domain name dispute resolution policy dating back to the initial NSI policies in the mid-1990's, illustrates that policies have changed with surprising regularity as practical experience identifies the need for reform.¹⁸⁰ ICANN must not shy away from reforming the domain name dispute resolution policy yet again.

This study provides compelling evidence that forum shopping has become an integral part of the UDRP and that the system may indeed be biased in favor of trademark holders. Both WIPO and the NAF, the two dominant ICANN-accredited arbitration providers, feature case allocation data that suggests that the panelist selection process is not random. Rather, it appears to be heavily biased toward ensuring that a majority of cases are steered toward complainant-friendly panelists. Moreover, the data shows that there is a correlation between

177. See Geist-Database, *supra* note 30.

178. See Cornell Law School, *Index of /udrp*, at <http://udrp.law.cornell.edu/udrp> (last visited Apr. 20, 2002).

179. See Domain Name Supporting Organization of ICANN, *UDRP Review and Evaluation, Terms of Reference*, at <http://www.dns0.org/dns0/notes/2001.NC-tor-UDRP-Review-Evaluation.v1.html> (amended with the NC motion voted on Aug. 11, 2001) (last visited Apr. 20, 2002).

180. See A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 58-59 (2000) ("NSI's control over the mechanics of registration allowed it to, and perhaps even operationally required it to, make decisions that had policy implications. The most controversial of these was undoubtedly NSI's frequently amended 'dispute policy.'").

provider panelist selection and case outcome. When providers control who decides a case, as they do for all single panel cases, complainants win just over 83% of the time.¹⁸¹ As provider influence over panelists diminishes, as occurs in three-member panel cases, the complainant winning percentage drops to 60%.¹⁸²

The solution to the forum shopping and bias issues may be relatively simple — the adoption of the three-member panel as the default approach. When combined with protective measures such as caseload minimums and maximums, transparent quality control mechanisms and greater accountability through standardized disclosure, the reforms would succeed in instilling greater confidence and fairness in the UDRP.

181. Geist-Database, *supra* note 30.

182. *Id.*

ANNEX A

PANELISTS LISTED WITH MORE THAN ONE PROVIDER

(As of July 31, 2001)

	PANELIST	NAF	eRes	CPR	WIPO
1.	Bansal, Ashwanie Kumar	Yes	–	–	Yes
2.	Bernstein, David H.	Yes	–	Yes	Yes
3.	Bianchi, Roberto A.	Yes	–	–	Yes
4.	Bridgeman, James Jude	Yes	Yes	–	Yes
5.	Carson, Ross	–	Yes	–	Yes
6.	Chiasson, Edward C.	Yes	Yes	Yes	Yes
7.	Christie, Andrew	–	Yes	–	Yes
8.	Creel, Thomas L.	–	–	Yes	Yes
9.	DeCicco, Paul Michael	Yes	Yes	–	Yes
10.	Diaz, Hon. Nelson A.	Yes	–	Yes	–
11.	Doi, Teruo	–	Yes	–	Yes
12.	Donahey, M. Scott	Yes	Yes	Yes	Yes
13.	Elliott, Clive Lincoln	Yes	–	–	Yes
14.	Fashler, Robert A.	Yes	Yes	–	Yes
15.	Gabay, Mayer	Yes	–	–	Yes
16.	Gulliksson, Jonas	Yes	–	–	Yes
17.	Haviland, Dana	–	Yes	–	Yes
18.	Hill, Richard	Yes	Yes	–	Yes
19.	Hudis, Jonathan	Yes	–	–	Yes
20.	Introvigne, Dr. Massimo	Yes	–	–	Yes
21.	Iteanu, Olivier	Yes	–	–	Yes
22.	Jayaram, Hariram	Yes	–	–	Yes
23.	Kaufman, Jeffrey H.	Yes	–	–	Yes
24.	Kim, Young	Yes	–	–	Yes
25.	Knopf, Howard P.	–	Yes	–	Yes
26.	Kyle, Rodney C.	Yes	Yes	–	–
27.	Lametti, David	–	Yes	–	Yes
28.	Le Stanc, Christian	Yes	–	–	Yes
29.	Lee, Moon Sung	Yes	–	–	Yes
30.	Leger, Jacques A.	Yes	Yes	–	Yes
31.	Leonardos, Gabriel	Yes	Yes	–	Yes

	PANELIST	NAF	eRes	CPR	WIPO
	Francisco				
32.	Li, Yong	Yes	Yes	–	Yes
33.	Limbury, Alan Lawrence	Yes	Yes	–	Yes
34.	Lisman, Natasha C.	–	Yes	–	Yes
35.	Lowry, Houston Putnam	Yes	Yes	–	–
36.	Machado, Eduardo Maga lhaes	Yes	–	–	Yes
37.	Mason, Paul E.	–	Yes	–	Yes
38.	Methvin, Gaynell C.	–	–	Yes	Yes
39.	Michaelson, Peter L.	Yes	Yes	Yes	Yes
40.	Mille, Antonio	–	Yes	–	Yes
41.	Ophir, Michael	Yes	–	–	Yes
42.	Osborne, Dawn	Yes	Yes	–	Yes
43.	Perritt, Henry	–	Yes	–	Yes
44.	Pimenta, Luiz Edgard Montaury	Yes	–	–	Yes
45.	Plant, David	–	–	Yes	Yes
46.	Richard, Hugues G.	Yes	Yes	–	Yes
47.	Samuels, Jeffrey M.	Yes	–	–	Yes
48.	Schanda, Reinhard	Yes	–	–	Yes
49.	Sellers, Sandra A.	–	Yes	Yes	–
50.	Semuyaba, Justine	Yes	Yes	–	Yes
51.	Singh, Maninder	Yes	–	–	Yes
52.	Sol Muntanola, Mario A.	Yes	–	–	Yes
53.	Swinson, John V.	–	Yes	–	Yes
54.	Szamosi, Dr. Katalin	Yes	–	–	Yes
55.	Thompson, Roderick M.	–	–	Yes	Yes
56.	Triana, Fernando	Yes	–	–	Yes
57.	Turner, Jonathan DC	–	Yes	–	Yes
58.	Ulmer, Nicolas Courtland	Yes	–	–	Yes
59.	Upchurch, Hon. John J.	Yes	–	Yes	–
60.	Wallace, Anne M.	Yes	Yes	–	–
61.	Wallberg, Knud	Yes	–	–	Yes
62.	Weinstein, Jordan	–	Yes	–	Yes
63.	Woo, Jisuk	–	Yes	–	Yes

KEYNOTE ADDRESS TRANSCRIPT

REED E. HUNDT*

REED HUNDT: Thank you all for inviting me. This is a return engagement, which I never have. But I know so much about my classmate Dean Joan Wexler that if there is anyone here who would like an office assignment or something like that, I can help. But I do honor what she's doing here, and I'm sorry I haven't been able to visit with her.

This is the most grandiose title that I was able to think of: "The Rule of Telecom Law in the 21st Century." I was thinking of saying "in the next millennium," but I think the century will do. So I thought this would take about twenty minutes to cover.

Your Professor Paul Schwartz is the best reviewer of my book, the only really good reviewer, that I had with this book that had a very tiny circulation. Sales have been flagging. So I thought that I would take plenty of time to pay attention to my book here.

It ought to be assigned, everywhere in the world. I just got an e-mail from my publisher who asked if I would agree that it could be translated into Japanese for \$100 due to the strength of the dollar vis-à-vis the yen. But that's okay, I said yes. And then I got an e-mail from the translator in Japan. The Internet is really great, but I'm a little worried about the way this book is going to come across. The translator e-mailed the following: "What exactly is the Federal Communications Commission? Is it a business and can you buy its stock?" The answer is, in a manner of speaking — that is the story of the book. Anyhow, we're not going to re-translate the Japanese back to the English, if any of you do want to assign this book in its original beginnings, you can still get copies from the remainderman.

* Senior Advisor, McKinsey & Co., Inc.; Chairman, Federal Communications Commission (1993-1997). Mr. Hundt is the author of the recently released book *You Say You Want a Revolution: A Story of Information Age Politics* (2000).

I left the FCC at the end of 1997 and like Rip Van Winkle, I just went to sleep, and I woke up here today, and the NASDAQ is up and the Dow is up and there doesn't seem to be anything to worry about. And yet everyone is overcome by misery with respect to both of these indices. In the beginning of the year 2000, the telecom sector of the American economy began to drop. It actually played a very big role in dragging down the S&P 500, just as the information sector and telecom in particular within that sector pushed it up in the previous two years.

There's nothing about this story that has made anyone happy. I've been on the boards of five companies that have gone bankrupt or closed their doors in this time period. They were all start-ups, they all had very interesting ideas, and they all ran out of money. As mentioned, I am fortunate to be on the board of Intel, which during the worst year for semi-conductors in history, made \$1 billion in profit. If you're very, very big and you have tremendous scale, you can cope. But if you're not so big and you haven't achieved economies of scale, you can't cope. This is a very simple thing to say that has the merit of being true about the telecom sector: many of the companies that have collapsed had never gotten to the economies of scale necessary to run their businesses.

Here is an obituary list for the sector. There are twenty-two companies on it. I knew most of the CEO's of these companies. They raised in debt and equity totaling \$95 billion — that's actual dollars received in the company — and in these cases they spent all that money. At the peak of the market, these companies collectively had a \$260 billion market cap. That means that they were worth almost as much as the incumbent former monopolists in telecom. Not quite as much, but in the same order of magnitude.

The view was that the attackers were going to be able to build the networks with very, very low costs, much lower than the incumbents; they were going to be able to take market share hand-over-fist; they were the new wave of innovators and they were going to replace the old — and now all the money's gone. Some other things have happened in this time period. Some people made money. In the time period from the beginning of the 1990's to the beginning of this decade, American households sold on a net basis, \$1 trillion of stock. That's a lot of cashing out by American households, and that is one of the reasons why the consumer sector has fought so valiantly

against the downturn and why our recession on a macro basis hasn't been that significant. All that cash has created a tremendous reservoir of consumer spending which you're continuing to see be tapped.

Now, of course, the paper wealth in these households has greatly declined. You heard Alan Greenspan making that point, worrying about the negative wealth effect, this week. The question raised is whether our regulatory policies in the United States, which we have fought for on the global level all through the 1990's, were wrong. Have they led to this boom and this bust? Did they precipitate the bubble? Were we at the FCC really the [Dutch] Tulip Commission? That is the question that is presented. I don't think that it does any good to pretend the question is not bouncing around.

Yesterday I got back from Poland, where I was trying to sell my book the previous three days. It hasn't been translated into Polish yet either, and based on my remarks I don't think it's going to be. The big question in Poland was this: Were they, because they didn't adopt these reforms, lucky? Have they had their scalp creased by a bullet? Are they warned now that they should retain regulations that promote the Polish telephone monopoly? Was that really the lesson to be learned from all this history?

This discussion in Poland led to still another discussion, which is the most important discussion in Poland and many of the Eastern European countries. What do they do about the fact that they have, plus or minus a few points, about 20% unemployment? If you graduate from school today in one of the former communist bloc countries, your odds of getting a decent job are maybe 50/50. There are no jobs in the manufacturing sector for these folks. Poland either becomes a service economy fairly quickly, or in the long run they won't have a competitive economy at all. [Charts presented].

So this chart is about fundamental demand. What this chart says is that consumers have paid more money and devoted a greater percent of their wallets, to communications services steadily through the 1990's.

And what have they bought? They've bought things that didn't previously exist to be bought. They've bought a widespread variety of wireless services, narrowband Internet access that you dial up to, at around fifty kilobytes a second. They've bought broadband, one and a half megabits a second. They

bought vertical services, the batch of extra line items on your bill that in fact practically doubles the average telephone bill in the United States. People are paying more for more. That's why this is a growth sector. That's why we're a successful service economy.

This underlying demand is continuing at a staggering rate. Cable TV is an industry that was built under the United States decision that it would be lawful to have monopolies — to achieve economies of scale. But the cable growth is essentially correlated to the GDP, which is not bad, but not eye-popping. However, when you look at the new services driven by the Internet, and the use of the existing networks through the new technologies that are associated with the Internet, the growth rates are prodigious. After the Twin Towers were attacked, you may have read, there were 1.2 billion instant messages sent within the AOL community alone that very day. Five or six per person in the United States. IM is a service that didn't exist a handful of years previously.

In the thirty-eight years after the telephone began to be deployed in the 1890's, 10% penetration was achieved. Cable TV took thirty years for 10% penetration under the monopoly paradigm. By contrast, narrowband is the fastest growing communications service in history. In two years, 10% of the United States had adopted the Internet.

There's one fundamental reason. The regulatory policy of the United States was to create the lowest input costs for Internet service providers of any country in the world by a factor of ten to 100. Let's say that same thing another way, because it's so incredibly important. We consciously decided in the United States to have Internet service providers be able to borrow the existing networks at very, very, very low costs. By regulation, we obliged the proprietors of those networks — the telephone companies for the most part — to sell on a wholesale basis the use of their network to Internet service providers at a very low incremental cost.

The result was that almost overnight 5000 Internet service providers sprung into being in the United States. One of them was called AOL. There was a tremendous winnowing process that went on here. But by and large, this huge industry, growing like Kudzu vines, shrinking like Darwin might have imagined, created massive penetration. In the exact same time pe-

riod, the regulators in Asia, particularly Japan, made the exact *opposite* decisions and produced the opposite results.

It cost 100 times more in Japan to be an Internet service provider, in the early years of the Net, than it did the United States. And ten times more in Europe. That's the reason why in Japan, Internet household penetration, as of six months ago I think, was under 10%. It's about 56% in the United States. First, if you've read about NTT Docomo, the wireless company, sending all these different messages, remember it's nine kilobytes a seconds. That's one-sixth of what narrowband access is in the United States. And second, it is popular because you don't get the Internet in many places except through that technology in Japan. The reason is that the parent company, the existing telephone company, charges so much to ISPs that comparatively few thrive.

In the U.S. we purposely created a new mass medium called the Internet. That's the reason the Internet is in English. It didn't start out that everybody said this Net is going to be in English. That is what I started out with in my book, if I haven't mentioned my book lately.

Broadband is the second fastest growing communications service in history. The United States has more broadband users, the last time I looked, than in all the other developed countries added together. Our percentage is lower than South Korea, which has adopted the American narrowband policies to broadband, meaning they built the facilities and obliged that they be made available at almost no cost to any broadband provider. They lowered the input cost and created a competitive market so that the output at the retail level is very, very low, and they have 45% household penetration for broadband as a result of that.

Do regulatory policies matter? They are one of the top two most important considerations, the other being the capital markets. And that's always been true. This is what we've learned in the last few years. We've learned that when you talk about communications services you should talk about four different demographic groups: big businesses, small businesses, mobile or wireless users, and then household residents. What we've learned is that each of these "buckets" actually calls for a different set of services. There's intense competition for some of these services in some of these areas, and in other areas there isn't.

So we've gotten smarter about understanding the business. The corollary is that there ought to be a different regulatory policy for each of these groups, which we did not recognize as a country a few years ago, and that isn't the way the law is written. When you talk about the future you need to look into the world of opportunity. What we've learned is that our legal and regulatory policies ought to be shaped around the future, not about the past. We ought not to have this spate of regulation and judicial decisions that reflect and help cause stock market decline. We ought to have decisions about what is the right paradigm to approach all of the stuff that hasn't yet been done.

About 70% of households in Europe lack Internet access — 45% in the U.S. And 56% of U.S. consumers don't have a cell phone yet. These are the services that have yet to be sold. If you do a demographic analysis, you see that unless there are ways for the services to be priced at lower levels, or to have more value per dollar, we're not going to increase penetration. There's no question that the Internet is going to shape the future. I just want to point this out. What wireless LAN and free high-speed data means is that in about three years every PC is going to have embedded in it — at a cost of about a penny to you the consumer — a chip that is going to mean that if we ever go in a room where someone has installed (talk about bad branding) an "802.11 hub site," then you are automatically going to be on the Internet.

This is what it means. Within three years everybody walking around with a PC, every time they go to Starbucks, they're going to be automatically on the Internet. They probably aren't going to be paying for it. It'll probably be in the price of the cup of coffee. That means that the mobile telephone industry that you know today isn't going to be the mobile telephone industry of three years from now. They're either going to adapt to this change or not. But if we're talking about regulation and law, what should they do in Poland, what should we do differently here, then the number one thing that I've learned in the last several years is this: You have to have a vision about where technology is going and you have to have a point of view about whether you want regulation, to try to stop it (a hopeless effort), or try to embrace it in some way, in a manner consistent with the national interest.

For example, maybe the right thing to do is to have innovative, constructive technologies not just for the sake of change —

although, maybe that is a sufficient reason — but for the different reason which is they're more efficient, they produce more services at a lower price, they produce higher productivity gains and they create a wealthier economy. If you don't have a wealthier economy, you can't talk about education and health care, social security, and military defense.

So in Poland, they're talking about the telephone company, and I was very struck by the following that one of my McKinsey colleagues shared with these folks: China was so committed to catching up in the 1990's, that they built one Bell-telephone-company-size phone network every year for the decade. Every single year. And now they have millions of telephone lines that they believe are stranded assets, that no one is ever going to use efficiently. They built yesterday's technology. They didn't build to what, in fact, is the overtaking technology, which is wireless phones, and they absolutely did not build an Internet network.

So this is what happens when the *state* decides either to close a particular monopoly or establish regulatory protection; or alternatively just to make the investment decisions itself. That's a staggering amount of money perhaps wasted in a relatively poor economy like China's. Is this one of the reasons why China Telecom hasn't yet gone public? Perhaps they can't figure out how to describe themselves to investors in some way that makes them look like they have the right business model.

Of course efficiency is a terrible thing because look at what can happen. Over sixteen years, long distance prices dropped gradually due to the introduction of a modest amount of competition by regulators. But on the private version of the Internet, where there's never been any price regulation of long haul data transmission, the drop in price was huge over a short period of time. So when you read about a Global Crossing going bankrupt, behind that there is a price drop of 90% in five months.

If you're a trader of bandwidth, like somebody in Houston, you'd say, "Well, if I could figure out how to trade this and catch those peaks, I could make a lot of money as a trader." But what if you're actually in the business of building one of these networks? In February you decide to spend \$100, on the assumption that you're going to get your money back over time, and you find out by May that you've got to cut your revenue line by 92%. We had fourteen long haul data networks built in

the United States in a few years. We will end up probably with two, maybe three that will survive bankruptcy.

Our government can make its contribution to the uncertainties of business and to the fundamental problems of change that technology drives. [Chart presented]. This is a chart that shows the biggest single mistake ever made by any government in the history of communications regulation. This is a chart that shows the effect of the auctions of 3G Spectrum in Europe. This is a cash flow chart. This is break even up here. They started off by selling off by auction licenses at such a high price and transferred so much cash so quickly in the auction sale, that if you look at what it will cost to build the system and where you will have to get in terms of cash flow to have operational break even, the bottom line is that these systems can't make money. The governments sold the spectrum at such a high price that they immediately put out of business any 3G industry in Europe. They happened to sell it to their national carriers, who are fixed wire based companies, and that's why all of them are now struggling to keep away from bankruptcy.

That's a heck of thing for a government to do, just in one decision, to be able to cripple an entire industry across a continent. At the FCC, it took many decisions for us to do that much harm, even according to our critics. You cannot have a policy unless business is willing to spend money to make the policy go. Investment is gas in the tank. For those who are business historians or legal historians, telecom is going to feel like anything that you've ever read or learned about railroads in the United States in the 1870's, 1880's time period.

So now we'll talk about "the sunny side of the street." This is supposed to be in the future — this is the theory of the future, the theory advanced by the tech community — it is not a theory that to my knowledge is embraced anywhere in government at the present time. We have a government right now in Washington that for ideological reasons doesn't wish to be involved in the thought partnership with technology that existed through the 1990's. Argentina and telecom both are too far South for this Administration to pay attention to.

They may be right. They may be wrong. But the cool theory is that more megabytes a second; faster, more efficient networks — specifically IP networks — will lead to the greater use, measured by message instructions per second, reflecting the power of your computer chip, which in turn will produce

new services. This means you will be able to do things with your computer that right now you don't do. You can download movies, you can make movies.

Some people here have read Larry Lessig's new book, *The Future of Ideas*. The beginning of that book, the *McGuffin* that gets the whole plot going, is a discussion about how everybody ought to be able to make their own movies with their computer. One of the reasons that they can't is because they don't have enough megabytes per second of bandwidth to challenge the PC's computing power. The new services then would be driven by this increase in the MBPS, and you would have a good virtuous cycle. Instead of the vectors being negative, they would all be positive, and the economy would be growing again. I'm going to briefly summarize the confession part — as to the mistakes that were made in the United States, in large part by me. But if you could just not pass this information on, I would be grateful.

In the residential market, there was no chance of having real competition in the fixed wire residential market without rebalancing — meaning without deregulating prices and allowing telephone companies to charge some price above cost. We didn't do that. We didn't have any rebalancing. It wasn't in the 1996 Telecommunications Act. The power to set these retail prices is with the states. The states have taken the FCC to the Supreme Court repeatedly over the jurisdictional question of whether the FCC could preempt the states on this. The states have fought every jurisdictional issue since the telephone was invented. And typically they've won because our Court, particularly in the last couple of decades, has been quite sensitive to the claim of states on jurisdictional issues. One of the results is a lack of adequate power to have a national paradigm. Therefore, there is not enough competition in the residential market of fixed wire.

But there's wireless. That's intermodal competition. The FCC did create a competitive market in wireless, with many, many carriers. It's the most competitive market in the world, and competition caused the price of wireless to drop very, very radically so that it began to substitute for wire. This was our way to pull the rug out from under those states that were trying to restrict, through their pricing mechanisms, competition in the residential market. And this technique will work in the fullness of time.

In the small to medium size enterprise market, unbundled elements work. If you allow . . . a new entrant to borrow the existing company's network, the retail prices are high enough so that the new entrant can afford to compete. But Darwin rules. This is a case of survival of the fittest. There were 300 competitive local telephone companies started in the wake of the 1996 Telecommunications Act. There was never any rational chance for more than about four or five big ones to survive.

Actually, I knew that. Nobody asked me, but I did know that. The reason I knew that is that a bunch of economists told me, and nobody was more surprised than those of us at the FCC to see the private equity community fund 300 CLECs. None of us to this day have been able to figure out what we could have done about it. But one idea is perhaps, contrary to any notion of free market behavior — we should have licensed the number of competitive companies so as to stop private investors from losing their minds and their money.

The problem now is that there's definitely a possibility that baby and bath water will be thrown out at the same time. Henry Ford was one of about 200 people who were inventing automobiles at the turn of the century, and it was his second company (the first went bankrupt) that became Ford Motor Company. This is an extremely common pattern of innovation. There were, I think, 1000 companies in the late 19th century that sold sweet, dark colored syrupy drinks, and one became Coca-Cola and the others eventually did not exist. Whether we're willing to have this Darwinian struggle work its way out in telecom depends on whether the investors in Manhattan are treated in a way that investors have historically been treated, or whether this sector is exempt by government from the harsh downside of competition.

Among large businesses, the buyers get the best prices in America that they get in any country in the world. It may surprise you to know that in the large business data market, AT&T and WorldCom collectively have about 80% market share. They've held it through thick and thin, because it's so difficult to service large businesses and because there is buying power.

Among global users, we have the best story in the world. When you free these markets to competition, you discover unmet demand, and it's a fantastic story. The nicest thing that I

learned in Poland is that, with competition, in five years they've completely eliminated the waiting lists for telephones, which used to be between five and ten years long. That's true on a global basis. In Brazil there's no longer a waiting list. It used to be one to two years. In none of the former communist bloc countries is there a significant waiting list. It used to be that you had to be the son of a high-ranking party official to get a telephone. And all that is gone. The unmet demand is being met, and new demand is being discovered.

Efficient universal service works, we've learned this in the last few years. What this means is that if you give the subsidy money to the buyer, and let the buyer do the shopping, you get a really great system.

Here's an example. The 1996 Telecommunications Act said we needed to have the Internet in every classroom in the United States. The previous paradigm was to tell the service provider — the telephone company — to put this in the classroom. Under the 1996 Telecommunications Act, by contrast, the paradigm was give the money to the school district on a matching grant basis, and then let the school district shop for the Internet. Ninety percent of the school districts in the United States found money for the matching grant within two years, and we went from 9% penetration in classrooms — not just in the buildings, but in classrooms — to 84% penetration, in four years. It's the most successful universal service story in any kind of state-mandated activity that I can think of.

And last but not least, we learned that everything is about market structure. In wireless, we've had a competitive market structure and produced great results. The market of long haul data was divided among fourteen carriers. There was no way that government could save many of those people from going under, and that's what's happened. In the local exchange and the cable market, the economies of scale and the network effects are so vast that it is very hard for regulators to create competition among rival identical networks.

We've also learned that ideas matter. So I'm just going to talk about the top one: Metcalf's Law. It is that the value of a network increases exponentially according to the number of users — meaning, if one more person joins a network, the value of that network increases for everyone on the network. Or to put it more simply, if Paul and I can talk to each other, that's great, but then we add Susan. So if I can call her and he can

call her and she can call us, we've suddenly got many more lines of potential calling available. The value of the network is greater for me, it is greater for him, it is greater for her . . . it has gone up exponentially. So what this tells you is the bigger the network, the more people it reaches, the more valuable the network is. That is the fundamental economic reason why the Internet has created so much value in the United States: because it increases value for all users. This notion that communities increase in value as they grow larger is the fundamental idea behind the way the Internet works. If it means anything, it must mean this: we really do want the Internet to be a mass medium.

How to achieve goals is the primary question for a regulator. It's almost certainly the case that we need to set, as a country, the goal of deregulating all retail prices. The idea of telecom was that one company would be regulated, originally voluntarily, to provide a "vanilla quality" product at a price that everybody would subscribe to. We need to recognize that if you're going to embrace competition, you need to have the other side of it, which is to be indifferent as a country to the regulation of retail prices.

We don't regulate the price of any of the necessities of life. You don't regulate the retail price of butter, DVDs, bread or wine, any of the necessities. So why are we regulating the price of telecom services?

There are at least two telecom services where we do not regulate the retail price. One is wireless and the other is the Internet. I can't see that any harm has come from either of those acts of deregulation. But we might never be able to deregulate the price at which a small company can connect to a big company's network. That's why phones may always have to be regulated; otherwise the network effects for the big company might mean that absent inter connection, any market would collapse into monopoly.

The other thing to decide is: are we going to be so eager to get economies of scale that we sacrifice diversity. The broadcast industry was regulated to guarantee diversity really until the administration of the present chairman, who has said he has less interest in doing this. And yet I think we have to recognize that during the period of the most intense regulation, there was really one kind of audience, one notion of the ideal American. And you look today at the content of TV and you say

there's just no question whatsoever that it is so much more eclectic, even in networks, than it has ever been before. But I think you have to ask the question: What is really the truth about diversity? Is it pluralism or multiple ownership? Which goals are those we're really trying for? Ownership diversity? Are we trying to have women and minorities own the stations? Lessig and others of that group would tell you that the main goal is to have a platform diversity, to make sure that none of these emerging broadband networks can design software systems that can preclude other people from inter-operating or interacting.

I think we have to recognize that on TV, the news has moved to the right, and entertainment has gone to the left. The news is much more conservative now than ever before. The entertainment is far more liberal, in a very general sense of the term. You can get what I would call a liberal point of view all over the entertainment media, to an astonishing degree. Look at shows like "West Wing." But that's far less true of mainstream media journalism. That's my view. But is it important that the government be concerned with this particular topic?

This is probably the most important of all these topics for a functioning democracy. It's the one that no one in government cares to talk about but everybody always cares about. I'm going to leave this one as just a huge question, and I'm going to move directly to the international piece.

There isn't any doubt that globalization is a more dramatic phenomenon with respect to the technology information sector than it is with respect to any other sector of the economy. I think I can say that without fear of challenge. There are other sectors that are massively globalized, such as financial. But the "financial services world trade organization treaty" doesn't exist, whereas there is a telecom and information technology world trade organization.

There is only one sector where as a matter of treaty on a global basis all nations are obliged to have a regulatory agency that follows the exact same four point precept for creating competition and providing a rule of law, and that's the communications sector. It's the only global treaty in which there is an independent agency that must be created in each of the sixty-nine signatory countries. And I was just in Pland talking to the first and second chairmen of their "FCC." Anywhere in the world that you go now you can find somebody who's the first or

second person to have ever held that regulatory job in their country. As we speak, they are trying to find lawyers, trying to figure out what ought to be in their codes and what ought to be their paradigms. And they're all vastly more similar than different.

This is the only industry on a global basis where this common rule of law is developing in this way; so the following questions have to be answered, because everybody around the world is asking for the answers: Is there some fundamental right to know with respect to content that ought to be embedded in the regulatory schemes of every country? We have, for example, in the United States, a number of notions kicking around in the administration to the effect that information should be precluded from the Web. Various government agencies are being ordered, as we speak, to take information off the Web or not to provide it on the grounds of security concerns. What's the right paradigm? We don't actually have an answer to that question, and we've got a lot of reasons to debate it seriously on all sides. But this is a question that exists in every country in the world, and we need answers.

The world of capital similarly wants to know the rules of competition, and we absolutely need this . . . we need to have some notion of how we're going to enforce on a global basis this particular treaty. And this is a huge field of conversation where there are no answers provided yet.

When everybody was talking about the Internet, they said: All of the people who get on the Internet here — and it's 8% of their population — are going to the United States for their information. They're all getting on the Internet and traveling to the U.S. They said 30% of all the international communication in and out of Poland is this 8% of people reading the Web in English in the United States. We don't like it. We think that there ought to be a Polish Internet country, just like there's a real physical Poland. What should we do? Should we charge different prices so it's too expensive for people to travel over the Internet to the United States? Raise the price, limit the amount? Should we have the government translate Yahoo into Polish? Should we just cut the Internet off? Should we supervise the websites? They're asking in effect: What's purely national here about communications? Is it the case that there isn't a national boundary?

The conference ended, and I was going to the airport. As I was driving by a wall along the road, I saw the answer. Somebody had spray-painted on the wall, "No borders, no nations." And I thought, "well, you know, this is great," because that actually *is* the answer. Now, I didn't say that's the answer as a *matter of law*. That is inevitably the answer as a *matter of technology*. It's not possible to look at the power of this technology and say that it has borders and that it respects nations.

It is also the case that any particular country can adopt a national paradigm that limits the efficiency, reduces the efficiency, limits the reach, shrinks the audience, creates less than a mass market, for these new technologies. But they can't alter the fact that the technology is a road. There can be barriers, and countries certainly can so slow the rate of change that they will make their country poorer or make their people more discontented, and many are choosing that particular path as we speak. The price of the Internet in Poland is 100 times higher than it is in the United States as we speak. There's a reason why it's just 8% online.

But is that really the right choice? It's immensely important at this conference and others like it. We continue to take the lead here in the U.S., and join with anybody anywhere else in the world and try to advance the ball, because at the other end of this story, in spite of the rainy weather in the market, it's absolutely the case there are pots of gold from a social perspective, from a wealth creation perspective, and it's up to us to find where the rainbow ends. Thank you very much.

PANEL III: INTERNATIONAL TRADE IN MEDIA PRODUCTS

COMMENTARY

GLOBALISM AND NATIONAL MEDIA POLICIES IN THE UNITED STATES AND CANADA: A CRITIQUE OF C. EDWIN BAKER'S *MEDIA, MARKETS, AND DEMOCRACY*

*Jerome A. Barron**

I. INTRODUCTION

In democratic societies, Canada and Western Europe for example, enthusiasm for free trade quickly dissolves when the product involved is a media product.¹ The United States obviously has an advantage in insisting that free trade should embrace free trade in media content no less than with other commodities. To assist it, the U.S. can bring to bear its dominance in the business of producing and distributing media content. It can also rely on the rhetoric of American First Amendment

* Harold H. Greene Professor of Law, George Washington University Law School. I would like to thank Professor Florian Sauvageau, Director, Laval University Center of Media Studies, Quebec City, Quebec, Canada for his invaluable assistance on the Canadian media law section of this Book Review and my colleague Professor Amitai Eztioni, George Washington University, for his thoughtful comments. My thanks as well to Ryan Wallach for his assistance on Federal Communications Commission waiver policy. I would also like to thank Leslie Lee, Assistant Director for Administration, Jacob Burns Law Library, for her excellent bibliographic assistance; Mark Hershfield of the George Washington University Law School Class of 2003 for his excellent research assistance and Katherine Poon-Sham for her excellent secretarial help.

1. See C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* 217 (W. Lance Bennett & Robert M. Entman eds., 2002).

law.² Surely, the argument runs, if free trade should be applied anywhere, it is free trade in ideas. The marketplace of ideas should be untrammelled and national boundaries should be no barrier to the life of ideas. Professor C. Edwin Baker outlines in convincing detail the steadfastness with which the U.S. has maintained this position.

In his book *Media, Markets, and Democracy*,³ Professor Baker, in a chapter entitled "Trade, Culture and Democracy," presents a subtle and sensitive discussion of the complexities inherent in considering the merits of free trade in media content. He warns us that yielding to arguments against American domination of the global market in media content may, in many countries, result in the substitution of government distortion for market distortion.⁴ He warns, therefore, against the categorical exclusion by one country of media content originating in another country. That, he states, is not the solution for imbalances in the production quality and delivery of media content among the nations of the world. As he puts it, categorical exclusion of imported media content will "stunt discourse."⁵

Professor Baker, however, is keenly aware that the media marketplace is imperfect and subject to market failure.⁶ This market failure has important consequences. The media products that prevail in the unregulated market often do not adequately serve the needs of smaller political and informational groups within society. Moreover, the unregulated media market fails because it does not appropriately identify, and is insufficiently egalitarian "in weighing people's desires for democratically relevant speech."⁷ Furthermore, international trade in media content accelerates the dissipation of local media and weakens its centrality to the media's democratic functions.⁸ On the whole, Baker doubts that unrestricted free trade in media content in the global media marketplace is supportive either of national or of global democracy.⁹

2. U.S. CONST. amend. I.

3. BAKER, *supra* note 1, at 245-75.

4. *Id.* at 254-55.

5. *Id.* at 255.

6. *See id.* at 246.

7. *Id.*

8. *See id.*

9. *See* BAKER, *supra* note 1, at 260-61.

This Book Review serves as a critique of Professor Baker's recent work, examining particular chapters as well as responding to his overall thesis. In Part II, the Review examines the chapter "Trade and Economics" and the impact of unrestrained global free trade upon local and national media content. Part III will address Baker's "culture of dialogue" and the need, or lack thereof, for its protection from unrestricted global free trade in media content. Part IV will explore Baker's suggestion that a "media specific" remedy may be available to resolve tensions between free international trade and globalization on the one hand, and the fostering of cultures of dialogue and the maintenance of local media institutions on the other. Part V will discuss the impact of the First Amendment on media regulation in the U.S., and how these regulations are being evaded in the name of the Constitution. Part VI will explore developments in Canadian media concentration, and how cross-ownership is actually being hailed as the stimulus for the economic health of that country's media enterprises.

II. FREE TRADE IN MEDIA CONTENT

In the chapter of his book entitled "Trade and Economics," Professor Baker undertakes an economic analysis of the impact of unrestrained global free trade on local or national media content. In light of this analysis, he contends that some forms of governmental intervention, such as subsidies, are necessary in democratic societies to preserve and nurture local media.¹⁰ Moreover, subsidies are not the only means by which national governments can seek to assure that some minimum level of local content survives. Mandating "screen quotas" of locally produced movies by national movie theaters and "broadcast time quotas" mandating local or domestic programming for a certain percentage of the programming on the broadcast day are other favored alternatives.¹¹ In democratic societies, "robust *domestic media content*" is essential, and "[r]estraints on imports can protect and promote these essential domestic products."¹²

10. *See id.* at 232 ("This economic justification for subsidies applies uniquely to local media products disadvantaged by the free trade regime.").

11. *Id.*

12. *Id.* at 238 (emphasis added).

In the United States, the protection of local broadcast media content has historically been accomplished through government intervention. The "must-carry" rule is an example.¹³ Local cable systems are required to allocate a certain percentage of their channel capacity to local over-the-air broadcasters.¹⁴ Since most television viewers in the U.S. are cable subscribers, Congress provided for must-carry to preserve local over-the-air broadcasting. Local broadcasters contended that, without must-carry, their survival would be in economic jeopardy.¹⁵ If broadcasters were limited to the over-the-air audience and deprived of the cable audience, the remaining broadcast audience would be too fragmented to financially support over-the-air "free" broadcasting.¹⁶ The result would be a kind of information *apartheid*.

If local over-the-air broadcast stations were no longer economically viable, those who could not afford to subscribe to cable television would be deprived of free television altogether. Programming directed to issues and problems unique to the local community might be deprived of any television time at all. This is indeed what Professor Baker thinks occurs on the international level.¹⁷ Baker is against absolute prohibitions on imports of foreign media content. On that issue he is a free marketer. On the issue of what control nation-states should have with respect to the protection of locally originated media

13. See Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534-535 (1994) [hereinafter Cable Act].

14. *Id.*

15. See *Turner Broad. Sys., Inc. v. Fed. Communications Comm'n*, 512 U.S. 622, 634 (1994) [hereinafter *Turner I*] ("Congress concluded that unless cable operators are required to carry local broadcast stations . . . 'the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.'" (quoting H.R. REP. No. 102-628, at 74 (1992))).

16. See *Turner Broad. Sys., Inc. v. Fed. Communications Comm'n*, 520 U.S. 180, 226 (1997) [hereinafter *Turner II*] (Justice Breyer, speaking for the plurality, justified must-carry as necessary in order to avoid "too precipitous a decline in the quality and quantity of programming choice for an ever-shrinking non-cable-subscribing segment of the public.").

17. See BAKER, *supra* note 1, at 238 ("[I]mports often will replace domestic media products that are *more* oriented toward crucial local needs.") (emphasis added).

content and the limiting of foreign media content, he favors governmental intervention — at least in democratic societies.¹⁸

A theme that runs through Baker's chapter on "Trade and Economics" is that the market does not necessarily give people the media content that they want.¹⁹ People can opt for the market, or opt for government restraints on that market. But free market rhetoric should not be allowed to trump the normal workings of democratic society: "People can get the media they want only if they have the right to adopt rules that determine how wants are identified and weighed. These decisions could show that people will obtain the media they want only through rules that interfere with free trade."²⁰

III. A CULTURE OF DIALOGUE

Although Professor Baker is skeptical about whether free trade in media content will serve democratic societies, his discussion of this complex issue is quite nuanced. Indeed, he insists on a fundamental distinction between the kind of culture or media content which should be exempted from unrestricted free trade, and the kind of culture or media content which should not. In assessing the merits of global free trade in media content, he distinguishes between two kinds of media content involving two conceptions of national culture — the first being a culture of dialogue, the other an artifact or museum conception of culture.²¹ This artifact or museum conception of culture is described as perceiving culture and cultural integrity as "relatively static, largely *backward*-looking, and very much

18. *See id.* at 234. He states:

At the stage of final choice, liberal democracy must leave decisions in the hands of individuals. However, the choice of structures or legal frameworks is an inherently collective matter. . . . [R]ather than relying blindly on the market, the more appropriate response is for the parties most affected to reach a judgment through the only mechanism available to them to make structural decisions: residents of each country should express their judgments through their political order.

Id.

19. *Id.* at 222.

20. *Id.* at 242.

21. *See id.* at 249-51.

*content-oriented.*²² Free trade threatens the content of the museum conception of culture. But there is no merit in insulating this conception of culture from the consequences of global free trade in media content. The implication is that if free trade in media content erodes or destroys a museum conception of culture, then so be it.

The culture of dialogue, however, merits a much greater degree of protection from unrestricted global free trade in media content. In a helpful explanation of what he means by a culture of dialogue, Baker identifies the aspects of a culture of dialogue which merit protection.²³ The watchwords of a culture worth protecting are characterized by “pluralism, diversity, citizen opportunity, choice, creativity and participation.”²⁴ These characteristics of a culture of dialogue have an obvious affinity with both First Amendment theory and First Amendment tradition. Professor Baker further describes the culture of dialogue as:

Discourse or dialogue makes participants, rather than content, central to culture. In discourse, it matters who the speaker and who the audience are. The speaker and audience typically struggle with the same concerns. . . . In this dialogic conception, culture is necessarily a living practice. Like all practice, discourses of identity and value require a context, which makes a cultural heritage crucial. Thus, [the dialogic] conception treats culture as the integration of a specific heritage into a current behavioral discourse. Addition, development, and, sometimes, rejection of particular cultural content are inherent in this dialogic conception of culture.²⁵

This explanation is an appeal, and a worthy one, for a non-nationalist use of the past. But it also suggests many connections with a museum conception of culture. The explanation seems to blur rather than sharpen the distinction.²⁶ Baker

22. *Id.* at 250.

23. See BAKER, *supra* note 1, at 250.

24. *Id.* at 253.

25. *Id.* at 250-51.

26. Later on in discussing and extolling the culture of dialogue, Professor Baker says: “Dialogues oriented to forging and understanding ‘national’ identity (or identities), whatever the current depth of these identities, are crucial for a democratic political order.” *Id.* at 257. In application, it would be very difficult to clearly distinguish dialogue oriented to forging national identity from “backward-looking” content.

presents a kind of Manichean divide between the artifact or museum concept of culture and the dialogic concept of culture.²⁷ The artifact concept of culture should be subjected to the ravages of free trade in media products; it does not merit protection or protectionism. The dialogic conception of culture, however, can be properly shored up by government intervention such as subsidies. National identity can hardly be forged without some reference to a nation or a people's past and a corresponding effort to preserve the culture that the past reflects. This line between an artifact concept of culture and a culture of dialogue is too imprecise. For that reason, I will use the neutral term "media content." Whatever the merits of the distinction between national media policies or cultures — the culture of dialogue which merits defense from trade and the artifact or museum concept of culture which does not — I think one must take into account the view of a media critic who feels that national media policies, of whatever character, are increasingly at risk and subject to erosion and capture.²⁸ An outspoken proponent of this view is Professor Richard McChesney of the University of Wisconsin. Consider his assessment:

[T]he impetus behind the global media system is far more corporate and commercial expansion than national geopolitics [T]he system is moving away from direct attachment to a particular nation-state. . . . [T]he always dubious notion that the product of the corporate media firms represents the essence of U.S. culture appears ever less plausible as the media system is increasingly concentrated, commercialized, and globalized. . . . There is no discernible difference in the firms' content, whether they are owned by shareholders in Japan or

27. *See id.* at 250-51. He states:

In the artifact view, culture and cultural integrity are relatively static, largely *backward-looking*, and very much *content-oriented*. . . . Contrast this artifact conception with a second one, which I referred to as the "discourse" or "dialogic" conception of culture. Discourse or dialogue makes participants, rather than content, central to culture.

Id.

28. *See* ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* 103-04 (Robert W. McChesney & John C. Nerone eds., 1999).

Belgium or have corporate headquarters in New York or Sydney.²⁹

There is an implication in Professor Baker's analysis that a national media policy — a culture of dialogue — can effectively resist the emerging global media culture. Professor McChesney is much more pessimistic in this regard.³⁰ Whether local media, national cultures and national media policies will survive is a matter about which I, like Professor Baker, am more hopeful. In this regard, I think Baker's proposed preservation of a culture of dialogue provides a needed goal.

IV. A MEDIA ANTIDOTE FOR GLOBALISM?

As an advocate of national media policies which foster cultures of dialogue in democratic countries, it is not surprising to find that Professor Baker says that he is "skeptical of international trade specifically and [of] globalization generally."³¹ But he is optimistic about the possibilities of national commercial media at least if some degree of governmental intervention is permitted.³² He suggests that there may be a "media-specific" remedy for economic globalization.³³

Is it possible that free trade in media content may counteract rather than reinforce "economic globalization?"³⁴ When one speaks about relying on the national media as a counterpoise to global domination by multinational corporations, it is best to recognize that the most powerful media corporations are themselves multinational corporations. Here, again, Professor McChesney provides some harsh truths. He argues that national commercial media should not be regarded "as some sort of oppositional or alternative force to the global market."³⁵ By virtue of media consolidation and concentration, media conglomerates dominate "regional and national markets" the

29. *Id.*

30. *See id.* at 104 ("[T]he notion that the transnational media conglomerates will ultimately fail because people tend to prefer their local media and cultures appears wide of the mark.").

31. BAKER, *supra* note 1, at 261.

32. *Id.*

33. *Id.*

34. *Id.*

35. MCCHESENEY, *supra* note 28, at 107.

world over.³⁶ In McChesney's view, these national and regional media firms aspire either to be bought up by the multinational media giants or at least to participate in joint ventures with them. As an incentive for their acquisition, they cheerfully offer "the 'local' aspect of the content" and their expertise in dealing with the local politicians.³⁷

Professor Baker is hardly unaware of arguments such as those made by Professor McChesney. Indeed, he probably agrees with McChesney's overall assessment. Nonetheless, out of a sense of balance and fairness, Baker sets forth some of the salient points, pro and con, in the argument that there may be a media specific remedy for economic globalization.³⁸ Since the engines of economic globalization are the multinational corporations that generate more revenue than the domestic products of most nation-states, and since unregulated economic entities often turn lawless, only legal regulation, preferably from democratic governments, can successfully channel corporate power to more socially beneficial uses. Nonetheless, one must also recognize that many countries are less powerful than the multinational corporations they might seek to constrain. The result is that "[i]n many respects, these corporations are the world's new sovereigns."³⁹

One possible remedy for the sovereign state dwarfed by the power of multinational corporations is the development of global government institutions. Multinational institutions should govern multinational corporations. The problem, however, is that existing international global institutions such as the World Bank, the International Monetary Fund and the World Trade Organization lack transparency and fail to be democratically responsive.⁴⁰ How can we, in these circumstances, develop a "global public sphere?"⁴¹ The mass media is the critical tool necessary to forge a global public sphere. Arguably, the inevitability of economic globalization underscores the need for free trade in media products and the "need for global

36. *Id.* at 106.

37. *Id.*

38. *See* BAKER, *supra* note 1, at 261-66.

39. *Id.* at 262.

40. *See id.*

41. *Id.*

media and global circulation of media.”⁴² The creation of public opinion through global media will preserve democratic discourse. But Baker is not optimistic that the creation of a global public sphere and of global institutions to counteract economic globalization could be successful.⁴³ Unlike Professor McChesney, he believes that “the more democratic structure of nation-states” will make resistance to economic globalization more feasible.⁴⁴ This, of course, immediately presents the question: Don't the same factors which lead to economic globalization find a parallel on the nation-state level? The reference here is to the centrifugal contra-local pressures driven by technological advancement and economic concentration.

Professor Baker makes the following observations in response to these developments: “[U]nadorned reliance on markets has been inadequate for the public spheres democratically required by traditional nation-states. Democracy within a country is better served by appropriate government interventions in the media order.”⁴⁵ I next propose to examine this approach by analysis of government media interventionist policies in the U.S. and Canada.

V. MEDIA POLICY IN THE UNITED STATES

In the United States, government interventions in the economic structure of the media order already exist. Despite increasing concentration of the media, however, even the fairly weak existing regulatory controls in the U.S. on the economic structure of media organizations are not only under assault, they are in danger of being completely scrapped. Ironically, this assault is undertaken in the name of the First Amendment.

The broadcasting system of the United States was founded on the idea that the local broadcaster is the trustee for his community.⁴⁶ Since all could not be licensed, the licensee was

42. *Id.*

43. *See id.*

44. BAKER, *supra* note 1, at 263.

45. *Id.* at 265.

46. *See Red Lion Broad. Co. v. Fed. Communications Comm'n*, 395 U.S. 367 (1969). Justice White summarized the trusteeship role of the local broadcast licensee for the Court in *Red Lion*:

entrusted for a limited period with a portion of the airways. The license was granted to the licensee on condition that the licensee performs in the public interest.⁴⁷ This public interest obligation, grounded in the licensee's duty to serve its community, obliged it to broadcast the issues and ideas that were important to the community covered by the license. Many of the Federal Communication Commission's ("FCC") long established regulatory policies are based at least in part on the importance of assuring diversity of expression by reducing the control that any one media company can have over the national opinion process.⁴⁸ Illustrative are the current fortunes of one such

There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

Id. at 389. Justice White further observed:

It does not violate the First Amendment to treat broadcast licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of these constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press.

Id. at 394.

47. See *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943). Justice Frankfurter summarized for the Court the rationale of the Federal Communications Act of 1934, 47 U.S.C. §§ 151-614 (1994) [hereinafter *Communications Act*], as regards broadcast regulation, stating that: "[T]he 'public interest' to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio.'" *Id.* at 216 (quoting 47 U.S.C. § 303(g)). He goes on to state:

The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts."

Nat'l Broad. Co., 319 U.S. at 216 (quoting *Fed. Communications Comm'n v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940)).

48. See *Time Warner Entm't Co. v. Fed. Communications Comm'n*, 240 F.3d 1126, 1131 (D.C. Cir. 2001) [hereinafter *Time Warner II*]. Judge

regulatory policy here in the U.S. In broadcasting and cable we have what are called "national audience caps."⁴⁹ These caps limit the share of the national audience that any one company may capture. Audience caps do not directly limit the extent of a media company's holdings, but they do so indirectly by limiting the size of the audience any one company can reach. These restrictions do not have their source in a desire to censor. Instead, in an age of ever increasing media concentration, they have their origin in a desire to curtail the influence any one media company may have over the national opinion process.

The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") directs the FCC to limit the number of cable subscribers a cable company may reach.⁵⁰ The FCC responded to this directive by establishing a rule that no one company may reach more than 30% of the national cable audience.⁵¹ The statute permitting the FCC to establish this rule was challenged by the Time Warner Entertainment Co. ("Time Warner") on First Amendment grounds. The United States Court of Appeals for the District of Columbia upheld the

Stephen Williams summarized the FCC's long-established policy on this point, stating:

The [FCC] is on solid ground in asserting authority to be sure that no single company could be in a position single-handedly to deal a programmer a death blow. Statutory authority flows plainly from the instruction that the [FCC's] regulations "ensure that no cable operator or group of cable operators can unfairly impede, either because of *the size of any individual operator* or because of joint actions of operators of sufficient size, the flow of video programming from the video programmer to the consumer."

Id. (quoting Cable Act, 47 U.S.C. § 533(f)(2)(A) (1994)).

49. See 47 U.S.C. § 533(f)(1); Telecommunications Act of 1996, Pub. L. No. 104-104 § 202(c)(1)(B), 110 Stat. 56, 111 (1996) (codified at 47 C.F.R. § 73.3555(e)(1) (2001)).

50. 47 U.S.C. § 533(f)(1)(A) ("In order to enhance effective competition, the Commission shall . . . conduct a proceeding . . . to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person or in which such person has an attributable interest.").

51. The FCC cable audience cap imposed a 30% limit on the number of subscribers that may be served by a multiple system cable operator. See 47 C.F.R. § 76.503 (2001); Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, 14 F.C.C.R. 19,098, 19,127-28, ¶¶ 71-73 (1999) [hereinafter Third Report].

constitutional validity of the 1992 Cable Act provision directing the FCC to establish audience caps for the cable industry.⁵² The court of appeals rejected the effort of the cable companies to dress their cause in the imagery and standards of the First Amendment.⁵³

Is it reasonable for Congress to conclude that concentration of ownership is a threat to “the diversity of information available to the public?”⁵⁴ Judge Douglas Ginsberg of the D.C. Circuit stated the rationale for an audience cap in the cable industry: concern about increasing concentration of ownership in the cable industry.⁵⁵ The concentration placed diversity and competition in jeopardy.⁵⁶ Therefore, it was reasonable to conclude that caps would reduce the level of concentration, thereby increasing the degree of diversity of programming sources.⁵⁷

In analyzing national responses to the phenomenon of global media issues, Professor Baker has adopted Professor Oliver Goodenough’s distinction between “strong protection” which

52. See *Time Warner Entm’t Co. v. United States*, 211 F.3d 1313 (D.C. Cir. 2000) [hereinafter *Time Warner I*]. The cable companies contended that they had a First Amendment right to speak to any audience that they would otherwise be able to reach. *Id.* at 1321. By restricting the number of subscribers a cable company could reach, the government was limiting their right to speak. *Id.* Actually, what was being curtailed was the cable company’s right to sell. No single denominator describes the program of content of large multiple system cable operators. Program content is more likely driven by economics — the result of negotiation between the cable system and the cable programmer. Government regulation such as audience caps should be viewed less as content-based speech or even as content neutral speech but instead as regulation that is indifferent to content. Basically, this latter view is the one the court accepted. See *id.*

53. The court had quite a different take on the policy behind audience caps. Judge Douglas Ginsberg expressed the court’s view quite succinctly. In authorizing caps in the cable industry, Congress was not valuing one speaker over another, or even one category of speech over another, but instead simply insisting that there be multiple speakers. *Id.* at 1318. “[I]ts concern [of Congress in enacting audience caps] was not with what a cable operator might say, but that it [the cable operator] might not let others say anything at all.” *Id.*

54. *Time Warner I*, 211 F.3d at 1320.

55. Senate Report 102-92 accompanying the 1992 Cable Act noted that by 1990, the five largest operators served almost half the country’s cable subscribers. See *id.* at 1319; S. REP. NO. 102-92, at 32 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1165.

56. See *Time Warner I*, 211 F.3d at 1320.

57. *Id.* at 1322.

has an exclusionary goal, and “weak protection” which is designed to promote choice by keeping domestic products in existence.⁵⁸ In a sense, in the domestic sphere one can look at the audience cap as a regulatory mechanism which allows a great deal of concentration but still keeps smaller media companies in business as a form of weak protectionism. In addition, it should be kept in mind that audience caps, like other FCC regulations, may be waived at the discretion of the FCC on petition of the parties.⁵⁹ The audience cap constraint therefore is not inflexible. One could therefore say that the cable audience cap is the kind of government intervention in the media order that Baker would favor.

However, one should be cautious about the durability of these and other media regulatory regimes. On March 2, 2001, the First Amendment case against audience caps got new life when the D.C. Circuit struck down the FCC imposed 30% limit on the audience reach any one cable company can have.⁶⁰ Although the court of appeals stood by its previous ruling upholding the statutory authority of the FCC to impose an audience cap on the cable industry, the court struck down the FCC's audience cap for cable on the grounds that the 30% limit failed to meet the standard of review usually used in cable cases.⁶¹ The

58. BAKER, *supra* note 1, at 267 (quoting Oliver R. Goodenough, *Defending the Imaginary to the Death? Free Trade, National Identity and Canada's Cultural Preoccupation*, 15 ARIZ. J. INT'L & COMP. L. 202, 209-210 (1998)).

59. In a case dealing with a cable audience cap, the FCC stated that its waiver authority was based on 47 C.F.R. § 1.3, which states that FCC rules may be waived for good cause shown but that the waiver applicant faces a “high hurdle.” See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations From MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, 15 F.C.C.R. 9816, 9846-49, ¶¶ 65-70 (2000).

60. See *Time Warner II*, 240 F.3d 1126, 1136 (D.C. Cir. 2001).

61. *Id.* Judge Williams, in *Time Warner II*, applied the test set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The Supreme Court had applied the *O'Brien* test to the must carry obligations imposed by Congress on the cable industry in *Turner II*. See *Turner II*, 520 U.S. 180, 189 (1997). Judge Williams described the test as follows: “[A] governmental regulation subject to intermediate scrutiny will be upheld if it ‘advances important government interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.’” *Time Warner II*, 240 F.3d at 1130 (quoting *Turner II*, 520 U.S. at 189). Unlike the must-carry rules which the Supreme Court upheld applying the *O'Brien* test, Judge Williams found that the FCC's 30% cable audience cap

FCC's basis for setting a 30% standard was held to be entirely conjectural and, therefore, burdened substantially more speech than was necessary.⁶² The judicial invalidation of the 30% limit shows that the media industry can effectively use the First Amendment to overturn economic judgments of government that affect their industry. The use of the First Amendment in this case to strike down the limit is reminiscent of economic substantive due process of the *Lochner* era.⁶³

Audience caps have been applied to broadcasting as well. The Telecommunications Act of 1996 actually sets a 35% audience cap in broadcasting.⁶⁴ Recent mergers, particularly the CBS Corporation-Viacom Inc. merger,⁶⁵ have greatly increased the pressure on the FCC to abolish the 35% cap, increase the cap or grant liberal waivers. Obviously, the success of the cable industry in getting a court to strike down the 30% audience cap in cable has energized the broadcast industry's effort to do likewise with respect to the 35% cap in broadcasting. Recently, these efforts have yielded some success. The United States Court of Appeals for the District of Columbia has re-

rule failed the *O'Brien* test since the FCC had failed to make a record demonstrating the basis for a 30% cap. *Id.*

62. *Time Warner II*, 240 F.3d at 1137.

63. *See generally* *Lochner v. New York*, 198 U.S. 45 (1905). Time Warner made two First Amendment challenges to the validity of the audience cap in the cable industry. The First Amendment challenge to the statute directing the FCC to set an audience cap for the cable industry is a good example of current corporate media use of the First Amendment. Clearly, in this case, Time Warner's purpose was to protect and dominate industry markets and not in any way to express a point of view. In this context, media industry First Amendment protections have a kind of cynical ring to them. In the case of the statute, the First Amendment ploy did not work. *See generally* *Time Warner I*, 211 F.3d 1313 (D.C. Cir. 2000). But in the case of the First Amendment challenge to the 30% limit established by the FCC, the First Amendment ploy was eminently successful. *See Time Warner II*, 240 F.3d at 1126.

64. Telecommunications Act of 1996, Pub. L. No. 104-104 § 202(c)(1)(B), 110 Stat. 56, 111 (1996) (codified at 47 C.F.R. § 73.3555(e)(1) (2001)).

65. *See* Verlyn Klinkenborg, *The Vision Behind the CBS-Viacom Merger*, N.Y. TIMES, Sept. 9, 1999, at A28; Press Release, Viacom Inc., Viacom and CBS to Complete Merger Tomorrow (May 3, 2000), available at <http://www.viacom.com/press.tin?ixPressRelease=45002243>.

manded the 35% audience cap rule in broadcasting to the FCC so that it may determine whether to repeal or modify the rule.⁶⁶

In his chapter on "Trade, Culture and Democracy," Professor Baker argues that the achievement of global democracy requires "national capacity to restrain and supplement free trade [by] . . . interventions designed to assure vigorous domestic media serving national, cultural, and political discourse functions."⁶⁷ Audience caps serve that objective. Unfortunately, examination of the current status and future of existing regulatory constraints such as audience caps indicates, to say the least, that their future is not bright.

Audience caps are not the only regulatory constraint on media concentration in the United States. The U.S., unlike its neighbor Canada, has a rule prohibiting cross-ownership. In 1975, the FCC set forth the cross-ownership rule prohibiting the prospective or future licensing or transfer of a broadcast station to a company that owned a newspaper in the same community.⁶⁸ This rule left the greatest number of cross-ownership situations in the U.S. unaffected. Existing cross-ownership combinations were essentially grandfathered.⁶⁹

In 1978, those challenging the FCC's cross-ownership rule sought to use the First Amendment as a sword to strike the rule down. The Supreme Court responded to their efforts by relying on the First Amendment as a *justification* for the regulation.⁷⁰ The objective of the cross-ownership rule is to achieve

66. See *Fox Television Stations, Inc. v. Fed. Communications Comm'n*, 280 F.3d 1027, 1033 (D.C. Cir. 2002). The court of appeals explained that it did so because, inter alia, the FCC's decision to retain the rule was "arbitrary and capricious." *Id.* The FCC failed to provide an adequate rationale for its decision. The court of appeals held further that the 35% broadcasts audience cap did not violate the First Amendment. The court also declined to vacate the rule as the networks had requested. *Id.*

67. BAKER, *supra* note 1, at 266.

68. See Amendment of Sections 73.34, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 50 F.C.C.2d 1046 (1975), *as amended* Amendment of Sections 73.34, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 53 F.C.C.2d 589 (1975) (codified at 47 C.F.R. §§ 73.34, 73.240, 73.636 (1976)).

69. *Id.*

70. See *Fed. Communications Comm'n v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 801-02 (1978). The FCC was the federal agency charged with regulating broadcasting in the public interest and its judgment that the issu-

the culture of dialogue Professor Baker seeks. Justice Thurgood Marshall, writing the cross-ownership opinion, rationalized its validity on the basis of First Amendment policy rather than antitrust policy.⁷¹ The cross-ownership rule reflects a certain leap of First Amendment faith, based on the underlying notion that a larger number of smaller and independently owned media in a community are more likely to yield diverse and original voices.⁷² Clearly, regulatory policies such as audience caps and the cross-ownership rule fall under the rubric of what Baker styles “appropriate governmental interventions into the media order.”⁷³

ance of cross-ownership rule would stimulate free and diverse expression did not violate the First Amendment. *Id.* at 794-95. The decision upholding the cross-ownership rule in the Supreme Court has been quite influential. It still stands as a leading precedent to justify government regulation of the structure of media ownership against First Amendment challenge. The cross-ownership rule assumes that the more diverse the ownership of broadcast stations within a community, the more diverse and participatory the content of broadcast programming will be. *Id.* at 784.

71. *Id.* at 810.

72. In May 2000, the FCC, in a report dealing with a number of its ownership policies, concluded that it should, as a general proposition, retain the cross-ownership rule “because it continues to serve the public interest by furthering the important public policy goal of viewpoint diversity.” 1998 Biennial Regulatory Review — Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 15 F.C.C.R. 11,058, 11,061, ¶ 4 (2000). Does a national media ownership policy like the cross-ownership make sense as a communications policy? Former FCC Chairman William Kennard said he believed that the newspaper/broadcast cross-ownership rule served the public interest. *Id.* at 11,127. At the same time, he suggested there were situations when it should not apply. Diversity and competition would not be threatened, for example, if a single radio station in a large market were allowed to combine with small suburban newspaper. *Id.* Former Commissioner Susan Ness’s comments about the cross-ownership policy were even more direct. Commissioner Ness said that sometimes the rule worked against, rather than for, diversity and competition in local markets. *Id.* at 11,129. She recalled the media world as it existed when the cross-ownership rule was adopted in 1975: “Back then, there were only three commercial broadcast networks; today, there are six or seven. . . . Then the rule was adopted, the big boom in cable franchising had not yet begun; today, cable television passes more than 97% of households of which approximately two-thirds subscribe.” *Id.* at 11,129-30. She went on to point out that satellite broadcasting had not arrived in 1975. *Id.* Today it has more than 10 million subscribers in the U.S. Of course, the Internet, with its millions of subscribers, was unknown.

73. BAKER, *supra* note 1, at 265.

The FCC is presently rethinking both the cable audience cap and the newspaper/broadcast cross-ownership rule.⁷⁴ The present FCC Chairman, Michael Powell, has expressed doubts about the wisdom of retaining them.⁷⁵ On the other hand, the current Chairman of the Senate Commerce Committee, Senator Ernest Hollings, is supportive of them.⁷⁶ Of course, even if

74. On September 13, 2001, the FCC began a rulemaking proceeding to consider revisions to its newspaper/broadcast cross-ownership rule. See Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, 16 F.C.C.R. 2997 (2001). On September 13, 2001, the FCC also initiated an inquiry into whether the regulatory approach reflected by subscriber limits or audience caps was "still appropriate." Third Report, *supra* note 51, at 19,100. The cross-ownership rule at a minimum is likely to be calibrated to a greater degree than is presently the case as a result of the FCC's inquiry. As for the future of an FCC-imposed audience cap in cable, it was initially anticipated that the audience caps would be abandoned altogether as a consequence of the FCC's inquiry. It is possible, however, that Enron Corp. and related scandals may now halt the deregulatory juggernaut.

75. In a February 6, 2001 press conference, Chairman Powell was asked whether he would try to eliminate the 35% audience cap in broadcasting. His response was basically negative on the audience cap issue and yet equivocal at the same time:

If competition were the only issue, I would most strenuously suggest that the cap has no purpose. But there are other goals embedded in the Telecom Act, like diversity of viewpoints, that are much more visceral. I'm skeptical that caps benefit consumers in the form of greater and more diverse products. We have to be able to justify regulatory intervention on something more than sentiment.

The Chairman Elucidates, BROADCASTING & CABLE, Feb. 12, 2001, at 34, 34. On September 13, 2001, the FCC announced an inquiry into the 30% audience cap rule in the cable industry in the light of the court of appeals decision setting it aside. See *Time Warner II*, 240 F.3d 1126 (D.C. Cir. 2001); *Implementation* of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, 16 F.C.C.R. 17,312 (2001). On September 13, 2001, the FCC also announced an inquiry into whether the cross-ownership rule barring common ownership of a broadcast station and daily newspaper in the same market should be revised. See *Cross-Ownership of Broadcast Stations and Newspapers*, 16 F.C.C.R. 17,283 (2001). The tenor of both inquiries indicates that the existing cable audience cap and the existing broadcast newspaper cross-ownership rule will at a minimum undergo substantial revision if they survive at all.

76. See Paige Albiniak, *Flip-Flop, Fritz: Senate Shift Returns Hollings to the Center Seat on Commerce*, BROADCASTING & CABLE, May 28, 2001, at 5. As a result of the defection of Senator Jeffords of Vermont from Republican ranks and the resultant Republican loss of control of the Senate, Senator Fritz Hollings (Dem.-S.C.) has become Chairman of the Senate Commerce Committee. Senator Hollings is expected to try to restrain network efforts to

these rules are retained in some form, one should be aware that they are susceptible to waiver or modification by the FCC. In short, existing structural rules have some force, but they are often evaded and their future is quite uncertain.

VI. MEDIA POLICY IN CANADA

Media concentration has recently undergone a period of massive expansion in Canada. In 2000, the Canadian Radio-Television and Telecommunications Commission ("CRTC") approved an application by BCE Inc. ("BCE"), Canada's largest telecommunications company, for the acquisition of one of Canada's largest television broadcasters, CTV Inc. ("CTV").⁷⁷ Besides giving BCE an even greater presence in Canadian telecommunications, the acquisition also presented serious cross-ownership issues. Prior to the CRTC hearing, there were press reports that BCE intended to acquire one of the country's leading newspapers, *The Globe and Mail* of Toronto.⁷⁸ Despite these issues, the CRTC approved the acquisition because of a "benefits package" offered by BCE which included expenditures of CA\$230 million over a seven year period to benefit Canadian programming. The CRTC noted that this sum included CA\$140 million to be spent solely on developing "prime time Canadian programs of consistently high quality and in sufficient quantity to attract significantly larger audiences and

abolish ownership regulations as well as deregulatory efforts by the new Chairman of the FCC, Michael Powell: "While all observers say Hollings has a good relationship with Powell, they also say the two have very different views. Powell is a champion of allowing market forces to operate; Hollings believes the big hand of government occasionally should be put to work." *Id.* at 6.

77. See 1406236 Ontario Inc. on behalf of CTV Inc., Decision CRTC 2000-747 (Dec. 7, 2000), available at <http://www.crtc.gc.ca/archive/ENG/Decisions/2000/DB2000-747.htm> [hereinafter CRTC 2000-747]. CTV held licenses to a number of television stations and pay and specialty services, including The Sports Network Inc., Le Réseau des Sports Inc., The Discovery Channel, The Comedy Network, CTV NewsNet Inc., and Outdoor Life. *Id.* ¶ 1. For its part, BCE and its subsidiaries provide its customers with a wide mix of communication services including in part local and long distance telephone services, wireless services, satellite communications, terrestrial broadcasting distribution undertakings and Internet access. See *id.* ¶¶ 3, 13, 16, 17 & 19.

78. See *Canadians Need Diversity of Voices*, TORONTO STAR, Sept. 20, 2000, at A26.

revenues.”⁷⁹ *The Globe and Mail*, BCE and CTV are all now part of a giant conglomerate, Bell Globemedia.

In July 2000, Hollinger, Inc., which is controlled by Canadian media magnate Conrad Black, sold thirteen major city daily newspapers plus half its share of the *National Post* to CanWest Global Communications Corporation (“Global”), which owns CanWest, the third largest English language television network in Canada.⁸⁰ In August 2001, the CRTC granted approval to the license renewal applications of television stations controlled by Global. When the CRTC renewed Global’s television licenses, it also renewed the television licenses of CTV. Global has a potential audience reach of 97.6% of the English language television market in Canada. The CRTC granted approval despite the troubling cross-ownership issues involved in the applications for renewal.⁸¹ The CRTC did express concern, however, that ultimately there might be complete integration of the newspaper and television operations in the cities where Global had a cross-ownership situation, with the result that in some communities there would only be a single media editorial and news stance for both the electronic and print media.⁸²

79. CRTC 2000-747, *supra* note 77, ¶ 30. The purpose of this funding would be to “demonstrate to other broadcasters that Canadian entertainment programming can be successful and self-sustaining.” *Id.* As a condition of approval, the CRTC required BCE to comply with rigorous annual reporting requirements to assure that the benefits package was “incremental to all existing and outstanding requirements.” *Id.* at pmbl.

80. *Conrad Black Sells 13 Dailies, Half-share in National Post*, AGENCE FRANCE-PRESS, July 31, 2000, LEXIS, News Library, News Group File.

81. *See generally* License Renewals for the Television Stations Controlled by Global, Decision CRTC 2001-458 (Aug. 2, 2001), *available at* <http://www.crtc.gc.ca/archive/ENG/Decisions/2001/DB2001-458.htm>. In the Vancouver-Victoria, British Columbia area, Global owns two television stations and three daily newspapers. *Id.* ¶ 8. In Calgary, Alberta and Ottawa, Ontario, Global owned one of the two major daily newspapers in each city. In Regina and Saskatoon, Saskatchewan, Global owned the only major daily newspaper in each city as well as a television station in each city. *Id.* ¶ 106.

82. *See id.* ¶¶ 102-7. This integration could eventually result in a reduction in diversity of the information presented to the public and of the diversity of distinct editorial voices available in the markets served. For example, under a fully integrated structure, the same editor could decide what matters would be investigated and what stories would be covered by a commonly owned television station and newspaper. Under such an integrated structure, the television station and the newspaper may no longer compete and might present a single editorial position and approach.

Therefore, the CRTC approved Global's license renewal applications on the condition that Global keep the news management for its television stations separate from the news management of its newspapers. This condition was part of a Statement of Principles and Practices that the CRTC imposed on Global as a condition of license.⁸³ The Statement also required Global to establish an impartial Monitoring Committee that would serve as a complaint mechanism for both the public and Global's employees.⁸⁴ Not surprisingly, the increase in cross-ownership in Canada is being hailed by Canadian media representatives as a reason for the economic health of the country's media enterprises.⁸⁵

There is a much greater degree of cross-ownership in Canada than in the U.S. During the past two years in Canada, two Canadian television networks, Global and CTV, have become parts of media corporations that own newspaper properties.⁸⁶ But the situation is somewhat relieved by the fact that in many Canadian cities where Global owns a television station and a daily newspaper, at least one other daily newspaper is operating. In short, the one newspaper town is much less common in Canada than in the U.S. In addition, in all Canadian cities, there is competition in radio and television.

In still another cross-ownership development, Quebecor, Inc. ("Quebecor"), a Canadian media corporation, has acquired Groupe TVA Inc. ("TVA"), a French language network.⁸⁷ Quebecor owns such daily newspapers as *Le Journal de Montréal* as well as *The Toronto Sun*, *The Ottawa Sun* and *The Edmonton Sun*. In order to quell the controversy its cross-ownership of newspaper and television properties generated, Quebecor itself developed a remarkably strict code of ethics which provides that its newspaper and television reporters "can't work in [the] same building, communicate in person, by phone, fax or

83. *Id.* at app. 1.

84. *Id.*

85. Tom Cohen, *Convention Highlights Differences Between U.S., Canadian Newspaper Businesses*, ASSOCIATED PRESS NEWSWIRE (May 6, 2001), at <http://wire.ap.org>.

86. *See Commons Committee Launches 18-month Study to Amend Broadcasting Act*, CANADIAN PRESS, May 10, 2001, 2001 WL 21163929.

87. *See Cross-Ownership is Issue in Canada*, TELEVISION DIGEST, May 7, 2001, 2001 WL 7882002.

Internet, or share equipment.”⁸⁸ Quebecor’s new code, separating the newsrooms of its newspaper and television properties, is another example of the Canadian approach to cross-ownership and media concentration. Quebecor will also establish a committee to monitor the separation between its newspapers and television stations.⁸⁹

New media mergers in Canada during the past two years have understandably occasioned a great deal of interest in the problem of cross-ownership in Canada. On December 7 and 8, 2000, I spoke at a conference held in Montreal that was sponsored by the Laval University Center of Media Studies. The Center was asked by Heritage Canada and the CRTC “to study the impact of current trends in media cross-ownership in the contexts of the mergers and strategic alliances of large media groups.”⁹⁰ I was struck by the distinctively Canadian approach to the cross-ownership issue. In the initial paper circulated to the participants, one of the questions the participants were asked to address particularly characterized this Canadian perspective: “Short of requiring structural separation or forbidding cross-ownership between broadcasters and print media, what mechanisms or safeguards could be put in place to promote or foster the diversity and plurality of editorial voices?”⁹¹

The working paper setting forth the issue stated that, although the issue of cross-ownership could certainly be addressed on the basis of an economic analysis, the conference would be directed to discussing the problem of cross-ownership “from a democratic or political angle.”⁹² In this respect, of course, such a vantage point has been taken in the U.S. As mentioned previously, the cross-ownership prohibition in the U.S. was upheld by the Supreme Court on the basis of First Amendment values rather than an economic analysis. But what is uniquely Canadian is that an actual cross-ownership prohibition, while not off the table, was *not* the focal point of

88. *Id.*

89. *See id.*

90. LAVAL UNIV. CTR. OF MEDIA STUDIES, MEDIA CROSS-OWNERSHIP: ISSUES AND ARGUMENTS (2000) (on file with Journal). The conference was held at the École des Hautes Etudes Commercial, Montreal, Quebec, Canada on December 7-8, 2000.

91. *Id.*

92. *Id.*

the conference. Yet, there was a great deal of interest in the cross-ownership prohibition in the U.S. by the audience at the conference's open meeting when I explained the cross-ownership rule in the United States. I emphasized the need, if the rule is retained, to calibrate it more sensitively so that it makes sense when applied in quite differing cross-ownership situations. I was interviewed by Canadian Broadcasting Corporation ("CBC") radio on the American cross-ownership prohibition and asked whether Canada should adopt an across-the-board cross-ownership prohibition.⁹³ It was a strange question. There was no likelihood that such a prohibition would be adopted in Canada. The reason for this, of course, is obvious — it is too late. The mega-mergers are, in large part, done deals. The cross-ownerships are already in place. Therefore, to propose a cross-ownership rule in Canada would be to discuss locking the barn door after the horse has been stolen. Why is there no general cross-ownership rule in Canada? The answer probably has a great deal to do with preservation of Canadian culture and the maximizing of Canadian content in the Canadian media. The rationale is that if media concentration, including cross-ownership, is allowed to take place, the Canadian media will be financially strong enough both to resist foreign — or perhaps more specifically — American media competition, and to develop Canadian content. Indeed, at license renewal hearings for Canada's two private commercial television networks, CTV and Global, the networks explained the case for media concentration to the CRTC.⁹⁴ In light of competition from television stations along the U.S. border, the development of new specialty channels and the emergence of the Internet, they argued it is essential that Canadian television networks become larger markets if they are to compete and survive.⁹⁵

The contemporary Canadian solution to the cross-ownership problem is separation of the newsrooms and editorial offices of newspaper and television properties owned by the same com-

93. *École des Hautes Etudes Commerciales* (CBC radio broadcast, Dec. 8, 2000).

94. See generally License Renewals for the Television Stations Controlled by Global, Decision CRTC 2001-458 (Aug. 2, 2001), available at <http://www.crtc.gc.ca/archive/ENG/Decisions/2001/DB2001-458.htm>.

95. See *Cross-Ownership is Issue in Canada*, *supra* note 87.

pany. As we have seen, the CRTC has conditioned approval of mergers involving cross-ownership on newsroom separation of television stations and newspapers. This has generated a good deal of criticism in Canadian media circles. Anthony Wilson-Smith, Editor of *Maclean's*, argued that this proposal may make sense to bureaucrats but doesn't make much sense elsewhere: "If you outlaw potential synergies and resultant efficiencies in news-gathering operations, that makes these properties even less desirable as a business proposition."⁹⁶ In the U.S., approving cross-ownership on condition of newsroom separation might give rise to First Amendment-based challenges alleging impermissible government intervention into editorial autonomy and journalistic judgment.

Generally, Canada has dealt with concentration of ownership problems on an ad hoc basis.⁹⁷ Professor Baker argues that capture of global media by a few multinational media conglomerates may be resisted by making domestic media stronger.⁹⁸ The case of Canada is instructive in this regard. On March 24, 2000, a majority of the members of the CRTC approved an application that would permit CTV, a commercial English television network reaching 99% of English-speaking households in Canada, to acquire an 80% interest in NetStar Communications, Inc. ("NetStar"), provided CTV met certain conditions.⁹⁹

96. Anthony Wilson-Smith, *The CRTC vs. Free Speech (?)*, *MACLEAN'S*, May 14, 2001, at 2, 2.

97. See Matthew Fraser, *We're About to Find Out if Big Really is Beautiful: Hearings to Review License Renewals of CTV, Global TV*, *NATIONAL POST*, Apr. 2, 2001, at C2. "The CRTC does not have an explicit media concentration and cross-ownership policy." *Id.* Professor Florian Sauvageau informs me that Canada did briefly have a cross-ownership policy. During the 1980's following the Royal Commission on Newspapers, the government of Prime Minister Pierre Trudeau and his Liberal Party issued a directive to the CRTC that it should not grant or renew broadcast licenses to applicants who controlled daily newspapers in the same market. This directive was withdrawn by the subsequent Conservative Party government of Prime Minister Brian Mulroney. Interview with Professor Florian Sauvageau, Director, Laval University, Center of Media Studies, in Quebec, Canada (Sept. 14, 2001).

98. See BAKER, *supra* note 1, at 261-66.

99. See CTV Inc. on Behalf of The Sports Network Inc. (TSN), *Le Réseau des Sports (RDS) Inc.*, and 2953285 Canada Inc. Operating as the Discovery Channel, Decision CRTC 2000-86 (Mar. 24, 2000), available at <http://www.crtc.gc.ca/archive/ENG/Decisions/2000/DB2000-86.htm>. The CRTC described NetStar as a "pioneer and leader in Canadian specialty television" and listed its holdings as follows:

One of the conditions demanded by the CRTC was that CTV divest itself within a year of its 40% interest in CTV SportsNet, Inc. ("SportsNet").¹⁰⁰ CRTC Commissioner David McKendry wrote a dissenting opinion denying that CTV's acquisition of NetStar would raise "significant competition issues."¹⁰¹ More importantly, he made a strong case *for* concentration of ownership in Canada by *Canadian* media, stating:

We are in transition to an environment of virtually unlimited global choices for entertainment and information. The policy and regulatory challenge is to facilitate the availability of Canadian choices in this environment. Once the transition is complete, the opportunity for Canadian broadcasters who are not strong may be at risk in a world where the Internet knows no borders. The Commission voiced this concern with respect to new media when it announced its decision not to regulate the Internet: "The CRTC is concerned that any attempt to regulate Canadian new media might put the industry at a competitive disadvantage in the global marketplace." The Commission defined new media services "to be those [services] that are delivered by means of the Internet."

As Global Television Network stated in the Commission's hearing to consider CTV's application, "All of us, our company, the CTV group, all of us are trying find our way in a new environment. This environment requires strong Canadian broadcasters with the resources to provide Canadians with Canadian choices in an entertainment and information world that is increasingly without borders."¹⁰²

Canada has acquiesced in cross-ownership and in concentration of ownership at the national level. But has it led to the

NetStar owns, directly or through a subsidiary, 100% of The Sports Network (TSN) and le [sic] Réseau des Sports (RDS) inc. [sic] (RDS), an 80% interest in the Discovery Channel (Discovery), as well as a non-controlling interest of 24.95% in Viewer's Choice Canada Inc. (Viewer's Choice), a company involved in pay and pay-per-view television services.

Id.

100. *Id.* The rationale for requiring CTV to divest itself from SportsNet is that, as a result of CTV's acquisition of NetStar, CTV was acquiring the most popular sports channel in Canada, The Sports Network, Inc., as well as other specialty channels. *Id.*

101. *Id.*

102. *Id.*

creation of a culture of dialogue? Of course, there is some diversity of ownership and content within the Canadian media. As already pointed out, competition in the intra-city daily newspaper market still exists. In addition, Canadian public broadcasting is an important source of diverse programming. CBC has 10% of the English-speaking television audience and Radio Canada has 20% of the French-speaking television audience.¹⁰³ The Canadian dilemma has been well expressed by a Canadian critic, Richard Stursberg. There is a "trade off between diversity of voice within the country versus diversity of voice in a North American context."¹⁰⁴ In order to be able to protect Canadian media products, concentration of media ownership in Canada has been tolerated to an even larger extent than is the case in the U.S.

The Canadian media experience is a good laboratory for some of Baker's ideas. An examination of recent Canadian experience shows that resistance to globalism may be at the expense of true dialogue. The recent acceleration in patterns of concentration of ownership of the media in Canada will perhaps prevent the Canadian media from being dominated by either American or global media concerns. But it is hard to see how the concentration of most of the print and electronic media in Canada in the hands of two or three companies can be expected to support or create the culture of dialogue sought by Professor Baker.

VII. CONCLUSION

In his chapter on "Trade and Economics," Professor Baker argues that one way to measure market preferences would be to "identify the media people would choose in the market if

103. See Canadian Broadcasting Corporation, *Annual Report: English Television*, at http://cbc.radio-canada.ca/htmen/6_2_2_3_00.htm (last visited Apr. 21, 2002); Canadian Broadcasting Corporation, *Annual Report: French Television*, at http://cbc.radio-canada.ca/htmen/6_2_2_4_00.htm (last visited Apr. 21, 2002); Canadian Broadcasting Corporation, *Annual Report: English Television*, at http://cbc.radio-canada.ca/htmen/6_2_2_3_99.htm (last visited Apr. 21, 2002); Canadian Broadcasting Corporation, *Annual Report: French Television*, at http://cbc.radio-canada.ca/htmen/6_2_2_4_99.htm (last visited Apr. 21, 2002).

104. See Canada by Design, *Telecable Communications: Home Wired*, at <http://www.candesign.utoronto.ca/wk4txt.html> (last visited Apr. 10, 2002).

they all had equal wealth.”¹⁰⁵ Basically, the approach to the market that Baker advocates is an approach which, as he puts it, gives priority to the political: “A democratic one-person-one-vote criterion is obviously a much more egalitarian criterion than is the market’s willingness-and-ability-to-pay.”¹⁰⁶ He would not apply this egalitarian oriented governmental intervention approach to individual preferences for all media goods.¹⁰⁷ For example, he would not apply such an approach to entertainment content. But, he believes “a more egalitarian weighting” is appropriate for cultural and educational products.¹⁰⁸ Egalitarian weighting of individual preferences can justify appropriate governmental intervention to preserve or increase diversity beyond that which the market could, or can be expected to provide.¹⁰⁹ Regulation of the domestic media content market is justified to nourish “domestically relevant news and local cultural materials.”¹¹⁰

National media policies, Baker argues, should be developed to avoid domination of the media, whether on the global or national level, by “elites, whether corporate, technical, or governmental.”¹¹¹ The idea here is that the capture of local or national media by global or multinational media corporations can be resisted by national regulation of the domestic media content market in order to nourish “domestically relevant news and local cultural materials.”¹¹² The problem with this is that the types of government intervention in media structure Baker favors are under siege or in retreat. I have referred earlier to structural restrictions on ownership in the U.S. in order to show how restrictions, albeit “weak” ones, have been developed in the U.S. The present outlook does not indicate that these restrictions will be expanded. On the contrary, the future they confront is substantial modification or repeal altogether.

105. BAKER, *supra* note 1, at 243.

106. *Id.*

107. *Id.* at 243-44.

108. *Id.* A policy of egalitarian-oriented government intervention is most applicable to “media goods most related to matters such as education, the vote, and maybe the creation of cultural contexts in which people can develop the capacity for autonomous choice.” *Id.* at 243.

109. *See id.* at 243-44.

110. BAKER, *supra* note 1, at 244.

111. *Id.* at 266.

112. *Id.* at 244.

Domestic media, if properly structured by national governments, may serve as an effective antagonist to global dominance by multinational corporations and whatever harms they may pose to the emergence or maintenance of a culture of dialogue in democratic societies. Still, one problem remains. In Western democracies, the national media is dominated by an increasingly small number of media organizations that are multinational corporations themselves.¹¹³ In both the U.S. and Canada, real efforts are being made to halt or limit the scope of these developments, but success is hardly certain.

Professor Baker is a champion of the "culture of dialogue." So am I. But if one looks at the current state of American law in its regulation of the broadcast and cable industries, we find that many of the existing regulatory policies which were designed to maintain a culture of dialogue have been abandoned or greatly weakened. The "fairness doctrine," which required the balanced presentation of controversial ideas of public importance over the life of the broadcast license period has been abolished.¹¹⁴ This doctrine was in effect from 1949 to 1987.¹¹⁵ Although never enforced with particular fervor, the fairness doctrine by its very name suggested that dialogue and debate were appropriate goals for broadcasting. Indeed, the very symbolic character of the fairness doctrine in this regard made it a particular target of those within the broadcast industry who

113. The manner in which American media corporations have become global media giants was illustrated by the details of a deal between Fox Family World Wide and Disney Entertainment Corporation ("Disney"). Disney is reportedly paying \$3.2 billion for the Fox Family Channel. See George Hager, *Disney to Purchase Fox Family for \$3.2 Billion Deal Would Expand Cable Reach in USA, 50 Other Countries*, USA TODAY, July 23, 2001, at B1. Eighty million U.S. cable viewers subscribe to the Fox Family Channel. Fox Family Channel was owned by Rupert Murdoch's News Corporation of America and Haim Saban's Saban Entertainment. *Id.* On Monday, July 23, 2001, Disney announced that it would buy Fox Family World Wide, owner of the cable Family Channel and other cable properties. Acquisition of the Fox Family Channel will give Disney ownership of the Fox Kids International channels which operate in fifty countries in Europe and Latin America, or an additional thirty-four million cable subscribers. *Id.*

114. See *Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987).

115. The fairness doctrine was set forth by the FCC in the *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949) and was abolished by the FCC in 1987 in *Syracuse Peace Council*, *supra* note 114. The FCC's decision was upheld in *Syracuse Peace Council v. Fed. Communications Comm'n*, 867 F.2d 654 (D.C. Cir. 1989).

denied that government could demand any obligation of broadcasters, save the single one of assuring them their licenses and thus freeing them from competition. The license renewal process — which examined at renewal time, among other things, whether the broadcast license has provided the community which it served with programming concerning the problems and issues of that community — has barely any teeth left.¹¹⁶ The Telecommunications Act of 1996 virtually assures renewal to incumbent licensees since it is a rare licensee who will not be able to meet its bare public interest requirements.¹¹⁷

In his chapter on “Trade and Culture,” Baker argues that “free trade [in media products] will not provide the media products that people in various countries desire or that their democracies require.”¹¹⁸ On the other hand, he is quite aware that free trade in media content is not a negative across the board, noting that free trade in media content may be particularly desirable in countries ruled by repressive regimes.¹¹⁹ As mentioned above, Baker has been influenced by Professor Goodenough’s distinction between “strong” protection of domestic media content, which is not favored, and “weak” protection of domestic media content, which is.¹²⁰ An example of the disfavored strong protection would be a national media policy, which excluded foreign media content altogether. Baker, however, is aware of the inevitability of disagreement about the application of such distinctions. Accordingly, he concludes that possibly the best solution for decision-making about free trade in media content, and the extent to which it should be restricted or regulated, would be to leave the entire area to “national discretion — that is, to exempt cultural materials from all free trade agreements.”¹²¹

Professor Baker concludes his chapter on “Trade, Culture and Democracy” by suggesting that international human rights

116. See generally Mark D. Schneider, *Renewal Procedures and Expectancy Before and After the Telecommunications Act of 1996*, 14 COMM. LAW. 9 (1996).

117. See Communications Act, 47 U.S.C. § 309(K)(1)(A) (1994).

118. BAKER, *supra* note 1, at 266.

119. *Id.* at 235.

120. See Oliver R. Goodenough, *Defending the Imaginary to the Death? Free Trade, National Identity and Canada’s Cultural Preoccupation*, 15 ARIZ. J. INT’L & COMP. L. 202, 209-10 (1998).

121. BAKER, *supra* note 1, at 270.

law might be developed to preclude strong protectionism and at the same time to nurture weak domestic regulation of media content.¹²² At the same time, he is aware that the First Amendment has been manipulated to serve the interests of corporate media firms on the national level in this country and that a parallel manipulation could occur with respect to international human rights documents.¹²³

Professor Baker prophesies that corporate media efforts to derail a just national media order through international human rights law will be as unsuccessful as corporate efforts in this country have been when they sought to set aside government regulation whose purpose was to protect and preserve local media.¹²⁴ Although, historically, efforts to throttle structural regulation of the media in the name of the First Amendment have generally been unsuccessful in the Supreme Court, they have met with a larger measure of success in more recent years in the federal courts of appeal.¹²⁵ Additionally, it is by no means certain that the Supreme Court's refusal thus far to adopt the position of the large media corporations will endure.

122. *Id.* at 274.

123. *Id.* at 271-73. Indeed, Baker provides an example of a response to an international report dealing with global communications that is not terribly supportive of any hope that international bodies or agreements support a culture of dialogue any time soon. He points to the example of the United Nations Educational, Scientific and Cultural Organization ("UNESCO") sponsored MacBride Commission Report's conclusion that "in many parts of the world, government would need to play a significant role in promoting a better communications order." *Id.* at 272. This conclusion generated a good deal of criticism from both the American Bar Association and the U.S. State Department. Professor Baker suggests that the real source of the criticism was not in professed sorrow about damage to "First Amendment values." *Id.* Rather, the source was a visceral reaction to the MacBride Report's recommendation that in "expanding communication systems, preference should be given to non-commercial forms of mass communication" and that public funds should aid in this endeavor. *Id.* at 272-73. Indeed, the MacBride Report and similar expressions from UNESCO officials caught fire from critics who "seemed to equate corporate interests — free trade and corporate dominance — with the meaning of the First Amendment and international human rights." BAKER, *supra* note 1, at 273.

124. *Id.* at 273.

125. For a recent example, see, e.g., *Time Warner II*, 240 F.3d 1126 (D.C. Cir. 2001) (striking down the FCC's limit on the audience reach any one cable entity may have and remanding the issue of the appropriate audience reach to the FCC).

Justice Clarence Thomas, for example, has been very clear that the only interests the First Amendment protects are those of the owners of the media.¹²⁶ A majority of the Supreme Court has not endorsed this narrow conception of First Amendment protection, but it is not inconceivable that this position may gain more adherents on that Court.

National media in the U.S. has been quite successful in beginning to dismantle the existing structure of regulation. The national media is now itself a division of multinational companies. I think it is likely that these multinational media companies will play a similar dominant role on the global stage that their national units play on the national stage. If there is going to be a culture of dialogue and a more just and egalitarian communications order, I agree with Baker that the first and most appropriate stage of battle should be the national arena. My basic criticism of Professor Baker is that he underestimates the difficulties in preserving, never mind constructing, a national media order through government intervention in democratic societies that bears any real resemblance to his desired culture of dialogue.

In the U.S., a regulatory structure still exists for the older electronic media, but it is clearly under attack. In Canada, prospects for such a structure are even dimmer. *Media, Markets and Democracy* makes a valuable contribution in showing that free trade in media content is not invariably beneficial to the health of free societies although it might be very beneficial to societies that are not free. The book shows the importance of preserving governmental intervention in the national communications order. Baker has provided an unusually thoughtful

126. See *Denver Area Educ. Telecomm. Consortium, Inc. v. Fed. Communications Comm'n*, 518 U.S. 727, 816-17 (1996) (Thomas, J., concurring in part and dissenting in part). Justice Thomas stated:

We implicitly recognized in *Turner* [I] that the [cable] programmer's right to compete for channel space is derivative of, and subordinate to, the operator's editorial discretion. Like a freelance writer seeking a paper in which to publish newspaper editorials, a programmer is protected in searching for an outlet for cable programming, but has no freestanding First Amendment right to have that programming transmitted. . . . Likewise, the rights of would-be viewers are derivative of the speech rights of operators and programmers.

Id. at 816-17.

and informed discussion of a subject — free trade in media content — where it is often concluded too quickly that simply to state the issue is to resolve it. In so doing, Professor Baker provides a rare and learned voice, which hopefully will be heard against the tide.