

**ISSUES ASSOCIATED WITH THE  
CREATION OF A EUROPEAN  
REGULATORY AUTHORITY FOR  
TELECOMMUNICATIONS**

**A Report by NERA  
and Denton Hall for  
the European Commission  
(DG XIII)\***

**APPENDICES**

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## APPENDIX 1. TERMS OF REFERENCE

**Subject: Regulatory and legal issues associated with the creation of a regulatory authority for telecommunications at the level of the Union**

### 1. Context

The Commission is currently preparing proposals for the regulatory framework governing the telecommunications industry for the time when the liberalisation process will have been completed. From the institutional perspective, this requires definition of the respective roles for national and Union regulatory authorities.

In addition, many industry participants have identified the need to streamline enforcement of the regulatory framework and called for an authority at European level. The Report on "Europe and the global information society" ("Bangemann Group Report") argued for such an authority, without however seeking to define its remit.

### 2. Background to the study

The future organisational structure for regulation of telecommunications in the EU must balance various policy objectives, which will form a set of benchmarks against which to judge any future regulatory environment:

- Any future structure should enable effective supervision of the telecommunications industry and ensure a consistent and efficient application of the regulatory framework. This will involve striking an appropriate balance between what should be done at a European level and what is best left to national regulatory supervision. This balance may well vary in different policy areas, such as the application of competition rules, frequency policy or licensing of infrastructure and services.
- Any future structure should facilitate the development of pan-European services and networks, as well as the trend towards convergence of different technologies and markets.
- Any future structure will have to take account of the present framework for regulatory cooperation between national regulatory authorities on a European (CEPT) and worldwide (ITU) scale.

### 3. Requirements

In the light of these considerations, the study will examine regulatory and legal issues associated with the creation and operation of a regulatory authority at a European level. The study will in particular focus on:

#### 3.1 *Identification of current issues which would best be dealt with at a European level*

- The study should identify what are considered by market players to be the current or emerging core regulatory issues which would best be dealt with at a European rather than a national level. This might address issues such as:
  - licensing and resource management (including fixed and radio-based infrastructure, frequency and numbering issues);
  - issues resulting from divergent licence conditions and styles of regulation; interconnection issues;
  - cooperation and restructuring within the telecommunications industry and between telecoms and other industries.

#### 3.2 *Analysis of the potential operational problems which might result from the existence of split regulatory responsibilities and recommendations to overcome these problems*

- The Study should consider in the light of the survey, and of experience in other jurisdictions, the practical and operational problems which could result from splitting of regulatory responsibilities between a European level authority and national and/or pan-European bodies. Whilst focusing on the telecommunications sector illustrations from other relevant sectors might be considered.
- The Study should also consider potential problems resulting from different levels of regulatory supervision for different parts of the Information Society, as well as possible approaches to overcome this. One example, could be the situation where the licensing conditions for pan-European new telecommunications services was supervised at a European level, whilst content related issues linked to cable television continued to be regulated at a national level.

The Commission has already launched a study on current regulatory structures in some of the main telecommunications markets outside the Union, viz. the United States, Canada and Australia. The results of that study may be useful in addressing the issues of a possible European level authority, given the federal structure in those countries.

### 3.3 *The legal issues surrounding the creation of such an authority*

- The legal basis for such a regulatory authority, both under the existing EC Treaty and in the perspective of possible changes to this Treaty following the 1996 intergovernmental conference.
- The activities which under those legal bases could be delegated to the authority and whether current legal structures would allow such delegation? What regulatory tasks must legally be retained by the Commission, and what activities could usefully be carried out either by national regulators or by non-Union bodies at a European level?
- In the light of these legal considerations recommendations for possible approaches to overcome the barriers and issues identified in parts 3.1 and 3.2.

This legal analysis should be undertaken in the light of the general principles of Community law, including subsidiarity and proportionality. Account should also be taken of the relationship of any regulatory authority at a European level with other Community institutions, with Member States' regulatory authorities and with international bodies in the telecommunications area

The study is likely to be carried out by a firm or consortium of firms with extensive regulatory and legal expertise, in particular in the telecommunications sector but not limited to that sector. The contractor should have confirmed experience of regulatory work at the level of the Union, in at least some of the Member States, and ideally also in some of the main jurisdictions outside the Union.

## 4. Conclusions

The study should draw conclusions from the analysis and present the legal issues which are likely to arise if a regulatory authority at European level were to be instituted for the telecommunications area. The study could also identify the various tasks which could be entrusted to such an authority and any particular issues associated with some of these tasks.

The study is not intended to make recommendations on the merits of whether or not such an authority at a European level should be created as a matter of policy, but may recommend particular approaches to be followed if such an authority were to be established; such recommendations might suggest different approaches for different regulatory issues. The Study is not intended to review existing policy lines followed by the European Union, nor to comment on their merits.



## APPENDIX 2. INTERVIEWS

### Austria

Dr. Singer, Ministry of Transport and Science.

Robert Springer, IBM Austria.

Ernst Strommer, Austrian Railroads.

Michael Sprinzl, Division for Transportation and Telecommunications Policy, Employers Association.

### France

C. Hacker, Chargé du bureau des affaires économiques et réglementaires/ Affaires européennes et multilatérales, France Telecom.

M. Louvet, Réglementation des Réseaux, France Telecom.

J.M. Linois, Chef du Service des Affaires Internationales, DGPT.

S. Petroff, Telecom Development Manager, Eurotunnel.

G. Chauveau, Chargé de Mission, SIRIS.

R. Deshayes, IT Manager, Crédit Lyonnais.

### Germany

Bernhard Spohr, Division Head, Regulatory Affairs, Deutsche Telekom.

Mr. Sanders, Deputy Head, Policy Issues, Ministry of Post and Telecommunications.

Dr. Karl-Heinz Neumann, Director of Regulatory Affairs, RWE Telliance.

Dr. Karl-Heinz Strache, Mannesmann Mobilfunk GMBH

Dr. Thomas Ehrmann, Vebacom.

Dr. Thomas Mellewig, Vebacom.

### Greece

Mr. G. Skarpelis, General Director, Telecommunications Networks, OTE S.A.

Mr A. Lambrinopoulos, President, National Telecommunications Committee.

Mr. N. Manasis, Business Development Manager, Panafon Hellenic Telecommunications Company S.A. Also, Chairman of the GSM European Interest Group and Vice Chairman of the GSM MoU Association.

Dr. P. Tzortazakis, Managing Director, FORTHnet S.A.

Mr. V. G. Cassapoglou, Advocate, Secretary General, Hellenic Telecoms Users Association.

## Italy

Claudio Boreggi, Vice-Director for Strategy, Planning and Control, Telecom Italia SpA.

Romano Righetti, Director-General, Directorate for Regulation and Service Quality, Ministry of Post and Telecommunications.

Michele Concina, President and CEO, Albacom SpA.

Bruno Lamborghini, Senior Vice President, Olivetti-Telemidia Group.

Roberto Pesce, Head, Telecommunications Services, Fiat SpA.

## Netherlands

Hans Kraaijenbrink, Director of European Policy and Regulation, PTT Telecom.

Fokko Bos, Deputy Head, International Policy Division, Policy Affairs Directorate, Ministry of Transport.

L. Titre, Technological Policy Division, Policy Affairs Directorate, Ministry of Transport.

J. Broere, Frequency Management, Policy Affairs Directorate, Ministry of Transport.

David Reibel, General Counsel in Charge of Legal Aspects, Esprit Telecom.

Frans Lijkamp, Regulatory Counsel, Unisource.

B. de Ruitter, Vice President Government & Intercompany Relations, Unisource.

Hein Albeda, Policy Officer, ConsumentenBond.

A. de Liefde, Director, BTG.

## Spain

José-Alberto Blanco Losada, Subdirector General of Strategic Planning, Telefónica de España, S.A.

Enrique Carrascal González, Subdirector of Access Networks Department of Network and Service Planning, Telefónica de España, S.A.

María Nieves Tapiador, Telefónica de España.

Pedro L. Alonso Manjón, Chief of Support Staff to the Director General, Dirección General de Telecomunicaciones.

Ignacio Menéndez de Luarda, Director of Business Development, Retevisión.

José Ramón Fernández Antonio, Director of Planning and Finance, Retevisión.

José María Sobrino las Heras, Director of Plans and Studies, Retevisión.

Carlos López Blanco, Secretary to the Board and Head of Legal Affairs, Airtel Móvil, S.A.

Victor González Muñoz, Assistant to the President, Airtel Móvil, S.A.

Luis Camarena Checa, Director of Marketing, BT Telecomunicaciones.

Antonio Llobet, Assistant Director General, Asociación Española de Usuarios de Telecomunicaciones (Autel).

Bruno Soria, Technical Director, Asociación Española de Usuarios de Telecomunicaciones (Autel).

## Sweden

Claes-Göran Sundelius, Director, National Regulatory Affairs, Telia.

Johan Martin-Löf, Director International Affairs, Telia.

Curt Andersson, Deputy Director General - Director of Licensing and International Affairs, Post & Telestyrelsen -National Post and Telecom Agency.

Anders Frederich, Head of Section, Coordination, Post & Telestyrelsen -National Post and Telecoms Agency.

Ola Silberman, Company Lawyer, Tele2.

Jörgen Nilsson, Manager, Business Strategy, Tele 2.

Alan Wright, Business Development Manager, France Telecom Nordphone AB.

## United Kingdom

Larry Stone, Head of EU Affairs & European Regulation, British Telecommunications.

Fiona Hope, Senior Adviser, European Regulation, British Telecommunications.

Caroline Varley, Director of Services Competition and International Affairs, Oftel.

André Sheehan-Evett, European Regulatory Officer, International Section, Oftel.

Julian Farrel, Communications and Information Industries Division, Department of Trade and Industry.

Christopher Holmes, Communications and Information Industries Division, Department of Trade and Industry.

Mike Dodds, European Telecommunications Section, Communications and Information Industries Division, Department of Trade and Industry.

Gareth Locksley, Mercury and Cable & Wireless Europe.

John Saxton, Martin Dawes.

## Other survey respondents

Nick White, Vice Chairman, INTUG.

Mel Read, Member of the European Parliament.

Hartmut Seibel, Regulatory and Legal Counsel, Hermes Europe Railtel.

Otto Björklund, Head of Representative Office, Nokia.

Marcel de Sutter, Secretary General, Association of Private European Cable Operators (APEC).

**Fact finding interviews**

Yves Mongelard, Deputy Head of Office, European Radiocommunications Office (ERO).

Jean-Yves Montfort, European Telecommunications Office (ETO).

## APPENDIX 3. BRIEFING NOTE FOR INTERVIEWERS

### 1. Purpose of Briefing Note

The purpose of this note is to provide guidance to those people undertaking interviews as part of the study of the issues associated with the creation of a European Regulatory Authority. In particular, we need to ensure that the output of the interview process is precisely geared to the objectives of the study, as related to us by DG XIII. It is important, therefore, that all interviewers read this note when conducting their programme of interviews.

### 2. Background

The European Commission has emphasised that the interviewers need to obtain as much hard evidence and as many reasoned arguments as possible so as to enable the prospective benefits (advantages) and costs (disadvantages) associated with a pan-European regulator to be assessed. To produce the requisite information, it will be necessary for interviewers to ask penetrating questions and to probe interviewees' responses, in addition to collecting any relevant supporting material. This in turn means that interviewers will need to ensure that they have thought in advance about the potential implications of the creation of a pan-European regulator, including its role vis-à-vis national regulatory authorities (NRAs) and existing European bodies, and have an understanding of what the major issues are in each of the areas covered by the questionnaire.

To help in this process, we have:

- attached the terms of reference of the study;
- attached a note from Denton Hall, which summarises the nature and activities of existing European telecommunications organisations;
- briefly discussed, in a later section of this note, some of the main issues which appear to us to be relevant. Interviewees are, however, encouraged to go beyond our list and to identify any additional issues which they regard as being relevant.

What the Commission does not want is a litany of complaints about NRAs, and their lack of independence, with the concomitant conclusion that a pan-European regulator is required in order to perform the role of regulator of the regulators<sup>1</sup>. The primary objective of this

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<sup>1</sup> We already have plenty of evidence about the lack of regulatory independence at present, and the slow or absent implementation of particular regulatory measures in certain Member States (from the ONP study). It is also important to note that EU measures to increase regulatory independence are imminent (see footnote 3). Any use of a pan-European body to improve the performance of NRAs would have to be shown to be necessary and to comply with the principle of subsidiarity. These issues can be considered in the report, but we do not want the interviews to be a conduit for complaints about the general capabilities of NRAs.

study is to examine the case for creating a pan-European authority, assuming that NRAs will become both independent and effective.

We have therefore defined the regulatory framework which can be expected to exist in the absence of a pan-European regulatory authority. This provides the benchmark against which the benefits of creating such an authority need to be assessed. The regulatory framework in the absence of a pan-European regulator is assumed to have the following elements:

- the NRA in each Member State is independent and effective. Thus, the case for a pan-European regulator does not rest on the fact that, at present, NRAs in many countries are not independent<sup>2</sup>;
- existing European bodies perform many of the functions which might be undertaken by a pan-European regulator. In particular, the following bodies need to be borne in mind when considering the potential role of a pan-European regulator:
  - the European Commission and the ONP Committee;
  - the European Committee of Telecommunications Regulatory Affairs (ECTRA), which provides a forum within which major telecommunications regulatory policy issues can be defined, individual NRAs can exchange views and share experiences regarding regulatory implementation, and common agreement can be reached on the principles of regulation;
  - the European Telecommunications Standards Institute (ETSI) which has responsibilities for designing standards;
  - the European Telecommunications Office (ETO) which was set up to consider the technical aspects of licence harmonisation and plays an important role in the area of numbering policy;
  - the European Radiocommunications Office (ERO) which is involved in radio frequency harmonisation;
  - the proposed European Union Telecommunications Committee (EUTC), consisting of representatives from Member States and chaired by the Commission, which has limited dispute resolution powers in respect of licensing questions;
- bilateral negotiations between Member States, e.g. on international accounting settlements.

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<sup>2</sup> The Commission has recently presented a proposal for amending the ONP Framework Directive (90/387/EEC). The proposal includes the requirement that Member States who retain ownership or a significant degree of control of TOs should ensure effective structured separation of the regulatory function from activities associated with ownership or control.

Put succinctly, the purpose of the study is to identify whether the creation of a pan-European regulator would lead to net benefits (after taking account of the costs involved) compared to a framework which consists solely of a combination of independent and effective NRAs, existing telecommunications institutions which operate at a pan-European level, and bilateral negotiations between Member States.

### **3. Potential Role for a Pan-European Regulator**

The central question to be addressed is what would the creation of a pan-European regulator offer that can not readily be provided by the framework defined above? Bearing in mind that the regulatory framework will need to cope with the increasing globalisation of telecommunications companies and the prospective development of trans-European networks (TENS), it would appear that such an authority might have a role to play in relation to:

- operation of networks and the provision of services that transcend national boundaries;
- interconnection of networks in different countries;
- coordination of the use of scarce resources (numbers and radio frequencies) in order to facilitate service provision and inter-operability at a European level;
- ensuring that regulatory principles and practices are sufficiently harmonised to prevent the emergence of regulatory “havens” and opportunities for companies to exploit differences between countries in regulatory conditions;
- resolution of disputes between entities in different Member States.

It will be necessary, as part of this study, to identify the potential importance of each of these possible roles for a pan-European body, and hence the potential benefits. Equally, it will be necessary to consider the problems and costs, which might arise from the creation of such a body, and their potential importance. A view will also be necessary on the extent to which a pan-European regulator would replace or augment the activities of existing supra-national bodies and committees.

### **4. Issues Relating to Specific Areas**

#### **4.1. Interconnection**

Appropriate interconnection arrangements are essential for the creation of a competitive telecommunications market. However, there is as yet no consensus on what constitutes the correct basis for setting interconnection prices. In this context, it is important to note that

the proposed Interconnection Directive is compatible with a variety of alternative pricing regimes and systems for costing and recovering universal service obligation costs.

This suggests that one possible role for a pan-European regulator would be to draw up and secure the implementation of a harmonised set of principles on which to base interconnection charges and universal service payments. The benefits and costs of this would have to be compared with those relating to the system in the proposed Interconnection Directive, whereby the Commission, in consultation with the ONP Committee, can issue recommendations on cost accounting systems relating to interconnection, and can draw up guidelines on the costing and financing of universal service.

Secondly, a pan-European body could act to resolve disputes, particularly where the parties concerned are operating under authorisations provided by different Member States. Again, however, it will be necessary to consider the benefits and costs of such an arrangement with those of the dispute resolution procedure in the proposed Interconnection Directive (which involves the Commission in consultation with the ONP Committee) combined with genuinely independent NRAs.

A third area, in which there may be a role for a pan-European body, is in setting accounting settlement rates. The existing system of rates bears little relationship to underlying costs and there are strong grounds for arguing that it should be replaced by an alternative, more cost orientated structure. In practice, there are likely to be a number of problems in moving towards a fully cost orientated structure, not the least of which is the existence of different costing methodologies in different countries.

In examining this issue it will again be important to compare the potential advantages and disadvantages of a pan-European regulator with other alternatives such as the continuation of bilateral negotiations. For example, which approach is likely to lead to the most rapid reduction of charges (both between individual countries and for the EU as a whole) and which is least likely to result in distortions in traffic patterns and the location of economic activity?

#### **4.2. Standards**

There are strong arguments for common standards both within individual countries and between countries. In particular, their adoption can generally be expected to result in reductions in:

- research and development costs;
- production costs;
- testing costs.

Common standards are likely to benefit manufacturers and hence operators and customers. In addition, harmonisation of standards may help to facilitate the development of competition. On the other hand, it may take time to develop an appropriate standard and, in some cases, an operator may wish to introduce a new technology before a common standard can be agreed.

While there is a clear role for a body to set standards it should be recognised that such a body, namely ETSI, already exists in Europe. As a result, it needs to be considered whether a pan-European regulator is needed in this area or, conceivably, whether ETSI might be incorporated within such a body, although the existence of non-EU members of ETSI would appear to make this difficult.

#### **4.3. Allocation and Management of Radio Frequencies**

There is a strong case for harmonisation of the use of radio frequencies within the EU, where this is feasible, since:

- this reduces interference costs;
- enables manufacturers to achieve economies of scale in equipment provision.

However, as in the case of common standards there already exists a European body in this area (ERO). The potential role of a pan-European regulatory body in the area of spectrum allocation and management therefore needs to be evaluated in this context.

#### **4.4 Numbering**

Numbering is a shared resource across Europe and the importance of European wide cooperation on numbering of telecommunications services is widely recognised and indeed the Council passed a resolution on this issue in 1992 (Council Resolution 92/C318/01; OJ 1992 C318/2)<sup>3</sup>. The European Numbering Office (ENO) was established in 1994 to allow the opinions of interested parties to be taken into account and for the Commission to be involved where necessary. Harmonisation is a key issue and the prospective net benefits of a pan-European regulatory body, with a remit in this area, will need to be considered.

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<sup>3</sup> In economic terms, number harmonisation may result in a reduction in transaction costs because, for example, of a reduction in misdialled calls.

#### **4.5 Licensing**

The proposed Licensing Directive should facilitate the provision of pan-European services and infrastructures and enhance the development of competition. In particular, it contains provisions relating to:

- harmonisation of licensing conditions and procedures;
- reliance on general authorisations which largely remove the need to apply for individual licences;
- one-stop shopping procedures, via ETO, which enable a single application to result in individual licences in different Member States.
- a dispute resolution procedure involving the proposed EUTC.

These provisions in the proposed Directive should help to generate significant economic benefits. Any move towards pan-European licensing and harmonised conditions and procedures is likely to result in the more rapid introduction of competition, which in turn may lead to dynamic efficiency benefits and a more rapid move towards cost-reflective pricing. Secondly, pan-European licensing is likely to result in a reduction in transaction costs relating to licence applications and administration.

Again, what we need to identify is how a new pan-European regulatory body would improve the situation and whether the benefits would outweigh the costs.

#### **4.6 Ownership and Competition Regulation**

Competition regulation at the European level is currently the responsibility of the Commission (DG IV). Given the existence of a pan-European regulator, a key issue would be the separation of powers between such a body and DG IV and between it and NRAs, bearing in mind the principle of subsidiarity. Again the question that needs to be answered is what would a pan-European regulator offer in terms of benefits and at what cost.

#### **4.7 Convergence of Telecommunications and Broadcasting**

A further area to consider is the implications of the convergence of telecommunications and broadcasting. If a pan-European regulator were to be established, should it deal with both telecommunications and broadcasting and should it be restricted to issues relating to access and transmission, or also regulate content. Again, the pros and cons of different solutions, with and without a new pan-European body, will need to be considered.

#### **4.8 Implementation and Enforcement of Directives**

A pan-European regulator could conceivably play a role in the implementation and enforcement of directives. However, the potential role is likely to diminish substantially with the creation of genuinely independent NRAs. The interaction and respective roles of the NRAs and the pan-European regulator is a key area that the study will need to address.

## APPENDIX 4. QUESTIONNAIRE

### **Regulatory and Legal Issues Associated with the Creation of a Regulatory Authority at the Level of the European Union**

At present Member State National Regulatory Authorities (NRAs) are the bodies responsible for carrying out most of the EC telecommunications implementation work. The Commission is examining whether this is appropriate in the long term or whether there is a need for a pan-European regulatory authority. In particular, the Commission would like to understand how regulation can best keep pace with developments in the telecommunications industry, such as the globalisation of telecommunications operators and the introduction of trans-European networks and services.

The aim of the interviews is to discuss, with the interviewees, the arguments for and against having various regulatory activities carried out at a European rather than a national level. In considering which activities might be best carried out by pan-European regulation, interviewees should not be constrained by what is allowed under current European treaty arrangements.

#### **1. Interconnection**

- 1.1 What is your view of existing arrangements for and likely developments on interconnection in your country?
- 1.2 Would the involvement of a European-wide regulatory body in the regulation of interconnection be beneficial?
- 1.3 If you consider that there is a need for the involvement of a European-wide body in the regulation of interconnection, which elements of the activity do you think should be handled at the European level (e.g. determination of cost-basis, dealing with disputes between operators) and why?
- 1.4 What would be your concerns, if any, regarding the involvement of a European-wide regulatory body in the area of interconnection, including potential transitional difficulties?
- 1.5 How are developments in telecommunications likely to affect the desirability of the involvement of a European-wide regulatory body in the regulation of interconnection in the coming years?

#### **2. Standards**

- 2.1 What is your view of existing arrangements for and likely developments in standards regulation in your country?

- 2.2 Would the involvement of a European-wide regulatory body in the regulation of standards be beneficial?
- 2.3 If you consider that there is a need for the involvement of such a body in the regulation of standards:
- which elements of the activity do you think should be handled at the European level?
  - why do you think each of these activities should be handled at the European level?
  - what would be the relationship and distribution of functions between ETSI and the new European-wide telecommunications regulator?
- 2.4 What would be your concerns, if any, regarding the involvement of a European-wide regulatory body in the area of standards, including potential transitional difficulties?
- 2.5 How are developments in telecommunications likely to affect the desirability of the involvement of a European-wide regulatory body in the regulation of standards in the coming years?
- 3. Allocation and management of radio frequencies**
- 3.1 What is your view of existing arrangements for and likely developments in radio frequency allocation and management in your country?
- 3.2 Would the involvement of a European-wide regulatory body in the management of radio frequencies (e.g. frequency coordination, interference, harmonisation) be beneficial?
- 3.3 If you consider that there is a need for the involvement of such a body in the allocation of radio frequencies:
- which elements of the activity do you think should be handled at the European level?
  - why do you think each of these activities should be handled at the European level?
  - what would be the relationship and distribution of functions between the European Radiocommunications Office (ERO) and the new European-wide telecommunications regulator?
- 3.4 What would be your concerns, if any, regarding the involvement of a European-wide regulatory body in the area of frequency allocation and management, including potential transitional difficulties?
- 3.5 How are developments in telecommunications likely to affect the desirability of the involvement of a European-wide regulatory body in the allocation and management of radio frequencies in the coming years?

**4. Numbering**

- 4.1 What is your view of existing arrangements for and likely developments in the management of numbering in your country?
- 4.2 Would the involvement of a European-wide regulatory body on numbering issues be beneficial?
- 4.3 If you consider that there is a need for the involvement of a European-wide body on numbering issues:
- which elements of the activity do you think should be handled at the European level (e.g. freephone and premium rate number harmonisation)?
  - why do you think each of these activities should be handled at the European level?
  - what would be the relationship and distribution of functions between the European Telecommunications Office (ETO) and the new European-wide telecommunications regulator?
- 4.4 What would be your concerns, if any, regarding the involvement of a European-wide regulatory body in the area of numbering, including potential transitional difficulties?
- 4.5 How are developments in telecommunications likely to affect the desirability of the involvement of a European-wide regulatory body on issues in the coming years?

**5. Licensing and licence conditions**

- 5.1 What is your view of existing arrangements for and likely developments in your country on:
- allocating and issuing licences;
  - the setting of licence conditions; and
  - the monitoring of compliance with licence conditions?
- 5.2 Would the involvement of a European-wide regulatory body be beneficial in these activities? In particular, do you see advantages in the existence of pan-European licences?
- 5.3 If you consider that there is a need for the involvement of a European-wide body in licensing, which elements of the activity do you think should be handled at the European level and why?
- 5.4 What would be your concerns, if any, regarding the involvement of a European-wide regulatory body in the area of licensing, including potential transitional difficulties?
- 5.5 How are developments in telecommunications likely to affect the desirability of the involvement of a European-wide regulatory body in the regulation of licensing in the coming years?

**6. Ownership and competition regulation**

- 6.1 What is your view of existing arrangements for and likely developments in telecommunications specific ownership and competition regulation in your country?
- 6.2 Would the involvement of a European-wide regulatory body in ownership and competition regulation for the telecommunications sector and, possibly, the audio-visual sector, be beneficial?
- 6.3 If you consider that there is a need for the involvement of a European-wide in ownership and competition regulation related to telecommunications and broadcasting, which elements of the activity do you think should be handled at the European level and why?
- 6.4 What would be your concerns, if any, regarding the involvement of a European-wide regulatory body in the area of telecommunications and audio-visual ownership and competition regulation, including potential transitional difficulties?
- 6.5 How are developments in telecommunications likely to affect the desirability of the involvement of a European-wide regulatory body ownership and competition regulation in the telecommunications and audio-visual sectors in the coming years?

**7. Implementation and enforcement of Directives (e.g. ONP)**

- 7.1 What is your view of existing arrangements for the implementation and enforcement of telecommunications related Directives in your country? How are these arrangements likely to change in the future?
- 7.2 Would the involvement of a European-wide regulatory body in the implementation and enforcement of Directives be beneficial?
- 7.3 If you consider that there is a need for the involvement of a European-wide body in the implementation and enforcement of Directives, which elements of the activity do you think should be handled at the European level and why?
- 7.4 What would be your concerns, if any, regarding the involvement of a European-wide regulatory body in the implementation and enforcement of Directives, including potential transitional difficulties?
- 7.5 How are developments in telecommunications likely to affect the desirability of the involvement of a European-wide regulatory body in the implementation and enforcement of Directives in the coming years?

**8. Others**

- 8.1 In what other activities do you think the involvement of a European-wide regulatory body might be beneficial? Examples might include:
- customer protection, i.e. dealing with complaints by users and service providers
  - regulation of price levels and price structures
  - funding and enforcement of universal service obligations (USO)
  - issues relating to number portability
- 8.2 What is your view of existing arrangements for and likely developments on each of these activities in your country?
- 8.3 For each of these activities, which elements do you think should be handled at the European level and why?
- 8.4 What would be your concerns, if any, regarding the involvement of a European-wide regulatory body in each of the activities you have identified, including potential transitional difficulties?
- 8.5 How are developments in telecommunications likely to affect the desirability of the involvement of a European-wide regulatory body in these other activities in the coming years?

**9. Further thoughts on the possible creation of a pan-European regulator**

- 9.1 Where, if at all, would you consider the involvement of a European-wide regulator to be of greatest relevance and urgency?
- 9.2 Are there any other relevant issues, not covered by the above list of questions, which you wish to discuss?
- 9.3 If relevant, what, in general terms, would you see as the respective roles of a pan-European regulator and national regulatory authorities?
- 9.4 How would you summarise your overall conclusions on the possible creation of a European-wide regulator?



## APPENDIX 5. EXISTING INSTITUTIONS IN TELECOMMUNICATIONS

Numerous bodies are involved in telecommunications both at pan-European and Community levels, and it is useful to recall how some of these institutions and Community bodies were established and the role they play in telecommunications in Europe

### 1. Pan-European Telecommunication Bodies

As discussed in Chapter 6 of the Main Report, the breadth of membership of a European Regulatory Authority might extend to non-EU countries. It is helpful to review the pan-European telecommunications bodies whose membership already extends to non-EU Member States, the mechanisms by which EU Member States transferred their sovereignty to them, and how these pan-European bodies are linked to the EU, if at all. A description of pan-European telecommunications bodies is provided in Chapter 2 of the Main Report.

#### 1.1 ERC/ERO

The Convention for the Establishment of the European Radiocommunications Office (ERO) is dated 23 June 1993 but only came into force on 1 March 1996, replacing the former MoU establishing the Office.

In becoming a Contracting Party, States had the choice of either signing the Convention prior to 1 March 1996, to take effect from 23 June 1993, or acceding to the Convention after 1 March 1996.

Article 18, "the Rights and Obligations of the Contracting Parties", states:

- (1) *Nothing in this Convention shall interfere with the sovereign right of each Contracting Party to regulate its own telecommunications.*
- (2) *Each Contracting Party which is a Member State of the European Economic Community will apply this Convention in accordance with its obligations under the Treaty establishing the European Economic Community.*
- (3) *No reservation may be made to this Convention.*

ERO does not, therefore, take any sovereign powers away from the Member States or the Community.

There is a direct link between both ERO and the ERC by virtue of an MoU and Framework Contract between the ERC and the Commission, under the terms of which the Community may sponsor work requirements. These are generally studies which are intended to

facilitate the development of European telecommunications policy. We were unable to obtain a copy of this document, but consider a similar document below in the context of ECTRA.

ERO/ERC have coordinated their work, particularly with ETSI, via MoUs which specify procedures for close collaboration in the development of standards for systems or equipment on the one hand and the harmonisation of frequency bands and regulatory requirements on the other. Further, there is a joint ERC/ECTRA/ITU Group which prepares for ITU Council meetings and Plenipotentiary Conferences.

We understand that the Commission is currently working on a report to the Council on the implementation of ERC Decisions, the idea being that these Decisions will become binding agreements to which the Member States will commit themselves in writing.

## 1.2 ETSI

The ETSI Statutes, adopted on 21 November 1990, state that representatives of the Community and EFTA shall enjoy special status as "Counsellors" at both the General Assembly and the Technical Assembly. Article 17 states that ETSI shall establish close working relationships with other European standards bodies.

The Statutes do not address the question of sovereignty or obligations under the EC Treaty.

## 1.3 ECTRA/ETO

ECTRA signed a Memorandum of Understanding with the European Commission on 9 September 1994, the same day on which, in accordance with the MoU, ETO signed a Framework Contract with the Commission. Under the former, the Commission will give "due consideration" to any relevant ECTRA outputs, "in particular Decisions or Recommendations"; the Commission and ETO meet regularly to discuss pertinent telecommunications issues, and they agree a yearly programme of work to be contracted out to ETO.

Under the Framework Contract, the Commission places specific contracts with ETO. ETO is also intended as a centre of expertise, which will follow the work of different standardisation bodies such as ETSI, ITU and ISO. It is also intended to form a close alliance with licensing and numbering experts from NRAs, in particular with those participating in ECTRA Project Teams on licensing, mobile, interconnection and numbering.

## 2. Community-level Committees

A number of Committees at the Community level are involved in telecommunications, and these are briefly considered or referred to below.

### 2.1 The ONP Committee

Created by Articles 9 and 10 of Directive 90/387, the ONP committee is an advisory committee comprising representatives of Member States, and is chaired by a Commission representative. Acting in an advisory role, it assists the Commission in relation to Open Network Provision issues. The Committee has an advisory, a regulatory and a conciliation role (the last function is being discussed under Section 4.3.2 of the Main Report). The ONP Committee's advisory and regulatory roles are managed under procedures I and III(a) respectively of Council Decision 87/373/EEC (the "comitology" procedures). According to both procedures, the representative of the Commission on the Committee submits to the Committee a draft of the measures to be taken. The Committee must deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter. The procedures then diverge: so according to the advisory function, the opinion is recorded in the minutes, and each Member State has the right to ask to have its position recorded. The Commission "shall take the utmost account of the opinion delivered by the Committee and "it shall inform the Committee of the manner in which its opinion has been taken into account".

According to the regulatory function, in the case of decisions which the Council is required to adopt on a proposal from the Commission, the Opinion is to be delivered by a weighted majority (as laid down in Article 148(2)). The Commission "shall adopt the measures envisaged if they are in accordance with the opinion of the Committee". If they are not, or if no opinion is delivered, "the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority". According to variant (a), as laid down in Directive 90/387, if the Council has not acted within 3 months after the date of referral to it, "the proposed measure shall be adopted by the Commission".

The regulatory function of the ONP Committee only applies in relation to rules for uniform application of the essential requirements, rules on standards necessary to ensure the interoperability of trans-frontier services and amendment of the annexes of certain ONP Directives. Although the role is therefore narrow, the Council's first common position on the Voice Telephony Directive was rejected by the European Parliament (under the "co-decision" procedure) because the European Parliament does not have any involvement in decisions taken under regulatory committee procedures. This problem has now been overcome by an inter-institutional agreement (a "modus vivendi") which ensures that the European Parliament is able to give an opinion when the Commission presents measure to committees of Member States representatives.

Similarly, the Economic and Social Committee recommended that the Community Telecommunications Committee proposed under the (now aborted) proposals for mutual recognition of licensing (see below) should have regulatory functions, but the Commission resisted this decision in order to avoid a further comitology debate with Parliament.

## **2.2 The Approvals Committee on Terminal Equipment**

This Committee was established by Directive 91/263 to advise the Commission on draft measures taken under the Directive - particularly the conversion of telecommunications standards into common technical regulations. The Commission is obliged to take "the utmost account" of the Committee's opinion.

## **2.3 The Licensing Committee**

The Commission's two proposals of 1992 and 1994 on the mutual recognition of licences (see Appendix 9) focused on the creation of a Community Telecommunications Committee, to have a broader role than the two committees mentioned above. The draft Directives envisaged a similar advisory role, though the Economic and Social Committee recommended a regulatory role under the guidelines set out in Council Decision of July 13, 1987. This was rejected on the ground of inevitable resistance from Parliament and the Member States, and, indeed, the two proposals have been superseded by a new proposal (see Appendix 9). The Proposed Licensing Directive includes the creation of a Licensing Committee to assist the Commission on licensing issues. In the Common Position on the Licensing Directive, the Council changed the name of European Union Telecommunications Committee into the Licensing Committee. At second reading, the European Parliament has adopted an amendment including within the review provisions in the Directive the need to examine the possible consolidation of the various committees established in Community telecommunications legislation.

## **2.4 Senior Officials Group on Telecommunications**

This group was set up by the Council on 4 November 1983, but much of its work has been taken over by the High Level Committee (see below) and it has not met for four years.

## **2.5 The Joint Committee on Telecommunications**

This was initiated in June 1990, with the aim of establishing a dialogue in the telecommunications sector at EC level.

## **2.6 The High Level Committee**

This Committee was recognised as a permanent forum by Council Resolution 93/C 213/01. It consists of the heads of the NRAs who meet to discuss issues of general policy - it is jointly chaired by DG IV and DG XIII.

## **2.7 National Regulatory Authorities**

The other relevant bodies are the NRAs, but it is beyond the scope of this Study to include an analysis of their functions.



## **APPENDIX 6. LESSONS TO BE LEARNED FROM OTHER SECTORS**

As mentioned in Section 5.3 of the Main Report, Community agencies in other sectors provide limited guidance as to the form and functions of a European Regulatory Authority, but a review of the various bodies is useful in identifying some operational difficulties that a European Regulatory Authority may encounter.

### **1. Trade Marks**

#### **1.1 Background**

Trade mark law across Europe was harmonised by the Trade Marks Directive of 21 December 1988, and has been implemented in every Member State except Ireland. The next steps were the creation of a Community-wide trade mark and an office to manage the new system. Provision was made for both of these steps in Regulation 40/94, known as the Community Trade Mark Regulation, adopted by the Council on 20 December 1993. The new system allows for the protection of trade marks in all the countries of the EU by means of a single filing. The new office is known as the Office for Harmonisation in the Internal Market (Office of Harmonisation).

Simply put, once the application is sent to Alicante, the Office of Harmonisation will do two things. It must establish whether the mark is registrable within the terms of the Regulation (e.g. it must be distinctive, and not consist of a generic or customary term), and it must draw up a search report on any other conflicting Community Trade Marks, while the national trade mark offices of the Member States will search their own registers. This should be completed within three months, and the application, provided it has not been withdrawn as a result of the searches or on absolute grounds, will then be published. Other companies will then have three months in which to challenge registration.

#### **1.2 Reason for European Regulation**

The Trade Marks Directive has removed several barriers to trade created in particular by differences in national laws. But others still exist, such as the problem of conflicting marks being owned in different Member States by unconnected enterprises; the fact that a trade mark owner can choose a different mark for different countries; and the fact that voluntary assignment can fragment a trade mark right among different enterprises. Also, the harmonising law will still operate in the context of varying legal systems and traditions, and linguistic differences will result in a proposed trade mark receiving different treatment at the hands of different national registries. These problems may be overcome by a Community Trade Mark.

From a wider perspective, this development is an important one in the consolidation of the internal market, and continues the trend towards decentralisation for areas in which it is

perceived that greater efficiency can be achieved in terms of administration and management.

### 1.3 Operational Problems caused by National/European Split

Problems are foreseen and have been experienced: there was much argument over where to site the Office of Harmonisation and which official languages to use. There will be cost disadvantages because different languages will be used, and the Office of Harmonisation is in Spain but the translations are to be carried out in Luxembourg. The original five-language rule was watered down after complaints from the Belgians and Dutch, and the rule will now be that applications can be made in any of the 11 official languages of the EU, but any opposition proceedings or challenges to the mark after it has been registered must be made in one of the five working languages of the Office of Harmonisation. This could cause problems if the two languages are not widely used within the EU, such as Greek and Spanish (one of the five working languages), and there is scope for companies to use languages tactically to ensure that proceedings are conducted in their native language.

Another potential problem is that companies have already expressed concerns about fees. First, it will not be cheap despite the fact that the Office of Harmonisation is non-profit making. For example, the filing fee will be Ecu 975 and the registration fee will be Ecu 1100. Secondly, and perhaps more seriously, the Office of Harmonisation will only accept payment in Ecu, and at present it seems that it will require the payments to be made into a bank in Alicante, which could place a considerable administrative burden on companies.

There could be problems where there is a prior trade mark in a Member State, as this will prevent the registering of a Community Trade Mark - so national registering in each State would still be required. Further, as the market becomes ever more integrated, brands will have to work equally well in several languages - what is acceptable as a mark in one language may be a fairly ordinary word in another. Other problems could arise when new countries join the EU.

Ultimately, particularly given that the system is not mandatory, it may not have much impact on European integration. Predictions of the volume of applications are low. In the first year, the vice-president of the Office of Harmonisation expects only 15,000 applications. The UK registry of trade marks has stated that, over time, it expects to lose no more than 20% of foreign applications (which make up half of UK applications).

### 1.4 Legal Basis

The Regulation has as its basis Article 235 of the EC Treaty:

*If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously*

*on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.*

The significance of the choice of a Regulation as the legislative vehicle is that under Article 189 of the EC Treaty such legislation is directly applicable in all Member States, i.e. it has uniform effect throughout the EU and has automatic legal force without the need for intervening national legislation.

The Preamble to the Regulation provides an insight into the extent of the powers granted to the Office of Harmonisation:

*...it is...essential, while retaining the community's existing institutional structure and balance of powers, to establish an office for harmonisation in the internal market (trade marks and designs) which is independent in relation to technical matters and has legal, administrative and financial autonomy; whereas to this end it is necessary and appropriate that it should be a body of the community having legal personality and exercising implementing powers which are conferred on it by this regulation, and that it should operate within the framework of community law without detracting from the competencies exercised by the community institutions.*

## 1.5 Conclusions

The relevance of the Office of Harmonisation to the creation of a European Regulatory Authority is discussed in Sections 4.4.2d and 5.3 of the Main Report.

## 2. Aviation

### 2.1 Background

In 1990 the European Air Traffic Control Harmonisation and Integration Programme (EATCHIP) was launched, managed by the 17-member Eurocontrol on behalf of the European Civil Aviation Conference (ECAC). The ECAC is an inter-governmental organisation whose aim is to promote the continued development of a safe, efficient and sustainable European air transport system; there are currently 33 member states. An important development has been the establishment of a Central Flow Management Unit at Eurocontrol in Brussels, which will be fully operational in April, and is intended to play an increasing role in managing traffic flows across Europe and in further reducing delays. Also established under the auspices of EATCHIP was the En Route Strategy, which is intended to develop radar coverage across Europe.

In September 1994, the European Parliament approved a resolution submitted by the Transport Committee on the harmonisation of Air Traffic Control (ATC), and the Council Resolution on 24th October 1994 considered the same topic. On 6th March 1996, the Commission issued a White Paper entitled "Air Traffic Management - Freeing Europe's Airspace" which discusses the possibility of establishing a single Air Traffic Control body.

The Parliamentary Resolution on the 1996 Intergovernmental Conference states that "the Treaty should provide for an integrated common transport policy including powers in air traffic control".

## **2.2. Reason for European Regulation**

The Council Resolution states that an efficient aviation sector in Europe requires significant progress to be made in the sphere of air traffic control/management, and calls for the Commission to give this special priority. The Transport Committee resolution states that the current anachronistic fragmentation of the European ATC system, with management at national level, is based on principles which are now obsolete and inadequate. This situation, combined with the increase in summer traffic and the French air traffic controllers' strike (which was itself a result of the shortcomings of the ATC system), led to serious inconvenience last summer and will deteriorate further with increased demand due particularly to the third stage of air transport liberalisation to take effect.

The Committee calls on the Commission to act as soon as possible on the harmonisation and integration of the European ATC system and the establishment of the basic framework for a single unified system covering the entire community air space and controlled by a single Community Civil Aviation Authority. It feels that the problems of energy saving, noise reduction and environmental protection should be an integral part of community ATC policy; that a flexible use of air space will achieve better cooperation between civilian and military authorities, allowing civilian utilisation of military air space; and that harmonisation would facilitate the free movement of citizens of the EU.

The Association of European Airlines has had a blueprint for a single European system on the table since 1989, and they argue that it would save the airlines and their customers millions of dollars and thousands of wasted hours, and would provide room for growth instead of slow strangulation.

According to the White Paper, at present, air traffic management is the responsibility of individual countries. Inter-state cooperation exists in the form of different organisations (E.g. the European Civil Aviation Conference (ECAC), Eurocontrol (the European organisation for air traffic safety) and the International Civil Aviation Organisation (ICAO)) working in parallel which duplicates resources. These organisations are based on government-to-government decision-making processes which the Commission perceives as ineffective. Furthermore, the various organisations are lacking in the power necessary to implement the technical programmes, and the European Community has no formal status in any of these organisations. Inadequate capacity in air traffic control systems has caused a high proportion of flight delays since mid-1994 at a cost of some ECU 2000 million.

## **2.3. Operational problems caused by National/European split**

The harmonisation process is at a very early stage so any problems are mainly in the future. Certainly there would be political difficulties in developing a single European ATC, since it

would involve ceding sovereignty of airspace to the new body. There would also be extremely demanding organisational problems. Christopher Chataway, chairman of the UK's Civil Aviation Authority, told the European Aviation Club in Brussels in October 1995 that the present situation is "a collection of very complicated businesses operating in 34 different and highly political environments. It is unlikely that the political and management genius exists to run all these organisations as a single entity."

The White Paper states that there is a need to have a central authority with a specific mandate and with the appropriate means to set up a single ATM system. The Paper explores three options to achieve this: a monolithic structure having all regulatory and operational control, a regulatory framework limited to the Community, or a broader European solution.

The Commission rejected arguments in favour of a single structure combining regulatory and operational functions, maintaining that the two functions should be kept separate as far as practicable. It considers that the two areas are very different, one requiring legal and administrative competence and the other based on technical knowledge and management proficiency. As to a framework within the EU only, the Commission feels it does not have the particular expertise in ATM and that a new executive body will have to be set up to prepare the decisions and monitor developments. This will be difficult to justify given that other organisations are already working in this field and the tasks of the new body will coincide largely with those of Eurocontrol. The Commission therefore suggests the setting-up of a system of ATM at the widest possible European level. Such a broad coverage will be a far better way of improving the efficiency of European ATM and will provide more flexibility, increasing the scope for sub-regional groupings to further integrate their airspace if they choose to do so. Another advantage of using a wider multilateral organisation is, the Paper states, that national governments might find it easier to allow such an organisation to play a role in the military use of airspace. The system will be based on the centralised exercise of regulatory functions together with operational tasks in the fields of air traffic flow management and air space management, but with other operational tasks remaining with individual countries.

The Commission recommends the reinforcement of Eurocontrol's regulatory powers to make it the sole air traffic regulator in Europe. Eurocontrol must be given the powers and mechanisms for decision-taking and monitoring needed to carry out its role with proper authority. The Community must become a member of the new Eurocontrol with the weight and terms which will enable it to exercise its competence and allow its institutions to perform the roles allocated to them by the Treaty.

## 2.4. Legal basis

The Transport Committee resolution had regard to Article 7a of the EC Treaty, which begins:

*The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992;*

and Article 5, which begins:

*Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community.*

The White Paper propounds the following legal bases for regulation in the ATM sector:

- Article 75(1) which states that “the Council...will establish...measures to improve transport safety...”;
- Article 84(2) for matters directly linked to the furtherance of the common transport policy;
- Article 100a for harmonisation measures;
- Article 129c for the interoperability and interconnection of national air traffic control systems;
- Article 130h for research coordination.

## 2.5. Conclusions

The conclusions to be drawn are limited by the fact that the single ATC body is merely an idea at the moment. The interest lies in the practical, political and economic arguments for and against the establishment of such a body. The White Paper concludes that it would be most sensible, given the existence and powers of Eurocontrol, to “reinvent” the body, rather than create a new body. An important point here is that this body is wider than merely the European Union, given that the Paper concludes that the new ATM system should be wider than the Union. The Instar Study is presently looking into a range of organisational models which will meet the requirements of the Paper; this will lead to revision of the Eurocontrol Convention as required to meet the model selected.

A further point of interest is that the Commission states:

*...since the Community already has competence in many of the fields for which the “new Eurocontrol” would be responsible...and because the further development of*

*Community competence would facilitate building a single ATM system, the Commission considers it essential that the Community becomes a full member of this organisation. This will allow the Community to exercise its competence and ensure that decisions were compatible with the policies of the Treaty and were taken in a more transparent and democratic way...Similarly, the positions of the Member States in matters where they are competent should be coordinated according to procedures which ensure close cooperation and the unity of the Community position in international fora.*

### **3. Environment**

The European Environment Agency was provided for in Regulation 1210/90, which came into force only in October 1993 after it was agreed that the headquarters would be in Copenhagen. It has been established to gather information and data on the state of the environment in the Community, and to publish a report every three years. It is also charged with disseminating the information it gathers and harmonising the measurement of data throughout the Community.

The Agency's role is limited, and therefore is of limited value as an analogy. It has not been given any enforcement or policing powers in relation to environmental legislation. In fact, the European Parliament has been trying to introduce such powers by proposing amendments to the Regulation, in the hope of converting it into a form of European Environment Inspectorate. However, there is a provision in the Regulation which requires the Council to reconsider the scope of the Agency's powers within two years of the Regulation coming into force, which in particular specifies a possible role in monitoring the implementation of EC environmental legislation.

Perhaps the most interesting point about the European Environment Agency is that it illustrates, in contrast to the proposed role of a European Regulatory Authority, just how little power has been granted to some, indeed most, EC bodies.

### **4. Pharmaceuticals**

#### **4.1. Background**

Although harmonisation of the pharmaceutical legislation was completed in 1992, the question of the harmonisation of decisions on the authorisation of individual medicinal products remained outstanding. To remedy this, a Council Regulation of 22nd July 1993 laid down Community procedures for the establishment of a European Medicines Evaluation Agency ("EMEA"). The EMEA opened in London in January 1995, its purpose to promote the free circulation of medicinal products by coordinating and supervising their licensing across the EU and in due course the EFTA countries. The first marketing authorisations from the EMEA were granted towards the end of 1995.

The function of the EMEA, in brief, is to provide a single marketing authorisation, through a "centralised procedure", which is valid throughout the Union for medicinal products intended for human or veterinary use. Use of the centralised procedure is compulsory for medicinal products derived from biotechnological processes. Applications must be submitted directly to the EMEA for scientific evaluation by a scientific Committee. The Committee has a fixed period (210 days) in which to reach an opinion which is then sent to the applicant, the Commission and the Member States. The applicant has a right to appeal against the decision. The Commission then prepares a draft decision and Member States have 28 days in which to make written observations to the European Commission. If these raise new scientific or technical questions not addressed by the scientific Committee then they may be referred back to the Committee for further consideration. A final decision is taken by the Commission after consulting a Standing Committee (consisting of representatives of Member States with a representative of the European Commission as Chairman) or, in the event of a significant disagreement between Member States, by the European Council.

#### **4.2. Reason for European Regulation**

Until the EMEA was set up, drugs companies had to submit applications to each agency in the 15 Member States, waiting up to six years for authorisation. Such delays reduced the value of patent protection (although there is now supplementary certificate protection available which alleviates this problem to some extent) and it cost Ecu 200 million per product to provide the required data. The system did not reassure public opinion about the safety of medicines; for example, it is difficult to understand why commonly used products such as the sleeping pill Halcion had to be withdrawn from one country but were accepted by the next. The single evaluation is designed to be of the highest possible scientific quality, reinforcing the protection of public health. A list of 1,600 experts has been established by the EMEA to serve within teams coordinated by the scientific Committees. A telematic network is also being set up with the assistance of the European Commission Joint Research Centre of Ispra, the purpose of which is to ensure fast and secure data transmission (e.g. of assessment reports and pharmacovigilance alerts). The opinions of the scientific Committees and the assessment reports, after removal of confidential information, are available to the public. The measures are designed to promote the free circulation of medicinal products within the community, as well as saving the Member States money by banishing duplication of effort.

#### **4.3. Operational Problems caused by National/European Split**

A decentralised procedure still applies to the majority of medicinal products (i.e. not innovatory or biotechnological) whereby an applicant who wishes to market his product in more than one Member State can apply for recognition in other Member States based on an assessment report from the first licensing authority. It is anticipated that there will remain inconsistencies in the experience and approach of different Member States militating against mutual recognition under the decentralised procedure. In the case of serious objections the dispute will be referred to a single committee which will arbitrate. There are fears that

Member States may, either by this method or through the power of veto under the centralised procedure, obstruct applications. At a time when States are trying to control health budgets, rapid approval of expensive drugs could mean higher drugs bills.

In 1994 the EMEA received 6,800,800 Ecu from the Community's budget which was totally devoted to investment expenditure. The major part of this money was spent on selecting, leasing and fitting out the new headquarters and installing computer equipment. The initial operational budget was said by the EMEA to be in the order of 20 million Ecu.

#### 4.4. Legal Basis

The EMEA was set up under the Council Regulation 2309/93 (the "Regulation") and London was chosen as its seat by a decision of the Heads of State and Government on 29 October 1993. The Regulation has as its basis Article 235 of the EC Treaty, the implied powers provision. Any legislation based on this Article has to be agreed by unanimous vote in the Council of Ministers. The significance of the choice of a Regulation as a legislative vehicle is that under Article 189 of the EC Treaty such legislation is directly applicable in all Member States, i.e. it has uniform effect throughout the EU and has automatic legal force without need for intervening legislation. Some of the Recitals in the Regulation illustrate the purpose for which the EMEA was set up, for example:

*Whereas only after a single scientific evaluation of the highest possible standard of the quality, safety or efficacy of technologically advanced medicinal products, to be undertaken within the European Agency for the Evaluation of Medicinal Products, should a marketing authorisation be granted by the Community by a rapid procedure ensuring close cooperation between the Commission and Member States.....*

Fees to be paid to the EMEA for the evaluation of medicinal products (which were the subject of some debate with some EU Members objecting to the proposed fees which they regarded as high compared with fees then charged in those individual states) were set out in Council Regulation 297/95. The debate over fees caused some delay in the start of operations at the EMEA.

#### 4.5. Conclusion

The establishment of the EMEA should lead to better use of the considerable product licensing expertise currently spread across the Member States of the EU. It remains to be seen if the application process, which is subject to tight time limits, will be speedier under the new arrangements and so reduce delays in bringing medicinal products to the market. Even with the EMEA there are mechanisms by which individual Member States can raise new issues, which, in theory, could delay the authorisation processes. The agency has only been operating for approximately one year and has begun granting authorisations. It is probably too early to assess how efficiently the new system is working.

## **5. Patents**

### **5.1. Background**

Under the European Patent Convention "EPC" (which is not an EU measure) provision is made for a single patent application to be made in the European Patent Office ("EPO") in Munich which will nominate to particular nation states in which patent protection is sought. The application takes effect as a bundle of national patents in designated states. Issues of validity are dealt with at the European level, while issues of infringement are generally dealt with at the level of individual nation states, although there is provision, recognised in certain countries, for pan-European injunctions.

### **5.2. Reason for European Provisions**

Whilst the EPC has been a successful system for a number of years for the granting of patents in all the Member States of the European Union, and some non-EU states, it is not a European Union convention and the EPO is not an EU organisation. The EPC does not provide an EU-wide system whereby a patent can be granted, by a single grant, to take effect throughout the whole of the EU.

### **5.3. Operational Problems caused by National/European Split**

The Community Patent will not replace existing national patents or the EPC but the question of which system is used by a proprietor will probably be determined by fees and the extent of the protection required. It seems likely that fees will be set so that, for example, a proprietor requiring protection in only one EU state would find that it is not cost effective to apply for wider protection. In contrast, a proprietor wishing to obtain EU-wide protection would find that the Community Patent Convention ("CPC") route would be cheaper. A 1989 Agreement (see below) provides for non-EU countries to join the CPC where they are invited to do so. It would first be necessary for the patent laws of those invited states to be compatible with the CPC. It is possible that the joining of countries to the CPC on an invitation basis will result in various arrangements being made for those invited countries, perhaps on a case by case basis, and various levels of membership arising. This may be a particularly important issue for the developing Eastern European block countries.

### **5.4. Legal Basis**

For many years there have been proposals for the adoption and ratification of a Community Patent Convention which, by contrast with the EPC, will allow for a single community patent across all Member States. Adoption of the CPC has been held up by disputes over translations and conflicts with the constitutional requirements of Member States. There was, in 1989, a Community Patent Agreement which sets out provisions for bringing the Community patent system into being. In order for the 1989 Agreement to come into force, it must be ratified by all the signatory States and will then come into effect twelve months after the last State to ratify does so.

## 5.5. Conclusions

Whilst there may be a demand for an EU-wide CPC, the convention still awaits ratification. The UK Patents Act 1977 s86 and 87 provides for the implementation of such a convention already (from a date to be appointed). In view of the differences in the memberships of the EPC and the EU (EPC membership extends to many countries outside the EU) it is possible that when the CPC is finalised it will need to be extended beyond the EU to provide for this difference.

Parallels may perhaps be drawn between the grant of a single community patent and a single community telecommunications licence. The patents granted under the CPC are intended to co-exist with national patents, leaving it for the applicant to determine whether he wishes to have a community patent or national patent and that level of choice may also be relevant in the field of telecommunications licences.

## 6. European Monetary Institute - a body requiring Treaty amendment

The European Monetary Cooperation Fund ("EMCF") was the operating fund within the EMS system. EMS member countries deposited gold and dollar reserves with the EMCF in exchange for European currency units. The EMCF was dissolved by the Maastricht Treaty, which provided for the establishment of a new central body, in the European Monetary Institute ("EMI") to strengthen monetary policies coordination of the Member States. The (EMI) took over the role of EMCF and its assets and liabilities.

The EMI was established under Article 109f of the EC Treaty (as amended by the Maastricht Treaty) on 1 January 1994. The EMI Statute was separately provided in a Protocol to the Treaty. EMI members consists of central banks of the Member States. It is governed by a Council consisting of the central bank governors from the 15 Member States, plus a Chairman. Maastricht laid down a firm timetable of three stages towards adoption of the Ecu as a single currency: the first was a loose process of convergence, the second started with the creation of EMI and greater convergence and the third stage (scheduled for 1 January 1997 or 1999 at the latest) will see the adoption of the Ecu and EMI being absorbed into a proper European Central Bank.

The main objective of EMI is to contribute to achieving the conditions necessary for the third stage of European monetary union. It does this by coordinating monetary policies to ensure price stability and preparing towards the establishment of the European Central Bank (Article 4b), the conduct of a single monetary policy and the creation of a single currency in the third stage and overseeing the development of Ecu. EMI also monitors the functioning of the EMS, holds consultations concerning the course of monetary policies and is consulted by the national monetary authorities before they take decisions on the monetary policy in the context of achieving monetary union.

EMI is charged with drawing up the regulatory, organisational and logistical framework necessary for the European Central Bank ("ECB") to perform its task in the third stage. The ECB is designed to sit at the centre of a European system of central banks and will fix a common interest rate policy for those in the monetary union once exchange rates are pegged, and will issue and regulate the new single currency.

The Institute is of interest, being an example of a body which, by virtue of its extensive regulatory and other powers, required specific Treaty amendment. The ECB, too, is a body to be created according to a specific Treaty amendment.

## 7. OFSAT - Aborted Body

The Denton Hall OFSAT preliminary study - (1990) recommended the setting up of an Office of Satellite Policy (OFSAT). Its role would have been to officiate satellite policy at national, EC and international level including regulation, standards, frequencies and development relating to all types of satellite services. In addition OFSAT could have the following brief:

- coordinating with international bodies and organising a pan-European approach to their activities
- liaising with related European bodies concerned with satellite technology
- formulation of policy initiatives with a view to their being implemented as EC Directives
- dealing with concerns of satellite operators, investigation of complaints with power to rectify abuses of process or dominant position.

It was important that OFSAT be impartial, not influenced by domestic governments, PTTs or major operators. It should also have enforceable powers to deal not only with policy issues but also everyday policy problems faced by the satellite industry. It should be equipped with powers to ensure its rulings were respected, including sanctions to prevent operators, governments and PTTs proceeding in breach of OFSAT's rulings in satellite policy. It is also expected that by empowering OFSAT with these formal powers it would be able to exert informal pressure by virtue of its being an influential body.

Ideally, OFSAT's powers could include extension of its jurisdiction to the whole of Europe, given considerable voting power at international conferences and increased opportunities to steer international negotiations in directions that would benefit Europe as a whole. Domestic governments would surrender their jurisdiction over satellite policy to OFSAT and undertake that any supplementary policy pursued at domestic level would be subsidiary and non-conflicting with OFSAT's policies. The study considered, however, that these aims were unlikely to be achieved in the short term.

The paper considered 3 possible methods for creating OFSAT:

- an international convention;
- through the Council of Europe; or
- through the European Commission;

and concluded that the third option was the most viable.

- (1) this is seen as the ideal solution, but *"would be impractical in the short term because it would probably take many years to draft and agree a convention acceptable to even a few of the developed European countries"*
- (2) this would have the advantage of being constituted by an organisation which has as its members almost all European States, and being a pre-existing organisation, the process of considering and recommending the establishment of OFSAT might be far quicker than under a separate international convention. But, *"the Council of Europe does not have this power to force its members to adopt its recommendations. The submission of members to Council of Europe recommendations is optional. Thus, even if the Council of Europe were to establish OFSAT and recommend that members submit to its jurisdiction...it would still be up to the various member countries to decide whether or not to ratify the establishment of OFSAT"*
- (3) the Study alludes to (without detailing) the potential legal problems of establishing the body under the EC Treaty, and concludes that, despite these difficulties the Community could provide an environment in which OFSAT could be established, *"having realistic powers to regulate and influence satellite policy as it extends to Member States. Furthermore, OFSAT could be established in a relatively short timeframe thus enabling it to begin to operate quickly enough to have a genuine impact on the pressing problems of satellite policy...it may be possible to establish an OFSAT within the EC which could, at a later stage, be extended to embrace other European countries...It would be far easier to persuade countries to join and submit to the jurisdiction of an OFSAT once they have had an opportunity to assess the benefits of it as it operates within the EEC."*

An OFSAT established by the Commission could take the form of an advisory agency which makes recommendations to the Commission for the Commission to implement through its existing powers (similar to the EEA). The disadvantage of this is that the time taken for a policy to be implemented will be very long given the Commission's constraints of time and resources. A better alternative may be to establish a separate EC body which is independently funded and would have its own executive powers. This might have the advantage of being the kind of body which could be extended to admit other countries

which do not wish the EC but which would wish to submit to a standard European satellite policy.

Within OFSAT itself, it would need to be governed by a management committee. This should be made up of the Directors General of the telecommunications regulatory bodies in each Member State together with 2 Commission appointees. OFSAT would have its own Director General, answering to the management committee, and its own staff.

The Study may therefore provide some useful insights into the consideration of the form and functions of a European Regulatory Authority.

## APPENDIX 7. COVINGTON & BURLING REPORT ON FEDERALISM IN UNITED STATES TELECOMMUNICATIONS POLICY

### 1. Introduction

The American experience with dual federal and state sovereignty in the area of telecommunications provides a good example of the efficiencies gained and conflicts created by a strong federal regulatory presence. The balance between state and federal power has tipped ever more toward the federal side as telecommunications technologies have advanced and converged. In part, this is because the interstate network becomes less amenable to state and local regulation as it becomes more integrated and intricate. In part, it is because the stronger federal interest in promoting competition creates more areas for federal intervention as technologies proliferate. Of course, increased competition, to some extent, also supplants some regulation of any kind, thus serving to check the expansion of federal regulatory power.

Over the past sixty years, the US federal government has asserted control in the telecommunications arena on the basis of two related notions:

- that the federal government has the power to regulate interstate commerce and the duty to ensure an efficient telecommunications network; and
- that the federal government is responsible for managing certain national resources (*e.g.*, spectrum).

The exercise of federal power has increasingly eroded traditional bulwarks of state authority such as the regulation of facilities siting, zoning, intrastate traffic, and consumer protection.

This paper examines some examples of how federal pre-emption has been used in relation to advancing technology, including new exercises of federal power under the Telecommunications Act of 1996.<sup>4</sup> Section 2 examines the formation of, and rationale for, the Federal Communications Commission, consistent with the preservation of the 50 states' separate regulatory spheres of the states and territories. It then provides a brief overview of the regulation of different communications sectors. Section 3 examines the evolution of federal pre-emption of state regulatory authority. Finally, Section 4 examines the most

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<sup>4</sup> This paper builds on recent studies submitted to the European Commission on the division of federal and state authority in US telecommunications: Wilmer, Cutler & Pickering, "Multilevel Regulation of Telecommunications: The Experience of the United States, Canada and Australia" (December 1995) (hereinafter, "WCP") and Ingo Vogelsang, "Federal Versus State Regulation in US Telecommunications" (October 1994) (hereinafter, "Vogelsang").

substantial effects of the Telecommunications Act of 1996 on the federal power to regulate telecommunications.

## 2. Basic Division of Federal and State Authority in Communications Regulation

### 2.1. The Origins of the Dual Regulatory Structure and Distribution of Power

On February 26, 1934, President Franklin D. Roosevelt urged Congress to create a new, independent federal agency called the Federal Communications Commission ("FCC"),<sup>5</sup> with the authority to regulate both the radio waves and the wirelines, then regulated separately by two other agencies.<sup>6</sup> Congress did so in the Communications Act of 1934 that, as amended, continues to govern telecommunications and broadcasting in the US.<sup>7</sup> In enacting this statute, Congress had the power to endow the federal agency with far-reaching authority to regulate the conduct of telecommunications service providers. The source of Congress' power, in this respect as in all others, is the US Constitution, which tells Congress what it can regulate and the extent to which those regulations may pre-empt state regulations on the same subject. Although the federal structure of government as a whole is relevant to interpretation of Congressional power, three provisions are particularly relevant: the Tenth Amendment, the Commerce Clause and the Supremacy Clause.

The Constitution's Tenth Amendment provides that the individual states retain all powers not expressly given to the federal government. Despite this apparent interest in preserving state sovereignty, the states' constitutionally protected province of exclusive authority is, in modern practice, quite small. This is because the Constitution's Commerce Clause, which empowers Congress "to regulate Commerce with foreign Nations, and among the several States,"<sup>8</sup> has been construed very broadly to nearly overwhelm the Tenth Amendment's preserve. US Supreme Court decisions dating from the mid-1930s have relied on the Commerce Clause to justify the federal government's entry into myriad, seemingly local, activities on the grounds that such activities have spillover effects (direct or indirect) on interstate commerce. These decisions have interpreted the meanings of both commerce and interstate commerce expansively.<sup>9</sup> Many telecommunications activities are quintessentially interstate activities, but others (a decreasing number) are not and, as discussed below, the

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<sup>5</sup> As an independent agency, the FCC is not part of the Executive branch and its leadership is bi-partisan (two commissioners each appointed from the Democratic and Republican parties, and a chairman appointed from the president's party).

<sup>6</sup> Federal regulatory authority over radio was vested in the Federal Radio Commission by the Radio Act of 1927, ch. 169, Section 1, 44 Stat. 1162. Federal regulatory authority to set interstate rates was vested in the Interstate Commerce Commission by the Mann-Elkins Act, ch. 309, Section 7, 36 Stat. 539, 544-45 (1910) (repealed by Communications Act of 1934).

<sup>7</sup> Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified at 47 U.S.C. "151-610).

<sup>8</sup> US Const. art. I Section 8, cl. 3.

<sup>9</sup> See, e.g., *Wickard v. Filburn*, 317 US 111, 128-129 (1942) (allowing Congress and its delegated authority to regulate agricultural production to be consumed entirely on producing farm because abstaining from consumption of such production would engage force inhabitants to engage in interstate commerce).

line between interstate and intrastate activities in this field has been particularly hard to draw.<sup>10</sup>

The second constitutional provision relevant to the exercise of federal authority is the Supremacy Clause, which empowers Congress and, as construed by the courts, federal agencies acting within their statutory authority, to pre-empt state law.<sup>11</sup> Pre-emption may occur in a number of different situations: when Congress expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated so comprehensively as to occupy an entire field of regulation, or where the state law opposes the execution of Congress' objectives.<sup>12</sup> The federal government has relied especially heavily on the incompatibility of state and federal regulations and on the state regulations' obstruction of federal objectives in pre-empting state communications regulation.

In creating the FCC, Congress endowed the agency with relatively moderate powers of regulation and pre-emption and stopped short of exploiting the full measure of the federal control permitted by the Constitution. Section 1 of the Communications Act creates the FCC for the expansive purpose of overseeing the development of "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. ' 151. Accordingly, Section 2(a) specifically grants to the FCC the authority to regulate "interstate and foreign commerce in wire and radio communication." 47 U.S.C. ' 152(a). However, Section 2(b) contracts what would otherwise appear to be very expansive powers by expressly denying the FCC "jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier." 47 U.S.C. ' 152(b) (emphasis added).

The apparent tug between federal and state authority embodied in the Communications Act has worked out very differently in the telephony and radio areas due to the different natures of telephonic and radio transmissions. From 1934 on, wireline telephony providers were common carriers — traditional subjects of state control.<sup>13</sup> However, radio

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<sup>10</sup> See generally, WCP, 36-85, and Vogelsang.

<sup>11</sup> Article VI of the Constitution provides that:

*this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every States shall be bound thereby . . .*

<sup>12</sup> The various grounds of pre-emption are enumerated and explored in *Louisiana Public Service Comm'n v. FCC*, 476 US 355 (1986), a case limiting federal pre-emption in the area of prescribing telephone plant and equipment depreciation practices for intrastate ratemaking purposes.

<sup>13</sup> The meaning of the term common carrier was so well defined at common law in 1934 as a carrier that holds itself out to the public for hire on general terms, that the Communications Act merely defined the term by reference to itself: "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio." 47 U.S.C. ' 153(h).

communications services largely transmitted one-way broadcasts and these not on a common carriage basis. States had little experience regulating such activities. Moreover, the poorly understood nature of radio wave propagation was reckoned to be inherently interstate. For these reasons, radio transmissions came to be regulated under Title III of the Communications Act, which lacks the constraint on federal power that Section 2(b) imposes under Title II with respect to intrastate communications.<sup>14</sup> Thus, radio transmissions were subjected almost exclusively to federal jurisdiction. With respect to telephony, on the contrary, the Supreme Court has noted that Title II of "the Act would seem to divide the world of domestic telephone service neatly into two hemispheres — one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the states would retain exclusive jurisdiction."<sup>15</sup>

To gain insight into the Communications Act's original division of labour, it is important to understand the communications environment of 1934 and differences between wireline and radio services. Local telephone service constituted about 98% of the total and states were its primary regulators.<sup>16</sup> Prior to the creation of the FCC, the agency responsible for federal telecommunications regulation was preoccupied with regulating railroads and saw little need to enter with as much force into this largely local industry.<sup>17</sup> With the creation of the FCC, the federal government assumed a great deal of the regulatory responsibility, but the Communications Act clearly recognised and preserved some of the states' existing authority.<sup>18</sup>

On the other hand, the federal government by 1934 had already gained significant experience in regulating radio and had come to the conclusion that radio interference problems rendered radio spectrum an inherently national resource. This federal experience

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<sup>14</sup> The Section 2(b) check on federal jurisdiction also applies to intrastate radio communications, whether or not they are conducted by common carriers. See *California v. FCC*, 905 F.2d 1217, 1240-42 (9th Cir. 1990).

<sup>15</sup> *Louisiana Public Service Comm'n v. FCC*, 476 US 355, 360 (1986). The Court continued that, "in practice, the realities of technology and economics belie such a clean parcelling of responsibility. This is so because virtually all telephone plant that is used to provide intrastate service is also used to provide interstate service, and is thus conceivably within the jurisdiction of both state and federal authorities. Moreover, because the same carriers provide both interstate and intrastate service, actions taken by federal and state regulators within their respective domains necessarily affect the general financial health of those carriers, and hence their ability to provide service, in the other 'hemisphere.'" *Id.*

<sup>16</sup> See Eli M. Noam, *Federal and State Roles in Telecommunications: the Effects of Deregulation*, 36 *Vand. L. Rev.* 949, 954 (1983).

<sup>17</sup> See Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulations*, in *A Legislative History of the Communications Act of 1934*, at 3 (Max D. Paglin ed. 1989).

<sup>18</sup> It must be noted that many of the Communications Act's nods to state authority are merely precatory and procedural. The Act devised a complex procedure for separating a telecommunications carrier's property into intrastate and interstate uses, so that states could play a regulatory role. 47 U.S.C. ' 221. However, it is the FCC that may classify property and prescribe depreciation charges. It may, but need not, defer to state methods, although it must at least notify and consult with state commissions before promulgating accounting and depreciation regulations. 47 U.S.C. ' 220. Another section, which was added in 1971, provides for joint state-federal boards to resolve regulatory issues of joint concern, although the FCC is empowered to make the ultimate decision. 47 U.S.C. ' 410. See generally, *Vogelsang* at 23-31.

began with the Radio Act of 1912, the first piece of domestic legislation to reduce destructive interference among government, commercial, and amateur radio users.<sup>19</sup> The 1912 Act's provision of federal power in this area, though novel, was very modest. For example, the licensing authority had no power to deny a license on the ground that the proposed station would interfere with existing stations.<sup>20</sup> Moreover, according to a 1926 decision by the Court of Appeals for the D.C. Circuit, this authority could not impose restrictions on frequency, power, and hours of operation and could not prevent a station from using a frequency not assigned to it.<sup>21</sup> Radio chaos ensued.

The Radio Act of 1927, the precursor to the Communications Act of 1934, was enacted to fill this power vacuum and "to maintain the control of the United States over all the channels of interstate and foreign radio transmission."<sup>22</sup> With respect to the distribution of radio licenses among "the different states and communities," the Federal Radio Commission was charged to "give fair, efficient, equitable radio service to each of the same."<sup>23</sup> Commenting on the legislation, one of the first Commissioners noted:

Congress has grasped the significance of radio as a vital force in American life and has recently enacted a law which in many ways is absolutely unique. I know of no other activity, conducted entirely through private enterprise which has seemed to Congress so important and so complex in its problems as to require the creation of a new and separate branch of government exclusively for its regulation.<sup>24</sup>

On the basis of this experience, Title III of the Communications Act vested the FCC with exclusive jurisdiction to allocate radio frequencies to various uses and grant licenses to various users.<sup>25</sup> Outside of content restrictions (e.g. libel, privacy, consumer protection), states have no significant responsibilities in the broadcasting and satellite transmission area, except to the extent that land use issues are implicated. Until recently, states played a

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<sup>19</sup> Act of August 13, 1912, ch. 287, 37 Stat. 302.

<sup>20</sup> The Radio Act of 1912 made a license necessary for the operation of a radio service, but required the Secretary of Commerce to issue licenses to all applicants. See *Hoover v. Intercity Radio*, 286 F. 1003 (D.C. Cir. 1923) (requiring the Secretary to grant a renewal of a license to the Intercity Radio Company even though such renewal would result in interference to government and other private radio stations).

<sup>21</sup> See *United States v. Zenith Radio Corp.*, 12 F. 2d 614 (D.C. Cir. 1926); see also Opinion of Acting Attorney General Donovan that the Secretary of Commerce had no power, under the Radio Act of 1912, to so regulate stations. 35 Ops. Atty. Gen. 126 (July 8, 1926).

<sup>22</sup> P.L. 69-632, Sec. 1, 44 Stat. 1162 (1927). The Act established the Federal Radio Commission and required it to "(a) classify radio stations; (b) prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class and each station within any class; (c) assign bands of frequencies or wave lengths to the various classes of stations [and]. . . for each individual station." *Id.*, at Section 4. The Communications Act subsequently assigned the same duties to the FCC.

<sup>23</sup> *Id.* at Section 9.

<sup>24</sup> Address of Commissioner Henry A. Bellows before the League of Women Voters, April 1927. Quoted in, J. Robinson, *Spectrum Management Policy in the United States: An Historical Account* (Federal Communications Commission OPP Working Paper Series, April 1995) at 21.

<sup>25</sup> See 47 U.S.C. § 303. See generally, WCP at 46-52.

greater role in the regulation of common carriage by radio, but, as discussed below, this role is now much diminished.

## 2.2. An Overview of Sectoral Regulation

As background for Section 3's pre-emption discussion, this section provides a brief overview of communications regulation in the various communications industries. The FCC's primary responsibilities are to regulate telephony (wireline and mobile), cable and broadcasting. The states have had major responsibilities in the first two areas, but far less in the third area. Such state responsibilities for mobile telephony have been reduced substantially, while state autonomy in regulating wireline telephony was narrowed considerably by the Telecommunications Act of 1996.

### 2.2.1. Telephony

The US telephone industry has three major components:

- local fixed line phone service is provided in a particular geographic area for which the customer does not have to pay a per-call or per-minute toll (generally, but not always, intrastate);<sup>26</sup>
- long distance phone service (may be intrastate or interstate);<sup>27</sup> and
- mobile communications.<sup>28</sup>

Local phone service is regulated in price, terms and conditions by each of the states' regulatory commissions and by the FCC's Common Carrier Bureau (with input from the Department of Justice in some cases). Long distance service, primarily regulated by the Common Carrier Bureau, has not been regulated as heavily as has local phone service since the 1984 break-up of AT&T because long distance service has been more competitive. Mobile communications, primarily regulated by the FCC's Wireless Telecommunications Bureau and Common Carrier Bureau, is regulated least of all because it has been more competitive and deemed, by the FCC, ancillary to basic wireline telephone service.

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<sup>26</sup> The most prominent companies in the \$100 billion local telephone market are the seven regional Bell operating companies (BellSouth, NYNEX, Bell Atlantic, Pacific Bell, US West, Ameritech, and SBC Communications), and GTE.

<sup>27</sup> Long distance companies include AT&T, MCI, and Sprint, which together control over 80% of this \$70 billion annual market.

<sup>28</sup> Mobile companies include AT&T (McCaw), AirTouch, Sprint Spectrum and the mobile communications affiliates of the local phone companies.

### 2.2.1.1. Wireline Telephony

Prior to the 1996 Act, the 1982 AT&T Divestiture Consent Decree (the Modified Final Judgement or “MFJ”) established a regulatory structure based on the principle that long distance and equipment markets should be opened, competition in those markets should be encouraged, and monopolies should be regulated by replicating the effects of competition. The profitable and infrastructure-intensive local loop was conceded to be, as a practical matter, the exclusive domain of the local exchange carrier (“LEC”), subject to price regulation set by the FCC and state commissions. State commissions generally set higher rates for business services, intrastate toll, and enhanced services than for basic residential local exchange services and subsidies generally flowed from long distance to local service.<sup>29</sup>

The MFJ Consent Decree opened the long distance market for competition by ensuring equal access to customers and local telephone company facilities by placing additional regulatory burdens on AT&T (which until 1995 was deemed to have a uniquely dominant position). The FCC built on the competitive spirit of the MFJ by expanding unbundling and interconnection obligations.<sup>30</sup> It required regional Bell operating companies (“RBOCs”) were to unbundle their network elements so that competitors could purchase these elements as they chose.<sup>31</sup> It further required RBOCs to interconnect with emerging competitors in their local markets.<sup>32</sup> Each of these requirements pre-empted state regulations on the same subject and further marginalised the state’s role. As discussed in Section 4, below, the 1996 Act dissolves the MFJ Consent Decree structure by seeking to ease entry of the regional Bell operating companies (“RBOC”), long distance companies and cable companies into each other’s businesses, subject to certain safeguards, and by expressly providing for expanded interconnection and facilities collocation.

### 2.2.1.2. Mobile Telephony

Mobile telephone services are broadly classified as Commercial Mobile Radio Services (“CMRS”) and, to a much lesser extent, Private Mobile Radio Services. CMRS also includes licensed services such as paging, satellite services, Specialised Mobile Radio, cellular, and Personal Communications Systems (“PCS”). It also includes unlicensed PCS services, which can be used for wireless private exchange and local loop access. Since the US adopted a law in 1993 to largely deregulate CMRS providers (see Section 3.2. below), the central regulatory issues for mobile and satellite services have been:

- the functioning of auctions as an assignment methodology; and

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<sup>29</sup> See Vogelsang at 81-82.

<sup>30</sup> See generally, WCP at 57-63.

<sup>31</sup> Amendment of ‘ 64.702 of the Commission’s Rules & Regulations (Third Computer Industry or Computer III), 104 FCC 2d 958 (1986), vacated sub nom. *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

<sup>32</sup> Expanded Interconnection with Local Telephone Company Facilities, 9 FCC Rcd. 5154 (1994).

- interconnection terms and rates with LECs.

Sorting out the proper relationship between CMRS providers and LECs has been essential to the development of mobile telephony and the possibility of competition in the provision of local telephone service. The existence of competitive mobile telephony services has hinged on the degree to which RBOCs would be able to use their unique access to customer proprietary network information, infrastructure, and bottleneck facilities to gain advantage in the mobile markets. The wireline companies gained a head start in cellular in the early 1980s by obtaining free licenses for the provision of regional service through guaranteed set-asides, with little or no delay due to litigation. To keep RBOCs from leveraging their position in the local loop market, the FCC imposed an in-region RBOC-cellular structural separation rule.

In turn, the FCC acted to prevent cellular companies from leveraging their positions to gain advantage in new markets opened up in the mid-1990s when the FCC auctioned licenses for the provision of digital CMRS – narrowband and broadband PCS.<sup>33</sup> To prevent the cellular companies from gaining undue advantage and ensure robust competition in PCS, the Commission limited the initial participation of the cellular providers.<sup>34</sup> It also structured some license auctions so that smaller companies would have a chance to bid for smaller license areas.

As discussed further in Section 4 below, the Telecommunications Act of 1996 defined the interconnection obligations of incumbent LECs. RBOCs are required to allow cellular and PCS services to interconnect with wireline facilities on a non-discriminatory basis. CMRS providers generally are not subject to the interconnection and unbundling requirements to which wireline providers are subject, leaving CMRS providers free to continue to bundle equipment and services.

### 2.2.2. *Cable*

What are colloquially referred to as cable services consist of multichannel video programming distributors operating on closed transmission path facilities (namely traditional hard-wire cable television and satellite master antenna TV (used in apartment buildings)), regulated by the FCC's Cable Services Bureau, and those operating on open transmission path facilities, such as wireless cable (a subscription service transmitted terrestrially over microwave frequencies) and direct broadcast satellite ("DBS"), which are regulated respectively by the FCC's Mass Media Bureau and the International Bureau. Hard-wire cable systems are also subject to the requirements of local franchises. Satellite

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<sup>33</sup> Narrowband PCS is essentially a two-way paging service that can carry small amounts of data. Broadband PCS can carry voice and high-speed data, competes with cellular and has the potential to compete with local wireline telephony.

<sup>34</sup> The FCC's attribution rules using 20% ownership of a cellular licensee as the point at which the entity would be restricted from bidding on PCS licenses were struck down as arbitrary and capricious in *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995).

services are almost entirely regulated at the federal level, although certain antenna and other satellite earth-station zoning restrictions may be imposed at the state or local level.<sup>35</sup> Certain federal rules apply to both closed and open path facilities, but additional regulations apply to hard-wire cable systems. Cable regulation has centred on the prohibition on cable's entry into the telephony, wireless cable and broadcast markets, and the strictures of the 1992 Cable Act, which checked monopolist cable prices, mandated cable competitors' access to popular cable programming, required larger systems (36 or more channels) to lease capacity to independent programmers, and ensured that cable systems carry local broadcast channels, thereby sustaining broadcast television as a viable competitor to cable (subject to an option for broadcasters called retransmission consent). Although local authorities responsible for granting cable franchises have been at the regulatory forefront, state laws have been responsible for keeping cable out of the local telephone industry.<sup>36</sup> As discussed below in Section 4, the Telecommunications Act of 1996 permits cable to enter the telephone business and reverses the Cable Act's price regulations in stages.

### 2.2.3. *Broadcasting*

Over the past 50 years, broadcast radio and television have been regulated by the FCC's Mass Media Bureau on the theory that licenses to use limited spectrum carry with them the obligation to operate in the public interest. This "trusteeship" model provides for less First Amendment protection than other mass media, such as newspapers, enjoy because of the limited resource involved. The public interest standard, embodied in the Communications Act, has resulted in ownership restrictions (for the sake of diversity), equal employment opportunity rules, licensee qualifications, and certain content requirements. Also critical to broadcasting regulation has been the attempt to preserve balance in the relationship between national networks and local affiliates by controlling the networks' market power. State and local regulations come into play only with respect to certain state law content restrictions and zoning and health and safety issues related to television towers and facilities.

## 3. Evolution of Federal Pre-emption Authority (and its Mixed Record)

### 3.1. The Evolution of the FCC Pre-emption Authority

#### 3.1.1. *The Ascendancy of Pre-emption Power*

The waxing and waning of the exercise of federal pre-emption power has been a factor of technological developments and competition. Most experts observe that until the late 1960s, federal and state telecommunications goals were congruent and the division of labour relatively harmonious.<sup>37</sup> The regulatory authorities agreed that the highest priority should

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<sup>35</sup> The FCC has recently pre-empted some of this regulation. See *In re Pre-emption of Local Zoning Regulation of Satellite Earth Stations*, FCC No. 96-78 (March 11, 1996).

<sup>36</sup> See generally, WCP at 72-74.

<sup>37</sup> See generally, WCP at 77-78; Vogelsang at 24-28.

be to provide universal service, requiring business and long distance users to subsidise lower residential local rates. They also agreed that "natural" telecommunications monopolies were necessary and thus erected a regime to regulate a package of local service and customer equipment (tariffed in a single bundle) and long-distance service.<sup>38</sup>

As technologies advanced with the advent of microwave, satellites and computers, the national network the FCC was created to foster became more complicated and competition both more essential and more likely. Beginning in the late 1960s and reaching a climax in 1996, the FCC has pursued a policy based on a belief that increased competition and the unbundled provision of services would best serve the public interest. Some state commissions, such as the New York and Illinois Public Utility Commissions have been in front of the FCC, seeking to introduce competition to local telephone service early on.<sup>39</sup>

However, many more have implemented policies designed to ensure low cost and universal access to residential and small business customers at the expense of competition.<sup>40</sup>

The first major showdown between the federal and state exercise of regulatory authority occurred in the area of customer-premises equipment ("CPE"). In 1968, in its Carterfone decision,<sup>41</sup> the FCC invalidated a tariff that allowed only CPE provided by the telephone company to be connected to that telephone company's facilities.<sup>42</sup> It did so in the name of fostering competition in the provision of telephone equipment. In 1974, the FCC responded

<sup>38</sup> See, e.g., Kellogg, et al., *Federal Telecommunications Law* 92 (1992).

<sup>39</sup> See, e.g., *Regulatory Policies for Segments of the Telecommunications Industry Subject to Competition*, 103 Pub. Util. Rep. 1 (N.Y.P.U.C. 1989).

<sup>40</sup> To this end, a number of states (e.g., Virginia, North Carolina, New Jersey, Florida, Georgia) until recently prohibited competition with the local telephone company. See generally Loeb, "The Communications Act Policy Toward Competition: A Failure to Communicate," 1978 *Duke L.J.* 1, 5-16; Noam, "Federal and State Roles in Telecommunications: The Effects of Deregulation," 36 *Vand. L. Rev.* 949, 956-7 (1983); Bewig, *Federalism and Telecommunications: On the Right Wavelength?*, 59 *George Washington L. Rev.* 1190, 1216 (1991).

There are several examples of states' interest in benefiting smaller customers at the expense of competition and advanced technologies. The court in *Public Utility Commission of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989) upheld the FCC's pre-emption of a state rule which would have prevented a major oil company from using its own private microwave transmission network to access the public switched network via its own choice of public trunk line providers, rather than the trunk line provider assigned to it under the state's plan.

The FCC touted its policy as benefiting large business enterprises with extensive microwave systems, while the Texas PUC argued that the result would be higher rates for smaller customers. At issue in *Louisiana Public Service Commission v. FCC*, 476 US 355 (1986) were differing federal and state approaches to the setting of depreciation rates to be used for intrastate ratemaking. The FCC favoured higher depreciation rates so as to encourage phone companies to contribute to a superior network by investing in new plant and equipment. State regulators preferred lower depreciation rates so as to keep intrastate rates low. The Court held that there was no cause for federal pre-emption and that the states could set depreciation rates for intrastate communications.

<sup>41</sup> *Use of the Carterfone Device in Message Toll Telephone Services*, 13 FCC 2d 420, recon. denied, 14 FCC 2d 571 (1968).

<sup>42</sup> Twelve years earlier, the Court of Appeals for the District of Columbia Circuit overturned an FCC foreign-attachment tariff prohibiting the use of a device to provide a quiet circuit. The court declared that the telephone customer has a "right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental." *Hush-A-Phone Corp. v. United States*, 238 F.2d 266, 269 (D.C. Cir. 1956).

to a number of state rulings banning interconnection of CPE to their respective intrastate telephone systems on the theory that the goal of universal service would be undermined if the telephone company lost CPE revenue. The FCC pre-empted all state regulation of CPE that conflicted with FCC policy, arguing that telephone equipment was necessarily used for all local and long distance telephone calls, and conflicting state law would frustrate the FCC's attempt to engender competition in the CPE market.<sup>43</sup>

The Fourth Circuit Court of Appeals affirmed the FCC's position in a decision that was to set pre-emption policy for the next decade. In North Carolina Utilities Commission v. FCC (NCUC I), the court held that Section 2(b) of the Communications Act (which reserves intrastate rate regulation to the states) only restrains the FCC from regulating matters "that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications."<sup>44</sup> What became known as the NCUC I rule authorised FCC pre-emption unless the state could show that the matter could be regulated separately by federal and state authorities and that state regulation would not substantially affect interstate communications.<sup>45</sup> Put affirmatively, the FCC could pre-empt if federal and state interests are inseparable or state regulation substantially affects interstate commerce. Because the NCUC I court recognised that 97% of all CPE use was for intrastate calls, the NCUC I rule implicitly rejected an allocation of federal and state responsibilities based on the volume of calls in each domain. Because some federal interest was implicated in each use of CPE, the FCC "must remain free to determine what terminal equipment can safely and advantageously be interconnected with the interstate Communications network and how this shall be done."<sup>46</sup> The federal policy of fostering competition in the interstate network thus gained predominance over the state's interest in controlling activities within its borders and the stage was set for widespread federal pre-emption.<sup>47</sup>

In 1980, the FCC took its position on CPE one step further and pre-empted all state regulation of CPE so that charges for CPE would no longer be bundled and would be entirely separate from charges for transmission service. The FCC also decided that the use of computers to perform circuit switching or data processing (enhanced services), although not part of the basic telephone service and therefore beyond the scope of traditional common carrier regulation, could be regulated by the FCC pursuant to its ancillary

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<sup>43</sup> See Telerent Leasing Corp., 45 FCC 2d 204, 215-220 (1974).

<sup>44</sup> 537 F.2d 787, 793 (4th Cir.), cert. denied, 429 US 1027 (1976).

<sup>45</sup> The Fourth Circuit reaffirmed the NCUC I rule in North Carolina Utilities Commission v. FCC (NCUC II), 552 F.2d 1036 (4th Cir.), cert. denied, 434 US 874 (1977) (upholding the FCC's jurisdiction to regulate even intrastate facilities used "predominantly" for local communication).

<sup>46</sup> *Id.* at 1043.

<sup>47</sup> See, e.g., Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982) (upholding FCC pre-emption of regulation of CPE used in interstate and intrastate communications), cert. denied, 461 US 938 (1983); New York Tel. Co. v. FCC, 631 F.2d 1059 (2d Cir. 1980) (upholding FCC pre-emption of regulation of local exchange service used in connection with interstate foreign exchanges and common-switching arrangement services); California v. FCC, 567 F.2d 84 (D.C. Cir. 1977) (upholding FCC pre-emption of regulation of foreign-exchange and common-switching arrangement facilities), cert. denied, 434 US 1010 (1978).

jurisdiction to regulate the interstate network. Here again, in the face of new technology that could hinder or support the competitiveness of the network, the FCC acted to pre-empt contrary state regulation.<sup>48</sup>

The District of Columbia Circuit upheld the FCC's pre-emption decisions on the ground that conflicting state regulation would frustrate the FCC's statutory duty.<sup>49</sup> Dismissing the argument that by deregulating, the FCC lost its pre-emption power, the court came to the important conclusion that deregulation was tantamount to "a different, affirmative regulatory scheme [created] through [the FCC's] ancillary jurisdiction."<sup>50</sup> Thus, this decision framed the FCC's actions narrowly and the interstate component of telecommunications broadly. Because the FCC had not actually set local rates, it was not usurping the ratemaking authority reserved to the states. Because the interest in a competitive interstate network was so strong, the FCC's choice to deregulate in furtherance of this interest was as controlling as a choice to regulate would have been.

In the cable area,<sup>51</sup> this exercise of the federal pre-emption power in the name of a nationwide network subordinated one of the key components of local regulatory power — the power to enact zoning regulations. In New York State Commission on Cable Television v. FCC,<sup>52</sup> the court upheld the FCC's pre-emption of state regulation that interfered with the public's reception of Multipoint Distribution Service ("MDS") transmissions. The FCC argued that New York's regulation of master antenna television cable systems would chill the development of MDS. New York asserted that any impediment would be to intrastate transmissions only. The Court of Appeals for the Second Circuit concluded that MDS "transmissions cannot . . . be split into interstate and intrastate components" and, therefore, the FCC could exercise its pre-emption power.<sup>53</sup>

Two years later, the Supreme Court affirmed the FCC's broad pre-emption powers in the cable area in Capital Cities Cable, Inc. v. Crisp.<sup>54</sup> In this case, the FCC had granted Oklahoma cable operators' petition for injunctive relief from an Oklahoma law that criminalised the broadcasting of alcohol advertisements. The Court upheld the FCC's

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<sup>48</sup> Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry or Computer II), 77 FCC 2d 384 (1980).

<sup>49</sup> Computer and Communications Industries Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 471 US 938 (1983).

<sup>50</sup> *Id.* at 217.

<sup>51</sup> The Supreme Court first upheld the FCC's jurisdiction over cable TV on the basis of the FCC's ancillary jurisdiction to regulate new technologies. United States v. Southwestern Cable Co., 392 US 157 (1968).

<sup>52</sup> 669 F.2d 58 (2d Cir. 1982).

<sup>53</sup> See *id.* at 65-66. See also New York State Comm'n. on Cable Television v. FCC, 749 F.2d 804, 812 (D.C. Cir. 1984) (upholding FCC's pre-emption of state regulation of entry into satellite master antenna television because such state regulation conflicted with the FCC's policies).

<sup>54</sup> 467 US 691 (1984).

power to pre-empt such state regulation to ensure that “the benefits of cable communications become a reality on a nation-wide basis.”<sup>55</sup>

### 3.1.2. *The Moderation of FCC Pre-emption Authority*

In Louisiana Pub. Serv. Comm’n v. FCC,<sup>56</sup> the Supreme Court modified the NCUC I rule to restrict the FCC’s pre-emption power. It did this by replacing the “or” in the NCUC I rule (matter is inseparable or affects interstate communications) to an “and” so that pre-emption would be permitted only when interstate and intrastate services are inseparable and state regulation impedes the FCC’s exercise of its statutory authority.<sup>57</sup> Louisiana PSC was about depreciation rules for telecommunications equipment and the extent to which states and the FCC could have varying rules. The FCC relied on a provision of the Communications Act that required the FCC to “prescribe for [carriers] the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property,”<sup>58</sup> and argued that state depreciation rates that did not permit capital recovery would frustrate the FCC’s promotion of a competitive environment. The Supreme Court rejected this argument because interstate and intrastate costs could be separated and different rates of depreciation could be applied in the state and federal spheres.<sup>59</sup>

### 3.1.3. *The Recent Course of Federal Pre-emption*

Two things became clear in the cases decided after Louisiana PSC. First, discriminating separable from inseparable intrastate and interstate communications matters is very difficult. Second, technological advances may well allow separation of intrastate and interstate traffic and rates that were once inseparable. The following are the recent pre-emption decisions in the wake of Louisiana PSC, followed by a discussion.

In Favour of Pre-emption:

- The FCC attempted to pre-empt Hawaii’s implementation of its own method, contrary to the FCC’s, of separating interstate and intrastate rate bases. The court ruled that this pre-emption was permissible because ratebase separation is a single

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<sup>55</sup> Id. at 708 (quoting 47 U.S.C. ‘ 151). See also New York State Commission on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984) (affirming FCC order pre-empting state and local entry regulation of satellite master antenna television); Evans v. Board of County Commissioners of the County of Boulder, 994 F.2d 755 (10th Cir. 1993) (holding local zoning regulation did not violate FCC order pre-empting specific antenna height limitations, but that any local ordinance which absolutely prohibits antennas over a certain height is pre-empted).

<sup>56</sup> 476 US 355 (1986).

<sup>57</sup> 476 US at 375.

<sup>58</sup> 47 U.S.C. ‘ 220(b).

<sup>59</sup> 476 US at 371.

(inseparable) activity within the FCC's exclusive jurisdiction under the Communications Act.<sup>60</sup>

- The FCC attempted to pre-empt Illinois' regulation of the marketing of Centrex (private exchange) services. The court affirmed. It held that even though Centrex may have been a purely intrastate service, it was typically sold in a package with interstate services and, thus, "[m]arketing realities might themselves create inseparability."<sup>61</sup>
- The FCC attempted to pre-empt Texas' enforcement of its LEC franchise boundaries against the will of an oil company's attempt to use an alternative LEC. The court affirmed the FCC decision on the grounds that the lines in question would handle both interstate and intrastate calls. Because it was impossible for the favoured LEC to block intrastate calls over its line, thus avoiding state regulation, pre-emption was appropriate.<sup>62</sup>
- The FCC attempted to pre-empt Maryland's regulation of the rates a local phone company may charge interstate carriers to disconnect customers for non-payment. The court upheld the pre-emption on the grounds that disconnection affects intrastate and interstate calls equally and that state regulation of disconnection would enable them to subsidise local service, against FCC policies.<sup>63</sup>
- The FCC attempted to pre-empt California from imposing structural separation requirements on RBOCs with respect to enhanced services. The court held that some state regulation of intrastate enhanced services (such as voice mail) could coexist with the federal policy.<sup>64</sup> The case was remanded to the FCC and the facts of the case were further developed. Ultimately, the court upheld the FCC's decision that separation requirements for intrastate services would effectively impose separation requirements for interstate services.<sup>65</sup>
- The FCC attempted to pre-empt California from imposing a rule that would have required a default Caller-Identification blocking service (for non-published subscribers that do not express a choice of a system to prevent disclosure of their telephone number to a called party) the California rule would have reduced the

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<sup>60</sup> Hawaiian Tel. Co. v. PUC of Hawaii, 827 F.2d 1264 (9th Cir. 1987).

<sup>61</sup> Illinois Bell Telephone Co. v. FCC, 883 F.2d 104, 113 n.7 (D.C. Cir. 1989).

<sup>62</sup> Public Utility Commission of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1989).

<sup>63</sup> Public Utility Commission of Maryland v. FCC, 909 F.2d 1510 (D.C. Cir. 1990).

<sup>64</sup> California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

<sup>65</sup> California v. FCC, 39 F.3d 919 (9th Cir. 1994), cert. denied, 115 S.Ct. 1427 (1995). See Report and Order and Further Notice of Proposed Rulemaking, Rules and Policies Regarding Calling Number Identification Service, 9 FCC Rcd. 1764 (1994).

number of caller-identifications that could be made in California. The court affirmed the FCC's reasoning that pre-emption was necessary to permit "the residents of, and callers to, [California to access] the benefits we have determined in this proceeding are associated with such interstate [Caller-Identification] services" and so enable the FCC to accomplish the objectives of its federal model.<sup>66</sup>

- Recently, the FCC has issued a number of pre-emption rulings which either have not been appealed or have been summarily affirmed.<sup>67</sup> It has pre-empted the application of state entry requirements and other regulations to the intrastate use of a paging service on the grounds that the paging service at issue could not differentiate intrastate and interstate pages. Importantly, the FCC limited the scope of its ruling to paging systems that cannot so discriminate.<sup>68</sup> It has pre-empted a state requirement for a preamble to 900-number information services that conflicted with the federally required preamble, finding it impossible to separate the intrastate and interstate components of the services. Again the FCC noted that if a provider could technically comply with conflicting preamble requirements, there would be no pre-emption.<sup>69</sup> It pre-empted a state's prohibition of intrastate voice mail services because such services could receive interstate calls.<sup>70</sup>

#### Against Pre-emption:

- The FCC attempted to pre-empt California's regulation of purely intrastate radio common carrier services, although it acknowledged that intrastate and interstate communications could be separated. The court rejected the FCC's argument that restrictive state regulations frustrated its efforts to encourage competition and spectrum efficiency and overruled the pre-emption.<sup>71</sup>
- As it had done with CPE, the FCC decided that the installation of inside wiring should be unbundled from regulated telephone service and de-tariffed. The states wanted to maintain tariffs on the inside wiring. The court sided with the states and held that state tariffing of the unbundled wiring would not frustrate the "federal

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<sup>66</sup> *California v. FCC*, 75 F.3d 1350, 1360 (9th Cir. 1996).

<sup>67</sup> An additional proceeding is pending in which the FCC has proposed to pre-empt state regulations to ensure that enhanced 911 emergency service is compatible with all PBX equipment and wireless services. In re. Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Notice of Proposed Rulemaking, 9 FCC Rcd. 6170 (1994).

<sup>68</sup> *Mobile Telecommunications Technologies Corporation and US Central Inc.*, 6 FCC Rcd. 1938, *aff'd* by the Commission, 7 FCC Rcd. 4061 (1992).

<sup>69</sup> Memorandum and Order, *Petition for an Expedited Declaratory Ruling*, 8 FCC Rcd. 698 (1993).

<sup>70</sup> Memorandum Opinion and Order, *Petition for Emergency Relief and Declaratory Ruling*, filed by BellSouth Corporation, 7 FCC Rec. 1619 (1992) *aff'd per curiam*, *Georgia PSC v. FCC*, 5 F.3d 1499 (11th Cir. 1993).

<sup>71</sup> *California v. FCC*, 798 F.2d 1515 (D.C. Cir. 1986).

policy of establishing a competitive inside wiring market" as state tariffing of CPE would have done.<sup>72</sup>

- The FCC declined to pre-empt the states' regulation interstate debit card services (allowing customers to pre-pay for calls) where intrastate use of the debit card existed but was incidental to the main purpose. The FCC based its ruling on the fact that it was possible to separate the intrastate and interstate traffic.<sup>73</sup> This decision was based on a prior decision not to pre-empt Connecticut from regulating unauthorised intrastate calls in the face of arguments that this impeded the provision of interstate service. The FCC determined that the intrastate traffic was not "incidental to, or inseparable from, the interstate traffic in the sense of any physical, logical, or practical inseparability."<sup>74</sup>
- The decisions following Louisiana PSC clearly show that the courts are taking far more care to preserve state jurisdiction, although pre-emption is still common and still justified by the federal interests in making new technologies widely available. It is safe to say that although the results have not differed wildly from what they were before 1986, the analysis has become more painstaking. In addition, before Louisiana PSC, the states generally bore the burden of proving separability in jurisdictionally mixed cases. It is now the FCC that bears the burden of proving inseparability. As demonstrated by the court's flip-flop in the California cases dealing with enhanced services (first treating them as separable and then as inseparable), the separability determination is a very fact specific and uncertain process. It is difficult to explain, for example, why inside wiring and CPE – both formerly parts of the regulated bundled telephone service – should not be treated the same with respect to the validity of state regulations. The extent to which any communications activity will be separable, of course, depends upon the state of the technology. Thus, if a paging system or 900-number information service provider could distinguish between interstate and intrastate calls, state regulation in these areas probably would not be pre-empted, as the FCC itself has recognised in its recent decisions. Thus, as technology develops, there will be increased pressure to assert federal jurisdiction over interstate network elements. On the other hand, it may become increasingly difficult to satisfy the Louisiana PSC pre-emption requirement of inseparability.

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<sup>72</sup> NARUC v. FCC, 880 F.2d 422, 429 (D.C. Cir. 1989). The FCC is considering whether to regulate cable wiring as it has telephone wiring, in light of the converging uses of the two. In re Telecommunications Services Inside Wiring; Consumer Premises Equipment, FCC No. 95-504 (January 26, 1996).

<sup>73</sup> In re The Time Machine, Inc., Request for a Declaratory Ruling Concerning Pre-emption of State Regulation of Interstate 800-Access Debit Card Telecommunications Services, Memorandum Opinion and Order, 1995 FCC LEXIS 7290 (October 26, 1995).

<sup>74</sup> Petitions of MCI Telecommunications and GTE Sprint Communications Corporation Regarding the Validity of Connecticut Statute Relating to Unauthorised Interstate Traffic, 1 FCC Rcd. 270 (1986).

### 3.2. Comparison of Successful and Unsuccessful FCC Pre-emption

Most of the federal pre-emption decisions may be credited as facilitating an increasingly competitive and varied communications network. The decisions with respect to mobile telephony provide a good example of this. Beginning in 1993, there was an exertion of federal jurisdiction over, and a deregulation of, mobile telephony. Because this two-pronged strategy was implemented at a time when improving technologies and increasing competition were making the service more desirable and affordable, the regulatory strategy worked in harmony with industry trends to accelerate the provision of mobile telephony services to the public. On the other hand, the exertion of federal authority in the cable area, coupled again with deregulation, in 1984 was unsuccessful. It came at a time when there was neither robust competition among cable companies in a given community nor advanced alternative technologies capable of competing with cable. This application of a regulatory strategy to an unripe commercial environment led to increased consumer cost and a delay in competition.

#### 3.2.1. *Mobile Telephony*

Mobile communications services were not very prevalent until the mid-1980s when paging and cellular services were licensed on a large scale. States had been regulating entry into the early paging services which were primarily intrastate in nature. When the FCC allocated spectrum for nation-wide and regional paging networks, it pre-empted state entry regulation that interfered with this “new, innovative, and primarily interstate telecommunications service.”<sup>75</sup> On the basis of its power to license radio frequency users, the FCC took some steps to pre-empt state regulation of the cellular market structure so as to encourage competition and the construction of a seamless national network.<sup>76</sup> However, the courts overturned the FCC’s attempts to implement a more thoroughgoing pre-emption of cellular entry regulation on the grounds that the states retained the right to regulate common carrier intrastate entry.<sup>77</sup>

In 1993, Congress did away with this reservation of the states’ rights by establishing a purely federal regulatory framework for CMRS providers. In the 1993 Budget Act,<sup>78</sup> it amended the Communications Act to pre-empt state regulation of private mobile service or CMRS entry and rates and directed the FCC to auction numerous CMRS licenses.<sup>79</sup> In so doing, Congress intended to end the practice of individual states exercising control over rates charged by a service that is fundamentally interstate in nature. States may seek authority from the FCC to regulate CMRS rates, but such regulation will be permitted only

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<sup>75</sup> Domestic Public Land Mobile Radio Service, 93 FCC 2d 908, & 37 (1983).

<sup>76</sup> See Cellular Communications Systems, 86 FCC 2d 469 (1981), on recon., 89 FCC 2d 58 (1982).

<sup>77</sup> See NARUC v. FCC, No. 86-1205 (D.C. Cir. March 30, 1987). See, generally, WCP at 48-51.

<sup>78</sup> Title VI of the Omnibus Budget Act of 1993, ‘ 6002, 107 Stat. 387 (1993).

<sup>79</sup> See 47 U.S.C. ‘332(c)(3)(A) (“[N]o state or local government shall have any authority to regulate the entry of or the rates charged by any [CMRS provider] . . . .”)

if the state can show that the service effectively substitutes for telephone service or that market conditions fail to protect consumers from unjust rates.<sup>80</sup> The 1993 Budget Act did preserve state authority over "the other terms and conditions" of CMRS service, such as certain "consumer protection and service quality standards."<sup>81</sup> The Telecommunications Act of 1996 did nothing to alter the FCC's exclusive jurisdiction over CMRS rates and entry.

In addition to circumscribing state authority, the 1993 Budget Act freed a substantial amount of federal government spectrum for PCS and other mobile uses, and directed the FCC to conduct auctions on an expedited basis for PCS. Indeed, the promise of competition from PCS was one of the justifications Congress relied upon for pre-empting state regulation of cellular rates. The FCC also has relied on the promise of competition from PCS, which is now being deployed throughout the US, in denying state petitions to regulate cellular rates. The early evidence from PCS-cellular competition, which is now limited to the Washington, D.C. and Hawaii markets, is that PCS does have a restraining effect on cellular prices.

To enable PCS and cellular to develop and flourish as viable competitors with wireline telephone service, CMRS providers need fair and efficient access to the wireline network at affordable rates. The FCC recently initiated a rulemaking to implement a federal CMRS interconnection policy.<sup>82</sup> It requested comment on three possible plans:

- allowing states to voluntarily accept federal guidelines for interconnection matters;
- adopting a mandatory federal policy which consists of general policy parameters while allowing states a wide range of discretion in implementing specific elements of these arrangements; and
- adopting specific, federal requirements for interstate and intrastate local exchange and CMRS interconnection arrangements.

These options illustrate the constant tug in the dual world of federal and state regulation.

The FCC has indicated its inclination to pre-empt state CMRS interconnection rules. Such pre-emption would satisfy the Louisiana PSC test because, with respect to mixed jurisdiction, allowing states to regulate the LEC half of LEC-CMRS interconnection rates would make it impracticable for the FCC to implement its Section 332(c) authority to regulate CMRS interconnection rates. It would frustrate the FCC's goal, as set forth by

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<sup>80</sup> 47 U.S.C. ' 332(c)(3)(B). Several states have petitioned the FCC for such authority; all such petitions have been rejected.

<sup>81</sup> 47 U.S.C. ' 332(c)(3)(A).

<sup>82</sup> See *In re Interconnection Between Local Exchange Carriers and Commercial Mobile Services Providers*, FCC No. 95-505 (January 11, 1996).

Congress, to develop a seamless, national network.<sup>83</sup> The FCC has reasoned that adoption of 50 different rate policies would result in a patchwork of different regulations governing CMRS instead of a unified network.<sup>84</sup> It also is highly doubtful that any critical mass of state commissions could act quickly enough to have effective regulations in place by the time broad-based PCS roll-out begins this year.

Physical inseparability is present as well. A typical CMRS user in the Washington, D.C. market, for example, demonstrates the inseparability of CMRS services: Her CMRS phone is registered in one state, she works in a second state, and she routinely travels through a third state (using CMRS towers in state one or state two). The challenge facing the FCC is that the Telecommunications Act of 1996 arguably places all interconnection arrangements, including those of CMRS and LECs, in the hands of states. If the FCC adopts this interpretation of the statute, then it will have to choose one of the first two options outlined above.

### 3.2.2. *Cable*

The experience of federal pre-emption in the cable area has been far less successful, primarily because the FCC misjudged the degree to which competition could be trusted to supplant regulation of cable rates.

In 1984, Congress enacted the Cable Communications Policy Act of 1984.<sup>85</sup> Its goal was to encourage the growth of cable systems, the development of cable services, and the provision of diverse sources of information. To do this, it sought to promote competition in cable communications and minimise unnecessary regulation that would impose an undue economic burden on cable systems.<sup>86</sup> In part, the 1984 Cable Act enhanced state and local authority by requiring all cable operators to obtain local franchises and permitting state law to determine the procedures that would be used in this respect.<sup>87</sup> In more fundamental respects, however, the law trumped state and local authority. First, the 1984 Cable Act pre-empted state and local authorities' rate regulation of those cable systems that the FCC determined faced "effective competition." A cable system was deemed subject to such effective competition if its subscribers could receive three over-the-air television signals.

<sup>83</sup> See H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993); S. Rep. No. 36, 103rd Cong., 1st Sess. 261 (1993).

<sup>84</sup> The FCC recently decided that States have authority over LEC interconnection charges to CMRS providers. See *Petition On Behalf Of The Louisiana Public Service Comm'n For Authority To Retain Existing Jurisdiction Over Commercial Mobile Service Offered Within The State Of Louisiana*, 10 FCC Rcd. 7898 (1995). This decision has been criticised as an unwise diminution of FCC authority in the context of a dispute that was not a subject of broad industry or public comment. If it stands, the same transaction (negotiation of rates for interconnection) between LECs and CMRS providers will be regulated at two different levels. Such a system would encourage "regulatory arbitrage" in which parties attempt to play the federal rules on one side of an arrangement against the state rules on the other side of the same arrangement.

<sup>85</sup> Pub. L. No. 98-549, 98 Stat. 2779 (1984) (the "1984 Cable Act").

<sup>86</sup> See *Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Services, Report on Competition*, 5 FCC Rcd. 4962 (1990).

<sup>87</sup> See 47 U.S.C. § 541.

This standard effectively abolished rate regulation for almost all cable systems.<sup>88</sup> Second, the 1984 Cable Act provided for a franchise “renewal expectancy” for incumbent cable systems. As a result, local authorities faced daunting procedural obstacles before they could terminate or refuse to renew a franchise.

Whereas increased competition and technological advances had consistently prompted federal pre-emption in the telephony area, the 1984 Cable Act freed the cable industry from regulation while it was also free from competitive market forces. Meaningful competition did not exist when Congress passed the 1984 Cable Act, and the provisions in the Act prevented it from developing. As a consequence, the cable industry was, in essence, an unregulated monopoly. Thus, in pre-empting state regulation without replacing it with adequate federal regulation, Congress mis-stepped. As a result, though investment in cable programming increased dramatically, cable rates skyrocketed and competition faltered. Data collected for Congress in 1992 showed that monthly rates for the lowest priced basic cable service had increased by 40% or more for 28% of cable television subscribers. Although the average number of basic channels had increased from about 24 to 30, average monthly rates had increased by 29% during the same period. The average monthly cable rate had increased almost three times as much as inflation. In addition, due to the expense of building a cable system and local franchise restrictions, incumbent cable systems faced very little competition.<sup>89</sup>

Congress enacted the Cable Television Consumer Protection and Competition Act of 1992<sup>90</sup> to remedy the situation. The 1992 Cable Act imposed federal rate regulation on most systems by redefining “effective competition.” As a result, a cable system would only be exempt from rate regulation if there was significant competition from other multichannel video programming distributors.<sup>91</sup> To promote the development of competition, the 1992 Cable Act both diminished and increased the role of the local franchising authority. It prohibited them from granting an exclusive franchise or unreasonably refusing to award a competitive franchise, thus constricting their gatekeeping function. On the other hand, local franchising authorities became responsible for policing cable systems’ compliance with FCC-set rates.

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<sup>88</sup> Between 1986 and 1992, 97% of all franchises were deregulated. See Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 102-862, 102d Cong., 2d Sess. (1992).

<sup>89</sup> See *id.*

<sup>90</sup> Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the “1992 Cable Act”).

<sup>91</sup> Under the 1992 Cable Act, a cable system experiences effective competition if:

- its subscribers number fewer than 30% of the households in the franchise area;
- the franchise area is served by at least two unaffiliated multichannel video programming distributors, each of which offers comparable programming to at least 50% of the households and the number of households subscribing to programming services offered by all but the largest distributor exceeds 15% of the total; or
- the franchising authority’s distributor offers video programming to at least 50% of the households.

In addition, the 1992 Cable Act requires vertically integrated programmers to make their programming available to competitors. The Telecommunications Act of 1996 alters the “effective competition” test, as discussed below.

#### 4. The Federalism of the Telecommunications Act of 1996

After more than two years of debate, Congress in February passed the Telecommunications Act of 1996 (the "1996 Act").<sup>92</sup> The 1996 Act seeks "to provide for a pro-competitive, deregulatory national policy framework" designed to make available to all Americans advanced telecommunications and information technologies and services "by opening all telecommunications markets to competition."<sup>93</sup> In embodying the hope that competition will substitute for regulation, the 1996 Act takes a leap in the direction in which the FCC has been moving since the late 1960's. In so doing, it exaggerates the trend toward increased federal power that the FCC's previous actions had started and that generally accompanies advancing and converging technologies. The FCC will initiate a large number of proceedings in the coming year to implement the 1996 Act; many of these will implicate state and federal relations and state regulators (as well as the incumbent interests with which they tend to ally) will no doubt attempt to narrow any additional allocation of authority to the FCC.

Before addressing the changes the 1996 Act effects in the state and federal balance of power, the following outlines the four core principles that shaped the 1996 Act:

- **Simultaneous Entry into Competing Lines of Business.** The 1996 Act is designed to allow RBOCs to enter the long distance business when competitors can enter the RBOCs local markets. It is also designed to permit cable, long distance and other companies to offer telephony services at approximately the same time and to allow telephone and cable companies into each other's respective spheres simultaneously. This desire for simultaneous entry comprehends the importance of timing deregulation, competition, and federalisation that the CMRS/cable example in Section 3 explored.
- **Level Playing Field.** The 1996 Act imposes restrictions on certain activities (e.g., joint marketing, toll dialling parity, video program access) on new entrants that have been imposed on incumbents to ensure that the rules of engagement in the competitive fight are the same. In some instances, the new entrant's lack of market power may render the rules wholly without policy justification. In such cases, the appearance of equal treatment may belie its reality.
- **Removal of Restrictions on Competition.** In the broadcast area, the 1996 Act removes cross ownership restrictions and increases the number of stations a single person may own. In the telephone area, the 1996 Act does what the EU Open Network Provision and Services Directives intend to do by pre-empting state barriers to local telephone competition and allowing utilities to enter into telecommunications. The 1996 Act also repeals the prohibition, already struck down

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<sup>92</sup> Pub. L. 104-104, 110 Stat. 56 (1996).

<sup>93</sup> S. Conf. Rep. No. 230, 104th Cong., 2nd Sess. 1 (1996).

by a number of federal courts, on the entry of cable and telephone companies into each other's businesses.

- **Relaxation of Regulations.** Cable companies, local telephone companies, some wireless cable companies, broadcasters, and others will be subject to less regulation. However, the RBOCs are subjected to new regulations in the form of open access and separate affiliate requirements.

In setting up the process for implementing these core principles, Congress reflected the tug of the federal/state duality. Two areas best illustrate this ongoing tension: local telephone competition and multichannel video competition.

#### 4.1. Telephony

When the 1996 Act was passed, many states had laws flatly prohibiting local telephone competition. Those laws were erased. When the 1996 Act was passed, several states had numerous and intimidating hurdles new entrants had to overcome before they could offer service. Those hurdles were removed.<sup>94</sup> When the 1996 Act was passed, many states required local telephone companies to impose high fees on companies connecting to their networks. Mechanisms have been put in place to reduce those fees.<sup>95</sup> When the 1996 Act was passed, RBOCs were not permitted into the long distance market. They now are, immediately in areas outside their local markets and within their local markets once these are sufficiently competitive.<sup>96</sup> But the 1996 Act did not airbrush states out of the picture altogether. Rather, the Act provides that within this broad federal framework – no barriers to entry, mandated access, cost-based rates – states retain authority to regulate the particular agreements incumbent and competing carriers reach on access to the network.<sup>97</sup> With respect to RBOC entry into the long distance business, the 1996 Act establishes a 14-

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<sup>94</sup> Section 253 of the 1996 Act substantially reduces the compass of states to regulate telecommunications. It removes all state and local barriers to the entry of competing telecommunications services providers. Thus, no state or local law or regulation may prohibit the ability of any entity to provide any interstate or intrastate telecommunications service.

<sup>95</sup> As part of the push towards competition, the 1996 Act, at Section 251, contains a general duty of interconnection for all carriers and expanded interconnection obligations for LECs (e.g., resale, number portability, dialling parity, and access to rights-of-way). Incumbent LECs face additional obligations to negotiate interconnection agreements in good faith, to provide access to network elements on an unbundled basis, and to offer resale of telecommunications services at wholesale rates. Carriers may voluntarily negotiate interconnection agreements, under Section 252, but are required to submit these agreements to the state commissions for approval. The FCC has authority to act where a state fails to.

<sup>96</sup> Section 271 establishes a procedure for permitting RBOC entry into the long distance business.

<sup>97</sup> States still may impose certain limited conditions on providers, especially to protect consumers, and local governments may manage their rights-of-way on a non-discriminatory basis. However, the FCC may pre-empt any state or local requirement that violates or is inconsistent with Section 253. With respect to interconnection obligations, Section 252 provides that state commissions will be responsible for resolving interconnection disputes according to enumerated standards and for setting interconnection prices for each network element. State access regulations may remain in effect if they are consistent with Section 251. States also have role in modifying or suspending interconnection requirements for very small carriers or for rural carriers.

point “competitive checklist” an RBOC must satisfy before it can compete, but the states are responsible for determining when that checklist has been satisfied.

The 1996 Act addresses the provision of universal service, historically governed by both federal and state regulations and long a source of tension between the two spheres. It creates, in Section 254, a federal-state Joint Board to review and recommend a policy on universal service.<sup>98</sup> Universal service is defined as an evolving level of telecommunications services and the FCC is charged with periodically establishing what components are:

- essential to educational goals or public health and safety;
- have been subscribed to by a substantial majority of residential customers; or
- are being deployed in public networks.

State authority is specifically preserved under Section 254 and a state may adopt any measure with respect to universal service that is not inconsistent with the FCC’s rules. The state is charged with determining how much all providers of intrastate telecommunications should contribute to universal service within that state. It may also adopt additional requirements with respect to universal service.

In this way, the 1996 Act sets out the broad federal policy, and prohibits states from enforcing certain anti-competitive laws, but allows states to administer the details of the new federal policy so long as the states remain true to the goals of the 1996 Act.

#### 4.2. *Multichannel Video*

Congress used a similar approach in writing the law affecting the ability of consumers to receive competing forms of video distribution. Here, too, it is apparent that new and converging technologies serve to spur the federalisation of telecommunications regulations, but that states retain a role in policing and implementing the federal vision. The 1996 Act, Section 207, establishes exclusive federal jurisdiction over direct-to-home satellite services and pre-empts local regulation that impairs reception by antennas used in these services. Ten years ago, the FCC adopted a rule pre-empting local ordinances that imposed unreasonable limitations on the reception of satellite-services.<sup>99</sup> Prior to the passage of the 1996 Act, the FCC initiated a proceeding making it easier for the FCC to adjudicate local zoning disputes, preventing states from regulating satellite antennas, and establishing presumptions that states cannot regulate small antennas (such as DBS 1-m dishes and VSAT 2-m dishes).

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<sup>98</sup> For background on universal service regulation and federal-state joint boards, see WCP at 64-66.

<sup>99</sup> In re Pre-emption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, 51 Fed. Reg. 5519 (1986).

Last month, the FCC issued a Report and Order on this subject and tentatively concluded that this decision satisfied the requirements of the 1996 Act.<sup>100</sup> As in its earlier pre-emption decisions, the Commission justified its expansion of federal pre-emption in the name of its Section 1 duty to ensure Americans' access to an efficient network. It balanced "the very weighty and important interests of state and local governments in managing land use in their communities . . . . [against] the federal interest in ensuring easy access to satellite-delivered services, which have become increasingly important and widespread in the last few years and are dependent upon rapid and inexpensive antenna installation by businesses and consumers."<sup>101</sup> As proof of how controversial pre-emption decisions remain, immediately after the FCC decision was released, a group of mayors held a news conference outside the FCC protesting what they called "unprecedented intrusion" of the FCC into local zoning, building codes and other local controls over satellite dish placement.<sup>102</sup>

Just as Congress bet on competition to deregulate and federalise mobile telephony, so it is betting on competition in the multichannel video area to enable deregulation of hard-wire cable. Here too, the trend towards federalisation is strong. The 1996 Act, at Section 301, eliminates rate regulation for small cable systems immediately. To give cable companies certainty, it terminates rate regulation in all circumstances by March 1999. Prior to that moratorium, the 1996 Act provides for the deregulation of basic and cable programming service tiers in franchise areas that have "effective competition." The FCC has come to a tentative decision, under Congress' guidance, about what the new test for determining whether or not there is "effective competition" should be, in addition to the tests provided in the 1992 Cable Act. This is whether an LEC or multichannel video programming distributor offers video programming services of at least 12 channels to subscribers, at least some of which are local broadcasting signals – a test that will result in rapid rate deregulation.<sup>103</sup>

The 1996 Act, at Section 302, also permits LECs to provide multichannel video services on a common carrier basis (meaning provision of transmission facilities on a non-discriminatory basis) or on an open video system (*i.e.*, subject to non-discrimination requirements and requirements that the operator not favour its own programming when system capacity is scarce). Open video systems are subject to reduced regulation, although local franchising authorities and states may impose fees on them. Section 303 of the 1996 Act pre-empts local franchising authority regulation of telecommunications services, including those provided by cable systems. Thus, if an operator is offering telephony or other telecommunications services, it will be subject to applicable state and federal regulations only, but not to the local authorities.

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<sup>100</sup> In re Pre-emption of Local Zoning Regulation of Satellite Earth Stations, FCC No. 96-78 (March 11, 1996).

<sup>101</sup> *Id.*

<sup>102</sup> *Communications Daily*, April 3, 1996, at 7.

<sup>103</sup> In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, FCC No. 96-154 (April 9, 1996).

After the 1996 Act, the distribution of federal and state authority with respect to cable is essentially unchanged. Cable systems must obtain local franchises and the local authorities are responsible for policing federally-set rates. However, the creation of open video systems under an essentially federal regime bodes for a larger federal presence in the multichannel video sector as a whole.

## 5. Human Resources of the FCC

### 5.1. FCC Staff Numbers

As of 1995, the FCC staff numbered 2,271, which is about the same as what it was in 1980.<sup>104</sup> In 1993, the FCC had only 1,724 employees. The increase came in 1994, when Congress appropriated additional funding so that the FCC could finally implement the Cable Act of 1992.

In 1994, under the direction of the newly appointed Chairman Reed Hundt, the FCC initiated a reorganisation to better implement the 1992 Cable Act and to respond to the Clinton Administration's Reinventing Government initiative.

Some bureaus changed their names. Cable television issues were removed from the Mass Media Bureau and placed in the new Cable Services Bureau. A Competition Division (consisting of 13 lawyers and four economists) was added to the General Counsel's office (consisting of the adjudication, administrative law, and litigation divisions) to write rules to promote competition. The legal staff grew across the FCC to remedy the FCC's poor record in the courts. Finally, people were hired to augment the FCC's mix of skills and help usher in competition (e.g. economists, MBAs, computer industry experts and experienced technical people and managers from the telecommunications industry).

As of 1995, full time employees were distributed among the FCC Bureaus and Offices as follows:

- in Compliance and Information Bureau (formerly Field Operations Bureau);
- in Mass Media Bureau;
- in Wireless Telecommunications Bureau (replacing the Private Radio Bureau);
- in Common Carrier Bureau;

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<sup>104</sup> This plateau is notable considering the substantial increase in the FCC's workload over the same period. Tariff filings increased from 1,821 (16,817 pages) in 1981 to 5,573 (264,640 pages) in 1994 - a 16-fold increase in the number of pages. Consumer inquiries to the FCC's Office of Public Affairs doubled between 1990 and 1994 (from 84,587 to 163,757) as did the number of Congress inquiry letters to the FCC (from 3,445 to 6,368).

- in Office of Managing Director;
- in Cable services Bureau (newly created);
- in International Bureau;
- in Office of Engineering and Technology;
- in Office of Public Affairs;
- in the Offices of the Commissioners and Chairman;
- in Office of Plans and Policy;
- in Administrative Law Judges;
- in Office of Communication Business Opportunities (formerly the Office of Small Business Activities within the Office of Managing Director);
- in Review Board;
- in Office of Inspector General;
- in Office of Workplace Diversity (newly created).

As of 1995, staff distribution was as follows: 28% in enforcement; 19.8% in authorisation of service; 13.9% in executive director/administrative support; 18.3% in policy/rulemaking; 12.7% in public information service; 4.4% in legal services; 2.9% in international activities.

The Common Carrier Bureau provides one example of a single bureau's professional staff breakdown. It has a total of 190 professionals to deal with 1,200 telephone companies, the RBOCs, competitive access providers and long distance companies. These professionals are distributed as follows:

- 17 doing primarily policy work;
- 164 in operations (managing tariffs, universal service, network reliability, complaints and consumer protection functions);
- 9 in management.

## 5.2. Roles of FCC Staff Members

The FCC is designed to react to the market information that regulated industries, the public, research and policy organisations, and other governmental entities give it. The notice and comment process, like the EU consultation procedure, requires the regulator to put questions to the public and then act on the basis of the responses. Supplemental information generated by the FCC may help to shape a given notice of inquiry and determine what questions the FCC asks, but final decisions must be made on a record consisting largely of public comment.

That said, both the FCC and the National Telecommunications and Information Administration (NTIA) - an executive-branch agency located within the Commerce Department - have methods to monitor market developments and augment the regulators' information base.

- The FCC employs about 55 economists who analyse the economic effects of rules and other FCC decisions presumably using actual market data as appropriate.
- The FCC Office Of Plans and Policy (OPP) exists as a quasi think-tank within the FCC. Issues are referred to it for analysis based on economic, business and legal expertise. In addition, OPP produces reports on trends and discrete market developments in telecommunications (usually related to a pending FCC proceeding).
- At least three of the FCC Bureaus have internal policy divisions that can be expected to monitor the market; the Common Carrier Bureau's Policy and Programme Planning Division; the Mass Media Bureau's Policy and Rules Division; and the Office of General Counsel's Competition Division.
- The NTIA was formed in 1978 (from two predecessor organisations) to manage government spectrum and to determine presidential policy on telecommunication issues. With respect to the latter duty, the NTIA has a substantial research staff. It publishes extensive technical reports as well as economic and policy studies on telecommunications issues. It frequently develops regulatory proposals and submits expert comments in FCC proceedings. Many of these activities require the synthesis and analysis of market data

## 6. Conclusion

The course of US telecommunications regulation has been one of increasing federalisation. This trend has both *precipitated* and *been formed* by technological advances, convergence, and increased competition. *How precipitated?* Because the FCC and Congress have tended to favour competition more strongly than have the states, which have had interests in protecting incumbents and subsidising basic residential service. In some cases this has not been the case and there has been great value in local laboratories demonstrating exemplary

policy choices. *How formed by the changes in telecommunications?* The integration and growing complexity of the interstate network has demanded federal coordination. Of course, growing competition and diminishing monopoly power tend to mitigate increased federal control by lightening the federal presence even as that presence spreads. The American experience shows that the timing of deregulation and federalisation must be approached carefully. There is a danger that if regulators and legislators federalise and deregulate too quickly, before there is sufficient competition, there will be higher consumer prices and reduced competition. This was the case in the US in the mid-1980s with cable television. On the contrary, properly pacing deregulation and federalisation with increasing competition may enable new and affordable technologies to emerge. This was the case in the US in the mid-1990s with digital wireless telephony and it is the hoped for result of the 1996 Act.

Another lesson to emerge from the US experience with dual state and federal authority is that the trend toward federalisation is not absolute. The retraction from a very broad federal pre-emption authority in 1986, under Louisiana PSC is one example. As technology advances and it becomes easier to separate interstate and intrastate traffic, the predicates for pre-emption that Louisiana PSC establishes may be met less frequently and, thus, federal pre-emption may be subject to more court challenges. What has been called the "schizophrenic" quality of the 1996 Act with respect to federal/state jurisdiction is another example. Undoubtedly, the removal of state barriers to competition in the local markets is a significant incursion on state power. However, among the most important provisions of the 1996 Act are those that deal with interconnection, which endow the states with a significant role. There are federal requirements for interconnection that are meant to foster competition. But interconnection agreements must be submitted to and mediated by the states and it is they that have first crack at determining the shape of competition to come.

## APPENDIX 8. SUBSIDIARITY UNDER RECENT PROPOSALS

As stated in Section 4.2.2a of the Main Report, the Community must satisfy the subsidiarity test before it can exercise powers conferred on it by the EC Treaty in areas where it shares competence to act with Member States. It is helpful, therefore, when considering if the Community has the authority to create a European Regulatory Authority, to look at how recent proposals in the telecommunications sector have dealt with the subsidiarity issue.

The Explanatory Memorandum of the Licensing Proposal stipulates that, in line with the principle of subsidiarity, the granting of authorisations is the responsibility of Member States and that the choice of whether they are granted through one or more documents, or given by one or more national/regional/local authorities, is to remain a matter for Member States.

It is clear that, if a European Regulatory Authority is to be formed and assume a licensing role, at least in relation to trans-European networks, Member States must accept that present goals on subsidiarity need to be moved. In this context the 29th recital of the Full Competition Directive (96/19/EC), as set out below, is important.

In the second Recital, reference is made to Council Resolution of 18 September 1995 on the implementation of the future regulatory framework for telecommunications (OJ C258 of 3 October 1995), which recognises as a key factor for a future telecoms regulatory framework the establishment, in accordance with the principle of subsidiarity, of common principles for general authorisations and individual licensing regimes in the Member States.

The Explanatory Memorandum of the Interconnection Proposal states that the proposed harmonised framework for interconnection will be characterised by clear responsibilities for national regulatory authorities, in accordance with the principle of subsidiarity; and that a European Community Directive is considered to be the most effective way of laying down the principles for interconnection in Member States while at the same time defining the role of national regulatory authorities consistent with the principle of subsidiarity.

In the 22nd Recital of the Interconnection Proposal, Article 3b(2) EC is almost literally quoted to the effect that the essential goal of interconnection of networks and services throughout the European Union and the provision of trans-European networks and services cannot be satisfactorily realised at Member State level, and is better achieved at European Union level by the adoption of this Directive.

The 29th Recital of the Full Competition Directive states that responsibility for measures to support the transition process to a fully liberalised telecoms environment rests mainly at Member State level.

The 30th Recital goes on importantly to state that the establishment of procedures at national level concerning licensing, interconnection, universal service, numbering and rights of way is

without prejudice to their harmonisation by appropriate European Parliament and Council legislative instruments.

This language appears to pave the way for possible further Community measures in the sector.

Finally, a common position has now been adopted by the EU Council of Ministers in relation to the ONP Framework Directive. This guarantees the independence of NRAs, but also promotes genuine structural separation between regulatory activities and other activities linked to ownership or supervision. The Council of Ministers has therefore re-asserted the continuing need for strong regulation at national level.

## APPENDIX 9. THE PROPOSED COMMUNITY POSITION ON LICENSING AND INTERCONNECTION

### 1. Introduction

Commission Directive 96/19/EC amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets ("Full Competition Directive") represents the final leg of the EU's journey to full liberalisation of the telecommunications industry. The Member States have (with certain exceptions) committed themselves to opening every market for telecommunication services (voice, mobile, satellite), and permitting the establishment and provision of infrastructure, at the start of 1998. The Directive also allows alternative infrastructure to be used for services that are already liberalised (that is everything but public voice telephony).

### 2. Licensing

As a half-way house to a Community licence, two previous attempts were made to introduce mutual recognition of licensing of services<sup>105</sup>. Both proposals were subsequently withdrawn, however, and recently replaced by a new proposal: the Proposal for a European Parliament and Council Directive on a common framework for general authorisations and individual licences in the field of telecommunications services ("the Licensing Directive")<sup>106</sup>. The Licensing Directive was first introduced by the Commission in 1995, and was amended following the Parliament's first reading of the Directive<sup>107</sup>. In December 1996, a Common Position was reached<sup>108</sup>.

It is, however, instructive to look back to the thinking behind two superseded Proposals in order to put the Licensing Directive in context and to evaluate how the issues of subsidiarity and comitology have impacted regulation in this area.

It was argued in the Services Proposal that the need to obtain separate licences or authorisations in Member States was inimical to a true single market, time consuming and a

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<sup>105</sup> The Amended Proposal for a European Parliament and Council Directive on the mutual recognition of licences and other national authorisations for telecommunications services (COM (92) 254) as amended by (COM (94) 41) ("the Services Proposal") and the Proposal for a European Parliament and Council Directive on a policy for the mutual recognition of licences and other national authorisations for the provision of satellite network services and/or satellite communications services (COM (93) 652) ("the Satellite Proposal")

<sup>106</sup> COM(95)545.

<sup>107</sup> Amended Proposal for a European Parliament and Council Directive on a common framework for general authorizations and individual licences in the field of telecommunications, COM (96)342.

<sup>108</sup> Common Position (EC) No 7/97 adopted by the Council on 9 December 1996 with a view to adopting Directive 97/. . ./EC of the European Parliament and of the Council of . . ., on a framework for general authorizations and individual licences in the field of telecommunications services.

barrier to entry. The Services Proposal therefore introduced the concept of a Single European Telecommunications Licence which, subsequently, was replaced by a watered-down procedure for mutual recognition of national authorisations, under a simplified and more efficient procedure based on prior harmonisation of national conditions for authorisation of telecommunication services (or, in some cases, even absent harmonisation). One-stop shopping procedures were also to be promoted as a transitional measure, regulated by ECTRA or under MoUs between NRAs where harmonisation of conditions was incomplete.

The Council justified action at Community level on the basis that Community action was required to establish an internal market in telecommunications services which, in turn, requires a harmonisation of licensing conditions. The Commission stated that licensing itself would remain the prerogative of Member States.

Similarly, the Satellite Proposal aimed for mutual recognition of licensing on the basis of harmonised national conditions for authorisation of satellite services by service categories; and it provided for mutual recognition of licences for certain categories of services without prior harmonisation where that did not seem required.

Both Proposals envisaged the creation of a Community Telecommunications Committee, but there was debate over the role of this Committee. The Proposals stated that the Committee was to have an advisory role, leaving final decision-making power in the hands of the Commission. The Economic and Social Committee, by contrast, recommended that the Committee should have greater regulatory powers, but the Commission resisted this.

Although NRAs would, in general, have retained the right to issue, monitor and enforce licences to provide telecommunications services, both Proposals contained powers for the Commission, in certain cases, to overturn national licensing decisions. This caused concern among Member States, and these powers are not replicated in the Common Position on the Licensing Directive.

The main difference between the Licensing Directive and the two withdrawn Proposals is that the Community has moved away from the idea of mutual recognition of licences, and consequently further away from pan-European licensing, in favour of harmonised national procedures for the granting of authorisations and the conditions attached to authorisations. To promote deregulation, the Commission also promotes the grant of general authorisations by Member States, thus removing the need for individual national licences in many cases.

The new proposed Licensing Directive does, however, retain certain elements of the previous Proposals: in particular, it requires that ECTRA and ERC/ERO develop harmonised licence conditions and that a one-stop shopping procedure for individual licences be set up to assist undertakings to provide trans-European services. The procedure may, if fully implemented, facilitate simultaneous delivery of individual national licences following a single application.

In a parallel development, on one-stop shopping, ETO has, since 1995, set up a type of on-stop shopping regime envisaged by the Licensing Directive, but only in respect of data transmission and value added services.

A further feature of the original Proposal was that, under Article 13, operators intending to operate in more than one Member State may request the relevant NRAs to coordinate their authorisation procedures in order to ensure that they issue the necessary authorisations on substantially the same conditions, but this provision was removed in the Common Position.

A Common Position was reached on 9 December 1996 under which the use of individual licences is limited in Article 7 to:

- allowing access to radio frequencies or numbers;
- granting licensees particular rights with regard to access to public or private land;
- imposing obligation and requirements relating to the mandatory provision of publicly available Member State services and/or public Member State networks, including obligations under ONP legislation and/or relating to universal service provision;
- imposing specific obligations related to competition rules on players with significant market power in relation to publicly available Member State services and/or public Member State networks.

Additionally, individual licences may be used in relation to the provision of voice telephony services, the establishment and provision of public Member State networks and of other networks involving radio-frequencies.

Furthermore, according to Article 10(1), the number of licences may be limited for any category of services or for the establishment and operation of networks "only to the extent required to ensure the efficient use of radio frequencies or for the time necessary to make available sufficient numbers in accordance with Community law". Where licensing is required, NRAs are put under stringent obligations and a new Licensing Committee is to be set up comprising representatives of Member States in order to assist the Commission to monitor the application of the Licensing Directive and to promote exchanges of information.

Another recent development in the field of licensing was the discussion in Council on 21 March 1996 of a proposal by the Commission to introduce S-PCS in the EU in a coordinated fashion<sup>109</sup>. A key issue was the need for action at Community level in this area, partly on

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<sup>109</sup> Proposal for a European Parliament and Council Decision on an action at a Union level in the field of satellite personal communications services in the European Union; COM (95) 529.

the grounds that coordination on frequency allocation and licensing already takes place via organisations like the ITU and the CEPT. Most of the Member States rejected provisions in the proposal allowing the Commission, together with a Committee of Member State representatives, to develop criteria for licensing operators for the EU market and for selecting the operators, which suggests political concern over a perceived expansion of the role of the Commission in the area of licensing and, accordingly, that the subsidiarity argument could be deployed against further pre-emption in this area.

On 27 September, Council reach agreement on a Common Position which authorised the Commission to act through the CEPT framework to harmonise the use of frequencies and the conditions for granting general authorisations for SPCS; a brief defines a specific task to be performed and a timetable. At the conclusion of the process, the Commission will submit proposals to the Licensing Committee mentioned above, but the Commission or any Member State will have a right to appeal earlier to the Licensing Committee if it considers that negotiations are not progressing satisfactorily.

On 9 December 1996, a Common Position was adopted by the Council with a view to the adoption of Decision No. . . /97/EC of the . . . European Parliament and of the Council on a coordinated authorization approach in the field of satellite personal communication services in the Community."

### 3. Interconnection

The ONP Voice Telephony Directive (95/62) sets out conditions for interconnection in defined circumstances, particularly with regard to the provision of voice telephony services. It also defines the powers and rights of national regulatory authorities with regard to interconnection with the voice network and requirements for cost-oriented pricing and for cost accounting for certain operators.

The Interconnection Directive<sup>110</sup> lays down harmonised principles for interconnection which are, in accordance with the principles of proportionality and subsidiarity, to be implemented at a national level. According to the Directive, in order to promote Community-wide telecoms services, there is a need to ensure interconnection of public networks and interconnection between different national and Community operators and ONP measures provide an appropriate framework for harmonising interconnection conditions. Hence, Article 6 of the Interconnection Directive lays down principles to guarantee transparency, access to information, non-discrimination and equality of access, in particular for organisations with significant market power (generally, an organisation with a share of more than 25% of a particular telecoms market in the geographical area in a Member State within which it is authorised to operate).

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<sup>110</sup> Common Position (EC) No 34/96 adopted by the Council on 18 June 1996 with a view to adopting Directive 96/ /EC of the European Parliament and of the Council on interconnection in telecommunications with regard to ensuring universal service and interoperability through the application of the principles of open network provision (ONP), OJ C220, 29.7.96.

The basis of the Interconnection Directive is that any existing barriers to interconnection be removed by Member States, and that authorised network and service providers should be free to negotiate interconnection agreements on a commercial basis in accordance with EC law, *subject to supervision and intervention by NRAs*. NRAs are to retain an important role in encouraging the development of a competitive market in the interests of European users, and in securing adequate interconnection of networks and services.

Negotiation of interconnection agreements may be facilitated by NRAs setting down certain conditions in advance, and identifying other areas to be covered in interconnection agreements. In the event of a dispute over interconnection between parties in the same Member State, an aggrieved party must be able to call on the NRA concerned to resolve the dispute. NRAs must be able to require organisations to interconnect their facilities, where it can be demonstrated that this is in the users' interests.

Also of particular interest are Articles 9, 13, 15 and 16. Article 9 defines in some detail the general responsibilities of NRAs and includes the requirement that, in relation to prescribed organisations (generally the major service or network providers), the NRAs shall, *inter alia*, set certain listed *ex ante* conditions, including a dispute resolution procedure, requirements for the provision of equal access and number portability, and requirements to provide facility sharing, including collocation. NRAs shall also encourage certain listed issues to be included in interconnection agreements, such as a description of interconnect services to be provided and technical standards for interconnection.

Article 13 states that NRAs shall ensure that organisations providing public telecommunications networks or services take full account of standards referenced in the Official Journal as being suitable for the purpose of interconnection. In the absence of such standards, NRAs are to encourage the provision of technical interfaces for interconnection in accordance with a prioritised list of standards, beginning with those adopted by European standardisation bodies such as ETSI. Further, in consultation with the ONP Committee, the Commission may request standards for interconnection and access to be drawn up, where appropriate, by European standardisation bodies.

Article 15 and 16 provide for the ONP Committee to be involved in both an advisory role and a regulatory role in accordance with Council Directive 90/387/EEC<sup>111</sup>.

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<sup>111</sup> Ibid.