# THE POTENTIAL RELEVANCE TO THE UNITED STATES OF THE EUROPEAN UNION'S NEWLY ADOPTED REGULATORY FRAMEWORK FOR TELECOMMUNICATIONS

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## INTRODUCTION

Not so long ago, specific services and the associated networks were closely intertwined. Telecommunications networks delivered voice telephony. Broadcast systems delivered radio and television. The introduction of cable television and satellite transmission resulted in only a marginal increase in complexity.

Today, one can no longer say that the service and the network are inextricably intertwined. Voice telephony is delivered over wireline telecommunications, wireless, cable and the Internet. Radio and television programming are delivered over radio, cable and, to a limited but growing degree, the Internet. Indeed, the Internet is fundamental to the challenges of convergence, insofar as it totally decouples the application from the underlying mechanisms of transmission.

Convergence poses vexing problems for the regulator. In the US, the Communications Act of 1934[1] (the statute governing telecommunications regulation) provides for substantially different treatment for wireline, mobile wireless, and cable-based services. To the extent that the Act fails to account for present technical and market

* The author is deeply indebted to Donald K. Stockdale, Jr. of the Office of Plans and Policy [hereinafter OPP] of the FCC, and has borrowed extensively from his work. Donald Abelson (FCC International Bureau [hereinafter IB]) provided invaluable guidance and support. Matthew Conway (recently of the UK Department of Trade and Industry [hereinafter DTI]) provided an extensive and extraordinarily helpful review. The author is also grateful for the helpful comments and suggestions of many other colleagues on both sides of the Atlantic, including Patricia Cooper (FCC IB), Sherille Ismail (FCC OPP), Peter Scott (European Commission), Paul Verhoef (European Commission), Tracey Weisler (FCC IB), and Irene Wu (FCC IB).

1. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151- 614 (2001), and in scattered sections of 47 U.S.C.).

realities, notably including the rapid growth of the Internet, there may be the risk of irrational results, regulatory arbitrage, or distortions in the development of technology or coverage. Convergence is by no means confined to the United States. It is a global phenomenon. Responses, however, have varied from region to region.

The European Union's telecommunications regulatory framework adopted in March 2002 represents a bold and innovative response to the challenges of convergence.[2] It recognizes that much of telecommunications regulation exists as a means of addressing potential and actual abuses of market power. With that in mind, the EU attempts a comprehensive, technology-neutral approach to regulation, which borrows concepts of market definition and of market power from competition law.

This paper assesses potential strengths and weaknesses of the EU approach, and considers its possible relevance to the very different legal and regulatory framework in the United States. The paper addresses the following questions, among others. First, why is it that the two systems appear to frequently generate similar results? When might the two systems generate different results, and why? Perhaps most intriguing of all: *Why* do we regulate the things that we regulate? What light does the new EU regulatory framework shed on this question?

In this paper, we consider first the U.S. telecommunications regulatory system, and then that of the European Union. We consider each system in terms of its regulatory framework, its competition law framework, the ability of regulators to obtain the information they need and to protect sensitive third party data, the support for deregulation, and the balance struck between centralization and decentralization. We then evaluate specific outcomes of the U.S. regulatory system, and then pose the question in each case as to whether the new EU system could potentially generate similar outcomes. We proceed to review briefly certain implementation challenges to the new EU system, and close by considering the potential relevance of the new European framework to regulatory practice in the United States.

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2. Indeed, the framework is in large part a response to convergence challenges raised in the "Green Paper" of 1997. European Commission: Information Society, *Results of the Public Consultation on the Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors* (1999), *at* http://europa.eu.int/ISPO/convergencegp/ip164en.html.

> Regulation needs to be transparent, clear and proportional and distinguish between transport (transmission of signals) and content. This implies a more horizontal approach to regulation with a homogenous treatment of all transport network infrastructure and associated services, irrespective of the nature of the services carried.

*Id.*

## I. CONVERGENCE AND THE US LEGAL AND REGULATORY FRAMEWORK

As previously noted, convergence has been widely recognized as representing a regulatory challenge. Particularly vexing issues relate to the regulatory treatment of broadband services over cable and wireline media, and potentially of IP telephony. For example, a recent report from the National Academy of Sciences noted:

> The Telecommunications Act of 1996, which for the most part assumes the continued existence of a number of distinct services that run over distinct communications technologies and separate infrastructure, does not fully reflect the convergent nature of broadband (different communications infrastructures are able to deliver a similar set of services using a common platform, the Internet) . . . .[3]

In this section, we consider the legal framework for telecommunications regulation in the United States.[4] We then proceed to consider merger and competition law in the U.S., in order to gain a comparative sense of how it relates to equivalent practice in Europe.

### *A. Legal Framework of Telecommunications Regulation*

Telecommunications in the U.S. is primarily governed by the Communications Act of 1934,[5] which was substantially amended, most notably by the Telecommunications Act of 1996.[6]

Within the Act, Title I establishes the structure and jurisdiction of the FCC, and also provides definitions used throughout the Act. Title II addresses the regulation of Common Carriers, which represent the traditional world of telephony. Title III concerns wireless services and broadcast Radio and television, while Title VI addresses the regulation of Cable Communications.

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3. NATIONAL RESEARCH COUNSEL, BROADBAND: BRINGING HOME THE BITS 32 (2002).

4. In this section, we deal with telecommunications regulation in its present form. For a treatment of the history of telecommunications regulation in this country, as it relates to competition and deregulation, see Donald K. Stockdale, *The Regulation, Deregulation and Non-Regulation of Telecommunications and the Internet in the United States* (2001) (unpublished manuscript, on file with the author) (portions of what follows appeared in that paper in a different form).

5. 47 U.S.C. §§ 151-614.

6. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 15, 18 and 47 U.S.C.).

Title II contains a wide range of obligations applicable to telecommunications common carriers. These provisions govern, for instance, the prices they may charge for services[7], obligations to publish those prices in tariffs[8], limitations on their ability to discriminate[9], and obligations to interconnect with other carriers and to provide collocation and Unbundled Network Elements.[10] Notably, there is a prohibition against Bell Operating Companies (BOCs) offering interLATA (long distance) services within their historic service areas until they have demonstrated that they have sufficiently opened their local markets to telecommunications competition within the state in question.[11]

These obligations are not applicable to wireless broadcasters or cable operators (except to the extent that they offer telecommunications services over their facilities). Broadcasters and cable operators are, however, subject to a different set of rules, many of which relate to the content that they carry, or to the spectrum over which wireless services operate.[12]

Under the Act, organizations that provide telecommunications services are held to be common carriers and thus subject to Title II regulation. *Telecommunications service* is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[13] *Telecommunications*, in turn, is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[14] The definitional category turns on the *nature of the service that is offered*, not necessarily on the technology over which it is offered.[15]

7. *Id.* at § 201.
8. *Id.* at § 203.
9. *Id.* at § 202.
10. *Id.* at § 251.
11. *Id.* at § 271.
12. *Id.* at §§ 301-96, 601-53 (2003) (In particular, the § 612 "must carry" rules for cable bear notice. Sherille Ismail suggests that differences in "must carry" regulatory treatment of cable compared to that of broadcast or DBS satellite may result, at least in part, from differences among these three in their degree of monopsony market power in the programming market. Sherille Ismail, *Achieving Regulatory Parity in Communications Policy* (forthcoming) (manuscript on file with author).
13. 47 U.S.C. § 153.
14. *Id.*
15. *See also* Fed.-State Joint Bd. on Universal Serv., *Report to Congress*, 13 F.C.C.R. 11,501, 11,559 (1998) [hereinafter *Stevens Report*].

> This functional approach is consistent with Congress's direction that the classification of a provider should not depend on the type of facilities used. A telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure. Its

### 1. The Computer Inquiries

The *Computer Inquiries* were a series of FCC regulatory proceedings that addressed the perceived convergence between telecommunications and computing.[16] The Computer Inquiries strongly influenced the Telecommunications Act of 1996; at the same time, certain of the orders remain in effect today.

In *Computer I,* the Commission made two decisions that laid the foundation for its regulatory approach to services provided by computer data processing service providers. First, the Commission concluded that the public interest would not be served by regulating such data processing services, since the provision of such services was deemed to be "essentially competitive."[17] Second, while the Commission determined that the participation of common carriers in the data processing market would benefit consumers, it expressed concern that common carriers might engage in unfair competition. The dangers of unfair competition, the Commission explained, relate "primarily to the alleged ability of common carriers to favor their own data processing activities by discriminatory services, cross-subsidization, improper pricing of common carrier services, and related anticompetitive practices and activities."[18] Accordingly, the Commission concluded that there was a need for competitive safeguards, and it required common carriers seeking to offer data services to do so through a structurally separate affiliate.[19] These safeguards were intended to ensure that carriers would not "give any preferential treatment to their data processing affiliates" and that competing data service providers would therefore have nondiscriminatory access to the underlying communications components used in providing their services.[20]

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> classification depends rather on the nature of the service being offered to customers . . . .

*Id.*

16. *See* Regulatory and Policy Problems Presented by the Interdependence of Computer and Comm. Servs. and Facils., *Notice of Inquiry*, 7 F.C.C.2d 11 (1966) [hereinafter *Computer I*]. *See generally* PETER W. HUBER, MICHAEL K. KELLOGG, & JOHN THORNE, FEDERAL TELECOMMUNICATIONS LAW 1086-03 (2d ed. 1999).

17. The Commission specifically found "that there is ample evidence that data processing services of all kinds are becoming available . . . and that there are no natural or economic barriers to free entry into the market for these services." *Computer I, Tentative Decision*, 28 F.C.C.2d 291, ¶. 20 (1970).

18. *Computer I, Final Decision and Order*, 28 F.C.C.2d 267, ¶ 12 (1971).

19. *See id.* at ¶ 12 *et seq.*

20. *Id.* at ¶ 21.

The Commission continued its examination of these issues in the *Computer II* proceeding, which it initiated in 1976.[21] In *Computer II*, the Commission reaffirmed its basic regulatory approach to the provision of computer data services, but refined its analysis. In particular, the Commission, attempting to define and distinguish regulated telecommunications services and unregulated data services, created the categories of *basic* services and *enhanced* services.[22] The Commission also specified in greater detail the extent of structural separation required between the incumbent telephone provider and its enhanced services affiliate.[23]

In 1986, the Commission further extended this line of reasoning with its *Computer III* decision.[24] *Computer III* offered an alternative set of competitive safeguards to protect competitive providers of enhanced services. Specifically, the Commission gave AT&T and the BOCs that sought to provide enhanced services the option of continuing to comply with *Computer II's* strict separate subsidiary requirements, or alternatively of complying with new "nonstructural safeguards."

Finally, in order to prevent any improper shifting of costs from unregulated to regulated activities, the Commission, in its *Joint Cost* proceeding,[25] adopted new, and more detailed, accounting rules that applied to all incumbent local exchange carriers and to dominant interexchange carriers.[26]

Thus, in the Computer Inquiries, the Commission reaffirmed its commitment to its essential policy of regulating only the common carrier

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21. *See* Amendment of Section 64.702 of the Comm'ns Rules and Regs., *Notice of Inquiry and Proposed Rulemaking*, 61 F.C.C.2d 103 (1976) [hereinafter *Computer II*].

22. The Commission defined the term "basic" service, which referred to traditional common carrier telecommunications offerings, as "the offering of transmission capacity for the movement of information." *Computer II*, *Final Decision*, 77 F.C.C.2d 384, ¶ 93 (1980). The Commission defined "enhanced services" as:

> [S]ervices, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different or restructured information; or involve subscriber interaction with stored information.

46 C.F.R. § 64.702(a).

23. *See Computer II*, *Final Decision*, 77 F.C.C.2d 384, ¶¶ 190-266.

24. *See* Amendment of Section 64.702 of the Comm'ns Rules and Regs., *Report and Order*, 104 F.C.C.2d 958 (1986), *vacated, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) [hereinafter *Computer III*].

25. *See* Separation of Costs of Regulated Tel. Serv. from Costs of Non-Regulated Activities, *Report and Order*, 2 F.C.C.R. 1298 (1987) [hereinafter *Joint Cost*]; *Joint Cost*, *Order on Reconsideration*, 2 F.C.C.R. 6283 (1984); *Joint Cost*, *Order on Further Reconsideration*, 3 F.C.C.R. 6701 (1988).

26. In *Computer III,* the Commission also imposed new rules governing disclosure of network changes and the handling of customer proprietary network information. *See Computer III*, *Report and Order*, 104 F.C.C.2d 958, ¶¶ 241-65.

*basic* transmission service, while exempting *enhanced* services (which represented a blending of computation and communications) from common carrier regulation. Enhanced services did not themselves *provide* bottleneck facilities, but they *depended* on bottleneck facilities controlled by the traditional carriers. The FCC therefore concluded that enhanced services *per se* did not need to be regulated as basic (telecommunications) services. The equipment necessary to implement enhanced services was available on the open market. Barriers to entry were potentially low. The FCC wisely chose to let market forces drive the evolution of enhanced services, without regulatory interference.

At the same time, the Commission continued to emphasize the need for competitive safeguards to ensure that common carriers did not use their bottleneck facilities to compete unfairly against unaffiliated enhanced service providers.

The Telecommunications Act of 1996 formalized and codified the distinction between basic services (renamed *telecommunication services*) and enhanced services (renamed *information services*). The Act defines an information service as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[27]

### 2. The Regulatory Framework and the Internet

The *Computer I, II* and *III* rulings and their embodiment in the Telecommunications Act of 1996 represent the underpinnings of U.S. deregulatory policy toward the Internet. On the one hand, they led to the view that the Internet should be viewed as an enhanced service, and that the Internet consequently should not itself be subject to significant regulation. On the other hand, they sought to ensure that the traditional carriers would not be permitted to withhold or to discriminate in the provision of the building blocks essential to the creation of the Internet.

In 1998, the FCC prepared a report to Congress on the likely impact of the Internet, and of Internet telephony, on contributions to the Universal Service Fund (USF).[28] The USF is a mechanism whereby the price of telecommunications service in areas of low teledensity (*e.g.* rural areas) is subsidized in order to ensure that it is affordable to all. A number of senators, notably including Senator Stevens of Alaska, were concerned that unregulated Internet services, which were not obliged to

27. 47 U.S.C. § 153(20) (2000).
28. *See Stevens Report*, 13 F.C.C.R. 11,501, 11,516-17 (1998)

contribute to the USF, would ultimately undermine the financial viability of the USF.

The Stevens Report confirmed that Internet access services should continue to be viewed as information services, consistent with longstanding FCC practice. It also analyzed IP telephony at length. In doing so, it established many of the underpinnings of current regulatory practice in the U.S. as regards converged services in general and the Internet in particular.

It is noteworthy that a telecommunications bill enacted a scant six years ago explicitly references the Internet in only two places – in section 230 (the "Communications Decency Act"),[29] and in referencing the support of advanced services to schools and libraries in section 254(h) of the Act.[30] This dramatically illustrates the pace at which the technology and the marketplace have progressed in the intervening years.

### *B. Antitrust Analysis in the US*

In the U.S., the relationship between telecommunications regulation and antitrust is complex. The FCC, as the independent regulatory body for communications, has statutory responsibility in a number of instances for determining the permissible portion of a national or local market that a single entity may own. It also has responsibility for restricting certain forms of cross ownership (for instance, between broadcast television and newspaper publishing in the same local market).

In the U.S., antitrust concerns sometimes arise as a result of the conduct of a single firm. The American attitude to large corporations has always been somewhat ambivalent – we worry about the power that large corporations wield, and yet at the same time we appreciate the potential benefits associated with the economies of scale and scope that they command. Consequently, it is not held to be a problem for a firm to possess market power; rather, what is problematic is the *abuse* of that market power.

Somewhat different antitrust issues may present themselves when two companies attempt to merge, particularly when the merger would dramatically expand their presence in a relevant market. One of two U.S. agencies will take the lead in investigating any merger – either the Federal Trade Commission (FTC), or the Department of Justice (DoJ).[31]

29. 47 U.S.C. § 230 (2003).

30. *Id.* at § 271. In addition, U.S.C. § 254 refers to "advanced services", while section 706 of the 1996 Act refers to broadband as "advanced telecommunications capability" – arguably, there are many *implicit* references to the Internet. *Id.* at § 254 (2003) (refers to "advance services").

31. In recent years, for instance, the Department of Justice analyzed the WorldCom/MCI merger and the attempted WorldCom/Sprint merger, while the Federal

In either case, the relevant agency determines whether the merger would constitute a violation of competition law.[32] In parallel with this evaluation, the FCC assesses the same merger using a very different standard: Does it serve the public interest?[33]

The DoJ/FTC Horizontal Merger Guidelines set forth the methodology that these enforcement agencies will apply in analyzing horizontal mergers (mergers between participants in the same industry).[34] The guidelines attempt to provide a rigorous economic methodology for evaluating the prospective impact of a merger.

Under the Guidelines, one begins by defining relevant markets. A relevant product market is defined as ". . .a product or group of products such that a hypothetical profit maximizing firm that was the only present and future seller of those products likely would impose at least a 'small but significant and nontransitory increase in price'."[35] In applying this definition, the antitrust authorities employ a "smallest market principle." That is, they begin by identifying a narrow group of products that includes a product or products of the merging firms. They then consider the effect of a "small but significant and nontransitory" increase in price on a hypothetical monopolist that was the sole supplier of that product or products. If the price increase would result in such a large reduction in demand that the price increase would have been unprofitable, then the next best substitute or substitutes would be added to the relevant product group. The agency applies this procedure iteratively until it has identified the narrowest group of products where the price increase would be profitable. This group of products would then constitute the relevant product market.[36]

The agency then proceeds to identify participants in the relevant product market,[37] and to determine the market shares of the market participants (typically based on dollar sales or shipments). A shorthand tool that is often used to assess the impact of a prospective merger is the *Herfindal-Hirschman Index (HHI)*. "The HHI is calculated by summing the squares of the individual market shares of all the

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Trade Commission analyzed the AOL/Time Warner merger. Note that the FTC has no jurisdiction over common carriers.

32. The competition law provisions applicable to mergers are contained in Section 1 of the Sherman Act and Section 7 of the Clayton Act. *See* 15 U.S.C. §§ 1, 12 (2003).

33. *See* 47 U.S.C. §§ 214, 310, 314 (2003).

34. United States Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, 57 C.F.R. 41,557 (Apr. 2, 1992) (revised Apr. 8, 1997), *at* http://www.ftc.gov/bc/docs/horizmer.htm.

35. *Id.* at § 1.1.

36. *See id.*

37. *See id.* at § 1.3 (the Guidelines necessarily consider the possibility of supply response).

participants."[38] In a perfectly monopolized market, the HHI would be 10,000; in a market with a vast number of tiny competitors, it would approach zero. The HHI is thus a measure of *relative concentration*. In a highly concentrated market (HHI greater than 1,800 after a merger), a merger that results in an increase in the HHI of 100 or more is felt *ceteris paribus* to "potentially raise significant competitive concerns."[39]

With this information in hand, the agency proceeds to analyze the likely competitive effects of a proposed merger, considering all relevant factors, including the likelihood of subsequent competitive entry, and any beneficial efficiencies that might flow from the merger.

The DoJ or FTC will coordinate with the FCC insofar as possible (see below) during a merger review; however, there is no assurance that FTC/DoJ market definitions and competitive threats will be directly reflected in FCC regulatory policy.

### *C. Investigative Authority and Access to Information*

In assessing a merger, one needs a great deal of information. Typically, much of the relevant information is in the hands of the merging parties, not initially in those of the competition authorities.

The Department of Justice is an investigative agency. When it needs information relevant to a merger, it generally issues a *Civil Investigative Demand* (CID)*,* which has legal force similar to that of a subpoena. Information received pursuant to a CID is maintained in strict confidence, much as would be the case in a criminal prosecution.

The FCC is not an investigative agency, but rather an administrative agency subject to the Administrative Procedure Act (APA).[40] Nonetheless, it has full statutory authority to use compulsory process to obtain information when necessary.[41] Furthermore, the parties to a merger will tend to be motivated to respond in order to gain permission to consummate the transaction.

In general, external documents received in connection with a "permit and disclose" proceeding must be placed in the public record; however, sensitive documents can be made subject to protective order.[42] Under the APA, all participating parties are in general entitled to see any

38. *Id.* at § 1.5.
39. *Id.* at § 1.51.
40. 5 U.S.C. § 551 (2003), *et seq.*
41. 47 U.S.C. § 409(e) (2003) ( "the Commission shall have the power to require by subpena [sic] the attendance and testimony of witnesses and the production of all books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation.").
42. A more complex question relates to requests for sensitive information made pursuant to the *Freedom of Information Act (FOIA)* 5 U.SC. § 552 et seq. (2000).

material submitted by any other party to proceeding; consequently, third parties may be reluctant to provide information, especially where there is threat of retaliation from the merging parties.

### *D. Deregulation*

A number of specific deregulatory initiatives are described later in this paper. The primary statutory *mechanisms* for deregulation are the FCC's *forbearance authority* and the *Biennial Review*.

The Telecommunications Act of 1996 directs the FCC to *forbear* (refrain) from applying any provision of the Act where analysis of the relevant market leads the FCC to conclude that associated charges are neither unreasonable nor discriminatory, and where forbearance does not harm the consumers and is generally in the public interest.[43] In doing so, the FCC must specifically consider whether forbearance will promote competitive market conditions.

The FCC is also required to conduct a Biennial Review of all of its regulations issued pursuant to the Act to determine whether any are "no longer necessary in the public interest as the result of meaningful economic competition".[44] The Biennial Review seeks to ensure that any deregulatory opportunities will be examined not less frequently than at two year intervals.

### *E. Centralization versus Decentralization*

The United States is a federal system. The Federal government has responsibility for interstate communications, while the states have responsibility for activities within their state. In the case of the Internet, the FCC has taken the position that its traffic is interstate, and thus not subject to state or local jurisdiction.

In practice, the relationship is complex. States regulate many aspects of local telephone competition, including local interconnection agreements. Local or municipal governments generally establish franchise arrangements for cable operators. This division of authority is sometimes problematic, but it also is sometimes a source of strength and resiliency for the U.S. regulatory system, enabling support for local preferences, and also providing a more flexible vehicle in some cases for local experimentation with new and innovative regulatory models.

Convergence places special challenges on these complex national/state/municipal interrelationships. First, it impacts the players in somewhat different ways – and their interests are not fully aligned.

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43. 47 U.S.C. § 160 (2003).
44. *Id.* at § 161.

Second, it slows the speed with which regulation can respond to changes in the marketplace, because regulation must adapt in different layers.

## II. THE NEW EUROPEAN REGULATORY FRAMEWORK

The European Union has been playing a progressively larger role in the regulation of telecommunications. In March 2002, the European Union adopted a new regulatory framework that effectively standardizes the regulatory framework for all EU member states.

An unusual confluence of factors appears to have motivated the EU to take a fresh and daring look at telecommunications regulation. First, EU regulations required a comprehensive regulatory review by the end of 1999. Second, the EU *per se* was not burdened with as long a history of preexisting regulation as is the United States. Moreover, most EU Member States have migrated only in the last few years from government ownership of telecommunications, primarily on a monopoly basis, to private ownership and competition. They are, in consequence, acutely aware of the benefits of competitive free market mechanisms. They are technologically sophisticated, and recognize the impact of convergence. They also understand that, in the European context, even where there is consensus for change, it can be time-consuming or challenging to translate that consensus into legislation – therefore, when they make a change, it has to last for quite some time. Finally, there are ongoing tensions within the European Union between a strong internal-market role for the European Commission, the executive arm of the E.U., and freedom for Member States to act as they wish. These tensions can be particularly acute when a sector, such as telecommunications, is still in the process of opening to competition for the first time. All of these factors contributed to the willingness of the EU to make so substantial a break with the past.

The Europeans recognized that the bulk of all telecommunications regulation deals, in one way or another, with responses to market power. In particular, they associate the possession of *Significant Market Power* (SMP) with obligations that could include transparency,[45] non-discrimination,[46] accounting separation,[47] access to and use of specific network facilities (including Unbundled Network Elements [UNEs], wholesale obligations, collocation, and interconnection),[48] price controls

45. Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), art. 9, 2002 O.J. (L 108) [hereinafter *Access Directive*].

46. *Id.* at art. 10.

47. *Id.* at art. 11.

48. *Id.* at art. 12.

and cost accounting,[49] making necessary leased lines available,[50] and carrier selection and pre-selection.[51]

The basic concept of the regulation is simple and straightforward. The European Commission will begin by defining a series of relevant telecommunications markets, and by providing a set of guidelines for determining the presence or absence of market power, all based on methodologies borrowed from competition law and economics. Within each market, the National Regulatory Authority (NRA) in each member state will determine whether one or more parties possess SMP. If SMP exists, the NRA will impose appropriate obligations from the set noted in the previous paragraph, taking into account the specifics of the particular marketplace in question.[52] These obligations are imposed *ex ante*, based on the presence of SMP – it is not necessary to demonstrate that market power has been abused. Conversely, if the NRA fails to find SMP, then any such obligations that may already be in place must be rolled back.

In doing so, the EU seeks to move completely away from technology-specific and service-specific legislation. This is a significant and dramatic innovation.

We now consider each element of the framework in greater detail.

### *A. Market Definition*

In the new framework, it is the European Commission, the executive branch of the European Union, that provides a Recommendation on Relevant Product and Service Markets, "in accordance with the principles of competition law."[53] Annex I of the Framework Directive provides an initial list of such markets.

National Regulatory Authorities then take the European Commission's recommendation and define markets within their geographic territories. They are to take "the utmost account" of the recommendation, but the Framework Directive also envisions that NRA definitions might diverge from those of the European Commission in some instances.

49. *Id.* at art. 13.

50. Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), art. 18, 2002 O.J. (L 108) [hereinafter *Universal Service Directive*].

51. *Id.* at art. 19.

52. There is no automatic presumption that any obligation will be appropriate. If a competition authority is about to act, for example, regulatory action may well be inappropriate.

53. Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), art. 15, 2002 O.J. (L 108) [hereinafter *Framework Directive*].

The European Commission may also adopt a Decision identifying transnational markets, markets that span all or a substantial portion of the EU.[54] In these markets, additional procedures are required to ensure that NRAs work in concert with one another.

The process for market definition is described in a document referred to as "the Guidelines."[55] The Guidelines adopt a common framework for NRAs and National Competition Authorities (NCAs), with the recognition that this should ideally lead to equivalent market definitions; however, the Guidelines recognize that the European Commission or national competition authorities may in some instances diverge from market definitions established by European Commission or national regulators for good and valid reasons. They are dealing with somewhat different issues.

European competition law is similar to that of the United States as regards market definition. The economic procedure employed is based on a hypothetical monopolist test, assuming a "small but significant, lasting increase" of 5% to 10% in price of a product or service.[56] The relevant market then includes all products and services that are readily substitutable for the services in question.[57]

This market definition immediately addresses a number of fundamental convergence issues, and technological neutrality is a direct consequence. As the Guidelines note:

> Although the aspect of the end use of a product or service is closely related to its physical characteristics, different kind[s] of products or services may be used for the same end. For instance, consumers may use dissimilar services such as cable and satellite connections for the same purpose, namely to access the Internet. In such a case, both

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54. Commission of the European Communities, On relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, *Commission Recommendation* (Feb. 11, 2003).

55. 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, Brussels (Mar., 3, 2001) [hereinafter *Draft Guidelines*].

56. *Id.* at 33.

57. *See id.* at 35.

> According to settled case-law, the relevant product/service market comprises all those products or services that are sufficiently interchangeable or substitutable, not only in terms of their objective characteristics, by virtue of which they are particularly suitable for satisfying the constant needs of consumers, but also in terms of the conditions of competition and/or the structure of supply and demand on the market in question. Products or services which are only to a small, or relative degree interchangeable with each other do not form part of the same market.

*Id.*

> services (cable and satellite access services) may be included in the same product market. Conversely, paging services and mobile telephony services, which may appear to be capable of offering the same service, that is, dispatching of two-way short messages, may be found to belong to distinct product markets in view of their different perceptions by consumers as regards their functionality and end use.[58]

### *B. Significant Market Power (SMP)*

Per the Framework Directive, "[a]n undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers."[59]

The Guidelines distinguish between determining market power *ex post* and *ex ante*. In an *ex ante* world, the only meaningful measure of market power is the ability "of the undertaking concerned to raise prices by restricting output without incurring a significant loss of sales or revenues."[60]

As a proxy for market power, the Guidelines suggest computing market shares, typically based on sales volume or sales value. SMP is normally viewed as being a factor only where the market share exceeds 40%. Where the market share exceeds 50%, SMP is assumed to be present.[61]

This notion of concentration is roughly equivalent to that of a highly concentrated market, as described in the DoJ/FTC guidelines. A market share of 40-50% would imply an HHI of at least 1,600 to 2,500, assuming that all other market participants were extremely small. Note that an HHI of 1,800 or greater implies a highly concentrated market to the DoJ. Thus, the level of concentration at which the US and EU would consider a market to be problematic are in the same general range.

The Guidelines also deal with market power in upstream or downstream vertically related markets,[62] and with collective dominance.[63]

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58. *Id.* at 36.
59. *Framework Directive*, *supra* note 53, at art. 14, pt. 2.
60. *Draft Guidelines*, *supra* note 55, at 65.
61. *See id.* at 67.
62. *See id.* at 74-76.
63. *See id.* at 77-79. The concept of collective dominance has become well established in European case law. By contrast, collective dominance is rarely raised as a concern in the U.S. unless there is actual evidence of collusion.

### *C. Access Requirements*

As previously noted, the EU Framework requires NRAs to impose appropriate remedies *ex ante* from the list of possible options[64] where one or more firms are found to have SMP, but to eliminate restrictions absent SMP:

> Where a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred to in paragraph 2 of this Article. In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that relevant market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations.
>
> Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings with significant market power on that market . . . and the national regulatory authority shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist.[65]

### *D. Investigative Authority and Access to Information*

When the European Commission assesses a merger, it has full authority to issue information requests with subpoena-like legal force, and it also has the obligation to protect confidential information that it receives pursuant to those requests. In these regards, its authority is similar to that of the U.S. DoJ or FTC.

The new framework recognizes the need for regulators to obtain data on which to base market definitions and determination of SMP. It accords NRAs rights and responsibilities equivalent to those of NCAs:

> Member States shall ensure that undertakings providing electronic communications networks and services provide all the information, including financial information, necessary for national regulatory authorities to ensure conformity with the provisions of, or decisions made in accordance with, this Directive and the Specific Directives. These undertakings shall provide such information promptly on request and to the timescales and level of detail required by the national regulatory authority. The information requested by the national regulatory shall be proportionate to the performance of that

64. *See Framework Directive*, *supra* note 53, at art. 16, pt. 2.
65. *Id.* at 3-4.

> task. The national regulatory authority shall give the reasons justifying its request for information.[66]

The EU regulatory framework also establishes parameters whereby NRAs can exchange the data that they thus obtain with NCAs, the European Commission, and other NRAs, but only to the extent necessary and proportionate to enable implementation of the Framework.[67]

### *E. Deregulation*

Under the new Framework, regulation and deregulation are handled symmetrically. Where SMP is present, appropriate remedies must be applied. Where SMP is absent, those remedies may not be applied, and if already present must be removed.

No specific timeframe is specified.

### *F. Centralization versus Decentralization*

If the U.S. is a federal system, the E.U. might be said to be more akin to the U.S. under the Articles of Confederation, particularly in regard to areas such as foreign policy, defense and internal security.[68] The European historical experience has differed from that of the United States, and the European system is in consequence significantly less centralized than that of the U.S. today in many respects.

The tensions of centralization and decentralization that have been fought over in the U.S. for many decades are arguably even more intense in the European context. In most respects, EU member states are sovereign states. They work together in certain ways in order to achieve specific goals, such as uniform competition policy or a single currency.

In establishing a common regulatory framework, it was necessary to delicately balance the prerogatives of NRAs against the needs of the single market, and the prerogatives of the European Commission in maintaining that single market.

The balance that was struck preserves the ability, in general, of NRAs to operate unilaterally, but with notice to the European Commission and to other NRAs. The European Commission retains the ability to require that a market definition or a designation of SMP be withdrawn where it would create a barrier to the single European

66. *Id.* at 1.
67. *See id.* at 2.
68. *Cf.* Guido Tabellini, *The Assignment of Tasks in an Evolving European Union*, CENTRE FOR EUROPEAN POLICY STUDIES POLICY BRIEF NO. 10, 4-6 (Jan. 2002).

marketplace, or would be incompatible with the EU policy objectives embodied in Article 8 of the Framework Directive.[69]

A particularly knotty case relates to transnational markets, markets that span all or a substantial portion of the EU. "In the case of transnational markets . . . , the national regulatory authorities concerned shall jointly conduct the market analysis taking the utmost account of the Guidelines and decide on any imposition, maintenance, amendment or withdrawal of regulatory obligations referred to in paragraph 2 of this Article in a concerted fashion."[70]

For there to be tension between centralization and decentralization in the implementation of the new telecommunications regulatory framework in the E.U. is perhaps not surprising – similar tensions have existed in many political systems, and in many eras.[71]

### *G. Benefits*

There is much to be said for the new EU framework. It attempts to address convergence by using fluid market definitions instead of enshrining technology-based definitions within the law. It thus offers the potential of regulating at a velocity that approaches that of the changes in underlying technology and marketplace.

The notion of regulating in a completely technology-neutral fashion is promising. If one service is substitutable for another, then it should be subject to roughly the same regulatory constraints, irrespective of the technologies used to deliver the services. This is a very elegant and appealing concept; however, it does not sit well with regulatory practice in the U.S., as we shall see.

At the same time, the proof of this pudding must lie in its eating – and significant questions remain. We take up this topic later in the paper.

69. *Framework Directive*, *supra* note 53, at art. 7.

70. *Id*., at art. 16, ¶ 5.

71. Indeed, this is a classic problem in social sciences. *See* Tabellini, *supra* note 68. Tabellini applies established theory to the EU environment, noting trade-offs between the ability to cope with heterogeneity of local preferences and to exploit local information, versus the impact of "spill-over effects" on specific public goods. *Id* at 5-6. Tabellini also notes the need to avoid "excessive centralisation" and he draws a key distinction between the "bureaucratic accountability" that arguably characterizes Europe today, versus "democratic accountability." *Id.* at 3-4.

## III. COMPARATIVE RESULTS

It is impossible to say exactly how the new European framework will be applied in practice, either by the European Commission or by the NRAs. It is nonetheless an interesting thought exercise to consider how it *might* be applied, and to compare the results to those of U.S. regulatory practice in a number of specific instances.

It is perhaps not meaningful to ask, "What would the Europeans do?" More meaningful is to ask, "Is this a plausible outcome in the context of the European framework?"

The examples that follow are drawn from well-established precedent, particularly in the area of traditional telecommunications services. We necessarily refrain from commenting on matters currently before the Commission.

### *A. Computer Inquiries*

We noted earlier that, in the Computer Inquiries, the FCC ruled that enhanced services should not be regulated because they implicated no bottleneck facilities, and did not entail a significant risk of monopolization. This notion was carried forward in the Telecommunications Act of 1996, with its introduction of the concept of information services, and represents a key foundation block for deregulatory U.S. policies toward the Internet.

This result would appear to be entirely consistent with the EU regulatory framework. In the absence of SMP, none of the remedies for SMP should be applied.

### *B. Competitive Carrier Proceeding*

In 1979, the FCC initiated the *Competitive Carrier* proceeding[72] to consider how its regulations should be modified for new firms entering

72. Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor, *Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C.2d 308 (1979); Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor, *First Report and Order*, 85 F.C.C.2d 1 (1980) [hereinafter *Competitive Carrier First Report and Order*]; Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor, *Further Notice of Proposed Rulemaking*, 84 F.C.C. 2d 445 (1981) [hereinafter *Competitive Carrier Further Notice of Proposed Rulemaking*]; Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor, *Second Further Notice of Proposed Rulemaking*, 47 Fed. Reg. 17,308 (1982); Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor, *Second Report*

formerly monopoly markets. In a series of orders, the Commission distinguished two kinds of carriers – those with individual market power (dominant carriers) and those without market power (non-dominant carriers).[73] The Commission found AT&T's Long Lines Department, which provided interstate long-distance services, to be dominant in the interstate, long-distance market (including the long-distance private line market). It also found AT&T's 23 local telephone companies as well as independent, incumbent local telephone companies to be dominant, because they "possess control of essential facilities."[74] The Commission further found that specialized common carriers and resale carriers, both of which provided interstate, long-distance services in competition with AT&T, to be non-dominant.

The Commission determined that non-dominant carriers were unable to charge unreasonable rates or to engage in discriminatory practices that would contravene the requirements of the Communications Act, both because they lacked market power and because affected customers always had the option of taking service from an incumbent dominant carrier whose rates, terms, and conditions for interstate services remained subject to close scrutiny by the Commission.[75] Accordingly, the Commission gradually relaxed its regulations of non-dominant carriers. Specifically, the Commission

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*and Order*, 91 F.C.C. 2d 59 (1982) [hereinafter *Competitive Carrier Second Report and Order*]; Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor, *Order on Reconsideration*, 93 F.C.C. 2d 54 (1983); Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor, *Third Report and Order*, 48 Fed. Reg. 46,791 (1983) [hereinafter *Competitive Carrier Third Report and Order*]; Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor*, Fourth Report and Order*, 95 FCC 2d 554 (1983) [hereinafter *Competitive Carrier Fourth Report and Order*], *vacated by* ATT v. FCC, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, MCI Telecomm. Corp. v. AT&T, 113 S.Ct. 3020 (1993); Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor, *Fifth Report and Order*, 98 F.C.C. 2d 1191 (1984) [hereinafter *Competitive Carrier Fifth Report and Order*]; Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor, *Sixth Report and Order*, 99 F.C.C. 2d 1020 (1985) [hereinafter *Competitive Carrier Sixth Report and Order*], *vacated by* MCI Telecomm. Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) [hereinafter *Competitive Carrier Proceeding*].

73. *See Competitive Carrier Fourth Report and Order*, *supra* note 72, at 558, ¶ 7 (The Commission defined market power as "the ability to raise prices by restricting output" and as "the ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable.").

74. *Competitive Carrier First Report and Order*, *supra* note 72, at 22-24. The Commission specifically noted that it would "treat control of bottleneck facilities as prima facie evidence of market power requiring detailed regulatory scrutiny." *Id.* at 21. The Commission also found Western Union, domestic satellite carriers, and miscellaneous common carriers that relay video signals to be dominant in various relevant markets. *Id.* at 24-28. It acknowledged, however, that market developments were likely to erode the market power of these carriers over time. *Id.*

75. *Id.* at 31.

eliminated rate regulation for non-dominant carriers and presumed that tariffs filed by non-dominant carriers were reasonable and lawful. It also streamlined tariff filing requirements, which, *inter alia*, had required dominant carriers to file tariffs with notice periods of up to 120 days, and to submit cost support with their tariffs. For non-dominant carriers, in contrast, the Commission required only that tariffs be filed on 14 days notice and did not require any cost support. Finally, the Commission reduced existing Section 214 requirements, which required dominant carriers to file a request for authorization before constructing new lines; under the Commission's streamlined rules, non-dominant carriers only had to file a simple, semi-annual report on circuit additions, but did not have to obtain prior authorization.[76]

Again, these regulatory outcomes would appear to be entirely consistent with European thinking. Retail tariff regulations flow from the possession of SMP (which is roughly equivalent to U.S. concepts of market dominance); in the absence of SMP, there should be neither rate regulation nor the obligation to publish retail tariffs.[77]

### *C. Streamlining the Regulation of AT&T*

As competition developed in the interstate, long-distance market, the Commission initiated two proceedings to determine whether it should streamline its regulation of AT&T, the sole dominant long-distance carrier. In 1990, the Commission initiated the *Interstate Interexchange Competition* proceeding to consider streamlining the regulation of certain AT&T services.[78] After analyzing the level of

76. *Id.* at 39-44. Subsequently, the Commission announced a policy of permissive "forbearance," under which it would forbear from applying the tariff filing requirements of Section 203 and the entry, exit, and construction authorization requirements of Section 214 to non-dominant carriers. *See Competitive Carrier Second Report and Order*, *supra* note 72, at 73; *Competitive Carrier Fourth Report and Order*, *supra* note 72, at 557; *Competitive Carrier Fifth Report and Order*, *supra* note 72, at 1193, 1209. In 1985, the Commission decided to shift from "permissive" to "mandatory" forbearance, thus requiring de-tariffing by all non-dominant carriers. *Competitive Carrier, Sixth Report and Order*, *supra* note 72, at 1030-32. The Federal Court of Appeals reversed this finding, holding that the Commission lacked statutory authority to prohibit the filing of tariffs, and in a subsequent appeal, the court further found that the Commission lacked the authority to allow permissive de-tariffing. *See* MCI v. FCC, 765 F.2d 1186 (D.C. Cir. 1985); AT&T v. FCC, 1993 WL 260778 (D.C. Cir. 1993), *aff'd* MCI v. AT&T, 512 U.S. 218 (1994).

77. *See Universal Service Directive*, *supra* note 50, at art. 17.

78. *See* Competition in the Interstate Interexchange Marketplace, *Notice of Proposed Rulemaking*, 5 F.C.C.R. 2627 (1990); Competition in the Interstate Interexchange Marketplace, *Report and Order*, 6 F.C.C.R. 5880 (1991) [hereinafter *First Interstate Interexchange Competition Order*]; Competition in the Interstate Interexchange Marketplace, *Memorandum Opinion and Order*, 6 F.C.C.R. 7569 (1991); Competition in the Interstate Interexchange Marketplace, *Memorandum Opinion and Order*, 7 F.C.C.R. 2677 (1992); Competition in the Interstate Interexchange Marketplace, *Memorandum Opinion and Order*

competition for particular classes of long-distance service, the Commission found that certain services provided by AT&T had become "substantially competitive," and accordingly, it streamlined the regulation of those services.[79] Specifically, for services that it found to be subject to substantial competition, the Commission removed those services from price cap regulation (i.e., eliminated rate regulation), reduced the notice period for tariff filings relating to those services; and eliminated the cost-support requirement for those tariffed services.[80] In addition, the Commission permitted AT&T and other interstate long-distance carriers to offer services pursuant to individually negotiated contracts (i.e., to offer contract tariffs).[81]

Subsequently, AT&T filed a petition to be reclassified as a non-dominant carrier in the provision of interstate interexchange services. In 1995, the Commission granted AT&T's motion, based on its finding that "AT&T lacked individual market power in the interstate, domestic, interexchange market."[82] Thus, the Commission freed AT&T from price cap regulation for all of its domestic, interstate, interexchange services, subjected it to the same streamlined tariffing and Section 214 regulations that applied to its non-dominant competitors, and eliminated certain accounting and reporting requirements applicable only to dominant carriers.[83] In 1986, the Commission reclassified AT&T as non-dominant in the market for international services.[84]

Once again, this seems to be altogether consistent with European thinking. Once SMP has been alleviated, competitive safeguards are no longer necessary and should be eliminated.

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*on Reconsideration*, 8 F.C.C.R. 2659 (1993); Competition in the Interstate Interexchange Marketplace, *Second Report and Order*, 8 F.C.C.R. 3668 (1993) [hereinafter *Second Interstate Interexchange Competition Order*]; Competition in the Interstate Interexchange Marketplace, *Memorandum Opinion and Order*, 8 F.C.C.R. 5046 (1993); Competition in the Interstate Interexchange Marketplace, *Memorandum Opinion and Order on Reconsideration*, 10 F.C.C.R. 4562 (1995) [hereinafter *Interstate Interexchange Competition* proceeding].

79. *First Interstate Interexchange Competition Order*, *supra* note 78, at 5911, ¶ 188 (The Commission found that services provided to large- and medium-size business customers had become "substantially competitive."); *Second Interstate Interexchange Competition Order*, *supra* note 78, at 3668, ¶ 1 (The Commission found that, with the introduction of 800 number portability, the market for 800 services (except for 800 directory assistance where AT&T had a monopoly) had become substantially competitive.).

80. *See First Interstate Interexchange Competition Order*, *supra* note 78, at 5894, ¶ 74.

81. *Id.* at 5897, ¶ 91.

82. *See* Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier, *Order*, 11 F.C.C.R. 3271, ¶ 1, 3356, ¶ 164 (1995).

83. *Id.* at 3281, ¶ 12.

84. *See* Motion of AT&T to Be Declared Non-Dominant for International Service, *Order,* 11 F.C.C.R. 17,963 (1996).

### *D. Obligations for Interconnection, Resale of Retail Services, Unbundled Network Elements (UNEs), and Collocation*

Section 251 of the Act provides for a very modest series of obligations for local exchange carriers in general[85] (including *competitive local exchange carriers [CLECs]*), but an extensive series of additional obligations for incumbent local exchange carriers (ILECs).[86] Notable among these are obligations to provide:

> (2) Interconnection
> The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network
> (A) for the transmission and routing of telephone exchange service and exchange access;
> (B) at any technically feasible point within the carrier's network;
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
> (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, . . .
>
> (3) Unbundled Access
> The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . .
>
> (4) Resale
> The duty--
> (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; . . .
>
> (6) Collocation
> The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier . . . .[87]

If we assume *arguendo* that ILECs possess SMP, then this regulatory outcome appears to be precisely analogous to that described in

85. 47 U.S.C. §§ 251(a), 251(b).
86. *Id.* at § 251(c).
87. *Id.*

the Access Directive. Article 12, "Obligations of access to, and use of, specific network facilities," enumerates a number of obligations that NRAs may impose upon undertakings that possess SMP, including obligations:

> (a) to give third parties access to specified network elements and/or facilities, including unbundled access to the local loop; . . .
>
> (d) to provide specified services on a wholesale basis for resale by third parties; . . .
>
> (f) to provide co-location or other forms of facility sharing, including duct, building, or mast sharing; . . .
>
> (i) to interconnect networks or network facilities.[88]

A significant difference between the two regulatory systems, however, entails the manner in which such constraints might be lifted if market conditions were to change and if effective competition were to emerge.

Under the European framework, the NRA should in theory automatically lift these obligations if market conditions were to change over time in such a way that the undertaking in question no longer possessed SMP.

The equivalent mechanism in the U.S. would be for the FCC to forbear from imposing portions of section 251(c). As previously noted, the Act provides the FCC with authority to forbear from imposing any regulation or any provision of the Act where the FCC determines that such forbearance is in the public interest, is not necessary to protect consumers, and is not needed to prevent discriminatory, unjust or unreasonable charges or terms and conditions.[89] In determining to forbear, the Act explicitly asks the Commission to weigh the competitive impact of forbearance.

As it happens, however, the Act specifically prohibits the FCC from forbearing from applying requirements under sections 251(c) or 271 until "those requirements have been fully implemented."[90] This might in practice be somewhat circuitous, and perhaps less certain in its execution than the European solution, but the net effect could potentially be precisely analogous to that envisioned in the European framework – once SMP has been eliminated, the remedies to SMP must be rolled back.

88. *Access Directive*, *supra* note 45, at art. 12.
89. 47 U.S.C. § 160.
90. *Id.* at § 160(d).

### *E. Entry of Bell Operating Companies into Long Distance*

One of the most significant sections of the Telecommunications Act of 1996 is Section 271. Section 271 prohibits Bell operating companies (BOCs) or their affiliates from offering interLATA (i.e. long distance) services in any in-region state[91] until and unless the BOC in question can demonstrate to the satisfaction of state and federal authorities that it is providing access and interconnection to competitors in that state. Section 271 includes a fourteen point checklist of conditions that the BOC must demonstrably meet in order to be granted authorization to provide interLATA services in that state.

This may not directly fit the European model, but it is consistent in spirit with it. The EU framework does not envision a prohibition on a carrier's ability to provide a vertically integrated service as one of the listed regulatory remedies to SMP; indeed, Member States may only prevent a carrier from providing networks and services for overriding reasons of public policy, public security or public health.[92] One might view the BOCs as having possessed SMP in 1996 (which is not an unreasonable assumption, considering that they were formed through a consent decree). The notion, then, that a regulatory remedy to SMP should be lifted once effective competition has been established is entirely consistent with the European model.

### *F. Rates for Cable Service*

Video services are subject to different rules, but many of the underlying principles are the same as those for common carriers. As one conspicuous example, "[i]f the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority . . . ."[93] This is entirely consistent with the new EC framework, in that regulatory rate setting is inappropriate in the absence of SMP.

91. An in-region state is any of the states allocated to that Bell operating company under the AT&T Consent Decree of August 24, 1982. *Id.* at § 271(i)(1).
92. *Access Directive*, *supra* note 45, art. 3, at 1.
93. 47 U.S.C. § 543(a)(2).

## IV. IMPLEMENTATION CHALLENGES

The new European regulatory framework appears to be both comprehensive and theoretically elegant. Implementation issues might nonetheless significantly impact its practical effectiveness.

Are there aspects of implementation that are particularly worrisome?

### *A. The Role of the European Commission versus that of the NRAs*

As we have seen, the Framework represents delicate compromises between granting new powers to the European Commission and preserving the autonomy of the Member State NRAs. On balance, the new framework increases centralization of the European Union insofar as telecommunications regulation is concerned. One might reasonably expect that the new framework will drive an increase in regulatory consistency across the Member States,[94] but possibly at some loss in the ability of the system as a whole to reflect diverse local needs or to enable innovative experiments at the Member State level.

This tension between centralization and decentralization would appear to represent a potentially significant "fault line" in the implementation of the new regulatory framework. The ability of European Commission and NRA regulators to apply the system in a sensitive and appropriate manner, and to find workable day-to-day compromises, may play a large role in determining the success of the new framework in practice.

The framework envisions possible differences in judgment among NRAs, and between NRAs and the European Commission, and it includes mechanisms for resolving those differences. It is difficult to predict how well those mechanisms will work in practice. This is an area that bears close watching.

### *B. Emerging or Nascent Services*

The definition of SMP is, by default, based on market share. In many cases, emerging new services represent a challenge to the power of entrenched incumbents, and thus represent an enhancement to competition.

There is, however, a risk in regard to new services. A provider of a new service might initially – thanks, perhaps, to first mover advantages – possess a large market share of a tiny, emerging market. If this were to

94. Indeed, this is an explicit objective for the NRAs. *See Framework Directive*, *supra* note 53, art. 8, at 3(d).

be interpreted as SMP, there is a risk that the regulatory apparatus of the state would be brought to bear in a way that impedes competitive entry instead of fostering it.

The Guidelines recognize this, and note that emerging markets "[S]hould not be subject to inappropriate ex-ante regulation. This is because premature imposition of ex-ante regulation may unduly influence the competitive conditions taking shape within a new and emerging market. At the same time, foreclosure of such emerging markets by the leading undertaking should be prevented."[95] In principle, this would appear to represent appropriate guidance. In practice, it may be difficult for NRAs to determine whether the imposition of ex ante regulation is appropriate or not, and it is natural to wonder whether different NRAs will be able to apply this guidance in a consistent way across the EU.

## V. RELEVANCE TO THE UNITED STATES

As we have just seen, in a great many cases the new European regulatory framework might well tend to reach conclusions similar to those which we reach in the United States. Given that the methodologies are radically different, why should the results be so similar?

Biologists speak of *convergent evolution*. Two unrelated species may evolve functionally equivalent organs in order to deal with similar environmental stresses. The human eye is not the same as that of a fruit fly, but they perform the same function.[96]

Analogously, the new EU framework and the U.S. regulatory environment tend to address similar issues in similar ways, not necessarily because of equivalent methodologies, but rather because our policy objectives, broadly stated, are similar. We are trying to solve roughly the same problems.

There are, however, important distinctions to be drawn. In the U.S., our laws and regulations contain specific regulatory *outcomes*, while the EU Framework defines a *process* for reaching similar results. If both methodologies potentially lead to roughly equivalent regulatory outcomes, is there reason to prefer one methodology to the other?

The EU framework is extremely logical, and has as we have seen the potential to generate good results. In addition, it has certain advantages in comparison with the U.S. methodology:

- In many instances, the notion of SMP more accurately expresses the need for regulation than does the U.S. equivalent regulatory category.

95. See *Draft Guidelines*, *supra* note 55, at ¶ 32.
96. *See generally* RICHARD DAWKINS, CLIMBING MOUNT IMPROBABLE 19-22 (1996).

- The notion that certain regulatory impositions should be imposed in the presence of SMP, and lifted in its absence, may express regulatory desiderata and the desired *timing* of regulation and deregulation more clearly and more simply than do equivalent U.S. statutes.
- In leaving the determination of SMP, and of suitable remedies, to regulation rather than to statute, the European system may be able to respond to change more nimbly than that in the United States.
- The European system arguably deals with technology convergence, which blurs regulatory categories, far more effectively than that of the U.S.

Thus, there would seem to be much to recommend the European framework.

Unfortunately, the European approach does not fit neatly into U.S. regulatory practice. It is important to bear in mind that the Europeans were able to initiate this monumental overhaul of their system because they had far less relevant regulatory history to contend with than do we in the U.S. They were thus able, with the benefit of experience, to revisit and rewrite their regulation anew.

Our law and our history do not lend themselves to direct application of the EU framework. The law, as we have seen, is based on regulatory categories that imperfectly correspond to market power. More significantly, the law embodies a complex history that reflects innumerable social compacts. The Communications Act of 1934 was itself an agglomeration of earlier practice. Title III, dealing with radio, was added after the fact. The FCC subsequently established regulations for cable television, which subsequently led to the Cable Television Act of 1992 and then to Title VI of the Act.

In the U.S. system, the balances between regulation and deregulation, and between federal, state and local authority all entailed delicate compromises. The European framework is elegant in its simplicity and directness, but it does not capture those nuances.

There would also be certain practical difficulties in any direct application of the European framework in this country. The EU framework depends, as we have seen, on acquisition of sufficient data to enable NRAs to unambiguously determine relevant markets and the possession of SMP. In the U.S., however, the FCC is the national regulatory authority. The FCC lacks the authority to get the information that it would, and may also lack the ability to protect that information from public disclosure.

Additional challenges exist. Europeans may tend to trust governments more than they trust corporations. In the US, it is largely the reverse. It is not clear that Americans would be willing to give regulators such broad authority.

The EU telecommunications regulatory framework nonetheless provides a convenient and natural way to think about the public policy implications of many of the choices that confront the FCC. As we have seen, the EU framework often provides a very simple and direct way of visualizing regulatory outcomes. It could be a very useful exercise for the FCC to use the European methodology as a means of visualizing and understanding the public policy implications of the most challenging regulatory decisions that we confront.