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## THE RAGING TELECOMMUNICATIONS WAR: THE OFFENSIVE STEPS THE WORLD TRADE ORGANIZATION SHOULD TAKE

*Katherine L. Haennicke*<sup>†</sup>

“As liberalisation unfolds, the established players have to wage war on two fronts: defending their customer bases against raids by hostile neighbours while at the same time mounting their own offensives behind enemy phone lines.”<sup>1</sup>

The connection of nations through means such as better transportation and more efficient communication has brought about the dawn of a globalization of information. The United States holds a peculiar position in the international telecommunications industry accounting for over twenty percent of all international communications;<sup>2</sup> yet facing great

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1. Ed Shelton, *Europe's Telcos Prepare for War*, THE EUROPEAN, Aug. 3, 1998 at 1998 WL 8700168.

2. See *In the Matter of Market Entry and Regulation of Foreign-Affiliated Entities*, 11 F.C.C. Record 3873, 1995 F.C.C. LEXIS 7684, 1 Comm. Reg. (P & F) 459 (Nov. 28, 1995) [hereinafter *Market Entry*]. For example, AT&T has announced that it will buy TCI in order to gain cable access to American homes. Although the acquisition will cost roughly \$48 billion, it will give AT&T access to the \$100 billion local telephone market. *AT&T Rings Up TCI Deal (June 24, 1998)*, at <http://money.cnn.com/1998/06/24/deals/att/index.htm>. Additionally, AT&T announced that it would enter into a joint venture with British Telecommunications (BT) to create a free standing company that shall allow the companies to offer universal service to their customers and take advantage of the \$600 billion telecommunications market. *Id.* Because American companies have such a large portion

opposition to its participation from other foreign government regulations.<sup>3</sup> With the passage of the Fourth Protocol to the General Agreement on Trade in Services under the auspices of the World Trade Organization<sup>4</sup> (WTO), signatories attempted to cultivate international telecommunications<sup>5</sup> thus giving Most Favored Nation<sup>6</sup> (MFN) status to the participating

of the market, many foreign companies are fighting to vie for American favor. *Id.* BT had originally tried to form an agreement with MCI but that deal fell through. *Id.* Now, BT and AT&T are hoping to join together in the raging telecommunications war in order to seize upon the growing opportunities the markets presents. *Id.*

3. See 141 CONG REC. S7492 (daily ed. May 25, 1995) (statement by Sen. Byrd quoting a December 1994 study by the Economic Strategy Institute). "A study by the Economic Strategy Institute in December of 1994 found that 'while the U.S. has encouraged competition in all telecommunication sectors except the local exchange, the overwhelming majority of nations have discouraged competition and maintained a public monopoly that has no incentive to become more efficient.'" *Id.* Senator Byrd continued on, stating that U.S. firms have competed against each other at a very high level thus allowing the most advanced telecommunications to result. *Id.* The Economic Strategy Institute's study also found that U.S. companies are hindered from entering the international front due to foreign government regulations that prohibit or restrict U.S. participation. *Id.* These international governmental regulations discriminate and overcharge against U.S. affiliates, be it the firm or the consumer. *Id.* The study claims that U.S. firms stand to lose over \$100 billion per year between 1992 and 2000 due to these foreign barriers. *Id.*

4. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND col. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter the WTO Agreement]. The World Trade Organization came into existence with the Uruguay Round negotiations which culminated in 1994. *Id.* The WTO was established on January 1, 1995 with a membership of 132 countries as of September 1997. *Id.* Unlike the GATT agreement, the new WTO is recognized in law as an international organization. *Id.* The WTO has amended and incorporated the 50-year-old GATT agreement into its new structure. *Id.* Previously, GATT only dealt with goods, whereas the WTO now covers intellectual property and services as well. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. The WTO has equal status as the International Monetary Fund and the World Bank whereas the GATT agreement was a provisional organization. See generally WTO Agreement. The WTO is a forum for negotiating trade agreements, handling trade disputes, monitoring trade policies of signatories, cooperates with other international organizations, and helps developing countries. *Id.* The basic principles of the WTO are: non-discrimination, lessening of trade restrictions, predictable policies, fostering of competition, and extra provisions for less developed countries. *Id.* These principles are further enhanced by the goals of the WTO agreements which aim at helping trade flow as freely as possible, continuously negotiating the liberalization of trade, and setting up an equitable means of settling international disputes. *Id.*

5. See Agreement on Telecommunications Services, Apr. 30, 1996, Fourth Protocol to the General Agreement on Trade in Services World Trade Organization, 36 I.L.M. 354, 366 (1997) [hereinafter Fourth Protocol]. The Fourth Protocol was supposed to be effective on January 1, 1998; however, this date was delayed due to the actions of a few of the countries.

WTO members who want to compete in the member's communications market.<sup>7</sup> The United States drastically changed its regulation of its telecommunications market with the 1997 Foreign Entry Order,<sup>8</sup> a step which was required by the WTO for those participating in the Fourth Protocol.<sup>9</sup> The European Union (EU) and the United States realized that liberalization of the telecommunications industry will allow more

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*Id.* The agreement was to be ratified by November 30, 1997, and then effective the first of January the following year. *Id.* WTO members finally agreed to a February 5, 1998, effective date but thirteen nations still had yet to ratify the agreement. Phillip L. Spector, *The World Trade Organization Agreement on Telecommunications*, 32 THE INT'L LAW. 217 (1998). The WTO then decided that a postponement of the effective date would not be beneficial, so the February 5th date was adhered to while the WTO sought pledges from those countries who had not yet agreed to it. *Id.* The ratification deadline was extended through the month of July for those thirteen countries. *Id.*

6. See GATT, *supra* note 4, art. 2. A country should neither discriminate between any trading partners nor between domestic and foreign companies. *Id.* The first discrimination between trading partners is called Most Favored Nation status (MFN). *Id.* If the United States extended benefits to one trading partner, it would have to extend that benefit to all other trading partners under this agreement. *Id.* No one country who is a fellow signatory of the agreement, can be heralded as more important or more beneficial; thus, given better status than another signatory—whether that country is weak or strong, poor or rich. *Id.* There are some exceptions to this rule such as agreements between regional countries that apply only to the goods within that region (NAFTA being an example). *Id.* Additionally, a country can place barriers on goods from specific countries that are trading unfairly. National treatment is also required by the agreement. *Id.* Once foreign goods have entered the market, these goods are to receive the same treatment as local goods. *Id.* This national treatment is only applied to the goods once they have entered the market. *Id.* Customs duties are not a violation of the national treatment. *Id.*

7. See Fourth Protocol, *supra* note 5, ¶ 3. Those countries who wished to sign on to the Protocol were thus bound by the tenets set forth in the agreement. *Id.* If a country chose not to be bound by the agreement, then the MFN status would not be applicable, and those party to the agreement could choose how to decide if that country could be allowed to participate in WTO member markets. *Id.*

8. See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Market Entry and Regulation of Foreign-Affiliated Entities, 12 F.C.C. Record 23,891, 1997 WL 735476 (FCC Nov. 25, 1997) [hereinafter In re Rules and Policies].

9. See John H. Harwood II et al., *Competition in International Telecommunications Services*, 97 COLUM. L. REV. 874 (1997). Although not prevalent in the United States, monopolies were of great concern to the negotiators of the Fourth Protocol. *Id.* To foster competition and open up markets, each signatory has to implement legislation that would allow others to enter the telecommunications market, be that company a domestic or foreign-born entity. *Id.* The United States had to pass legislation that would no longer require analyzing how open an applicant's market was, and instead allow an applicant from a signatory nation to enjoy MFN status. *Id.*

competition within its markets, and facilitate the rapid change needed in the industry to promote growth and productivity.<sup>10</sup>

This article shall discuss the organization of the EU and the structure with which the EU analyzes potential competition threats. After laying a foundation, this article will look at the telecommunications market in the EU and its current status. This article will then focus on the American telecommunications market, and its analysis of competition within the market to form the framework that will lead to an understanding of the telecommunications industry. By analyzing how the international society has dealt with past international telecommunication agreements, this paper establishes that the Federal Communications Commission's (FCC) Effective Competitive Opportunity Test (hereinafter ECO Test) is no longer valued. Finally, this article suggests that the WTO should form a committee to focus solely on such agreements. An international committee, would open markets, lower costs for joint venture authorization, and secure a place for competition to thrive.

## I. THE BATTLE FIELD

The telecommunications field and information technology businesses have been growing since their very inception, with each infiltrating the lives of citizens across the globe. In 1998, the United States exported more than \$165 billion, of which \$40.6 billion went to the European Union collective. Canada (\$25.9 billion), Mexico (\$18.3 billion) and Japan (\$15 billion) all bought from the United States. The information technology industry is rather unique. The tools available, such as the web and switching systems, allow access for anyone who has the ability to conceive and implement new ideas to make a mark on the industry. Ventures are not limited to the biggest battalion but rather, to any army in the war. Steve Baloff, from Advanced Technology Ventures discussed the ability to enter the information market, stating "[t]here are better and more opportunities for smaller and newly formed companies in information technology, especially software, because of the tools available."<sup>11</sup> Baloff and other industry experts advise that entrepreneurs should be "careful not to repeat common mistakes, such as rushing into a foreign market before gaining enough experience at home, underestimating how much

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10. See Constantine J. Zepos, Note, *Liberalizing the "Sacred Cows": Telecommunications and Postal Services in the EC*, 3 DUKE J. COMP. & INT'L L. 203 (1992). See also Catherine Curran Butcher, Comment, *Telecommunications in the European Union*, 48 ADMIN. L. REV. 451 (1996).

11. Christopher D. Lancette, *Connected*, ENTREPRENEUR, Sept. 1, 1999, at 8.

money they'll need, and trying to develop products for industries they don't really understand."<sup>12</sup>

## II. THE EUROPEAN UNION: THE BASIC TACTICS OF ITS STRUCTURE

The Treaty of Rome, signed in 1957, created the European Economic Communities (originally known as the Common Market) with the goal of establishing free movement of goods, people, and services.<sup>13</sup> In 1992, the *Maastricht Treaty*<sup>14</sup> sought to broaden the authority of the union of Member States by amending the term used to refer to members.<sup>15</sup> Under the Treaty of Rome, Articles 30-36 provide the foundation for the free movement of goods among the Member States.<sup>16</sup> Article 85 forbids any agreements, alliances, and other such arrangements that will, "as their object or effect," prevent, restrict or distort competition.<sup>17</sup> Article 86 does not allow for any "[a]buse[s] by one or more undertaking of a dominant

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12. *Id.*

13. *See* Treaty Establishing the European Community, Mar. 25, 1957, 298 U.N.T.S. 11.

14. *See* Treaty on European Union, Feb. 7, 1992, O.J. (C 224) 1 (1992), 1 C.M.L.R. 573 (1992) [hereinafter *Maastricht Treaty*]. The *Maastricht Treaty* incorporates the original Treaty of Rome. *Id.* Any reference to the Articles of the Treaty can be found in either the original treaty, which established the European Economic Community (1957 Treaty of Rome), or the *Maastricht Treaty*. *Id.* The *Maastricht Treaty* introduced the term European Union. *Id.*

15. *Id.*

16. *Id.* art. 30-36.

17. *Id.* art. 85.

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

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. *Id.*

position.”<sup>18</sup> After denouncing this practice, the Article then lists many examples, which the EU members can follow to judge the actions of dominating corporations.<sup>19</sup> Government monopolies are allowed under Article 90 but are subject to the Treaty’s competition principles.<sup>20</sup>

Although several layers of differing representative bodies govern the Treaty,<sup>21</sup> the European Commission holds the administrative power of the

18. *Id.* art. 86.

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

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets, or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. *Id.*

This article applies to the analysis of dominant positions and whether a company or companies will frustrate the goals of the common market. *Id.*

19. *Id.*

20. Maastricht Treaty, *supra* note 14, art. 90. “In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaty, in particular to those rule provided for in Article 6 and Articles 85 to 94.” Thus, the Maastricht Treaty does not take away the ability to grant exclusive or special rights. *Id.* Instead, each Member State is held accountable for the special grants. *Id.* If the rights granted to the company violate the Treaty, then those rights are not valid and both the Member State and the company can be fined. *Id.*

21. *See generally* Maastricht Treaty, *supra* note 14. The European Parliament is directly elected from the citizens of Europe. *Id.* Other European Institutions include the Court of Justice, which is the judicial overseer of the exercise of EU law. *Id.* The Court of Auditors regulates the money that is spent by the Union and makes sure that all the budgets are in accordance with the rules and regulations. *Id.* The Economic and Social Committee is an advisor to the various branches. *Id.* They investigate various areas of the economic and social activity in the Member States and do so at their own initiative or by a referral by the Council, Commission, or the Parliament. *Id.* The Committee of the Regions is another advisory establishment that helps deal with local cultures of the Member States and help resolve the laws with the different cultures. *See generally id.* European Ombudsman is the institution to which a European citizen (a person is a citizen of his country as well as a

EU.<sup>22</sup> The European Commission proposes legislation, investigates violations of the EU law,<sup>23</sup> oversees the provision regarding government monopolies, and addresses directives to the Member States.<sup>24</sup> The Council of Ministers is at the top<sup>25</sup> and adopts the proposed directives from the European Commission.<sup>26</sup> The European Parliament can propose amendments to the intended directives.<sup>27</sup> Once the Commission proposes

citizen of the European Union) applies to when the person feels that they are a victim of abuse of authority by an EU institution or body. *Id.*

22. *See id.* art. 155.

In order to ensure the proper functioning and development of the common market, the Commission shall:

- ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;
- formulate recommendations or deliver opinions on matters dealt with this Treaty, if it expressly so provides or if the Commission considers it necessary;
- have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty;
- exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter. *Id.*

23. *Id.* Through special committees set up by the Commission or any of the advisory committees, the Commission can investigate whether or not a member state has complied with the Directives and Regulations set forth by the EU governing bodies. *Id.*

24. *See id.* art. 90(3). "The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States." *Id.* These directives, which are a basic form of legislation that is enacted by the European Union, are binding on each Member State. *Id.* art. 5.

25. *See id.* arts. 145-50. The Council of Ministers is made up of one person from each member state. *Id.* The Council coordinate national policies between the members in order to resolve the differences between the different members and their institutions. *Id.* The Council of Ministers makes administrative decisions that are based upon either a unanimous vote or a qualified majority (a weighted vote). *Id.* The Council has the duty of adopting or vetoing the proposed legislation from the European Commission. *Id.* The Council is not obligated to pass all legislation that is handed to them by the Commission. *Id.* Instead, the Council evaluates the proposal and decides for itself whether or not to enact the proposed legislation. *Id.* arts. 145-50.

26. *See* Maastricht Treaty, *supra* note 14, art. 169. The Commission does have limited power to pass directives and regulations without consulting the Council first. Directives intended to further the competition goals of the Union do not have to go before the Council. *Id.* art. 85. The Commission can pass the necessary directives and regulations that further duties specifically given to it through the treaty, such as those which foster competition in the EU. *Id.*

27. *See id.* arts. 137-44. These articles set forth the general rules and guidelines for the Parliament and the powers that they are provided. *Id.* The articles set forth the number of



a directive, the Council adopts it; it is then left to the Member States to implement that directive,<sup>28</sup> although the Member States have room for their own literal expression of the directive.<sup>29</sup>

The Directorates-General IV of the Commission (a division of the Commission) is in charge of the competition law in the EU.<sup>30</sup> When two companies merge within the EU, the merger must be verified through the European Commission, and more specifically this division provides the Merger Task Force, which receives merger notifications.<sup>31</sup> The Directorates-General IV investigates actions and is allowed to find corporations which violate the EU competition law.<sup>32</sup>

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representatives from each member state that shall be elected to the Parliament, how the President should be elected, voting, and duties of the Parliament. *Id.*

28. *See id.* art. 169.

If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice. *Id.*

29. *See id.* art. 5. The Member States do not have to accept the directive as written, word for word, but they are required to accomplish the intentions of the directive. *Id.* It is not that the Members are allowed to choose which directives they wish to follow, but instead are allowed great room in the actual implementation. The directives are required but the literal words are not obligatory, only the directive's objective is binding. The Commission can take action against Member States who do not implement a directive. *Marshall v. Southampton Area Health Authority*, 1986 E.C.R. 723, 728.

30. *See Maastricht Treaty*, *supra* note 14, art. 90. The Commission has the authority to investigate mergers and to apply the law as set forth in the treaty. *Id.* The article states that the Commission "shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States." *Id.* *See generally* RALPH H. FOLSON, *EUROPEAN UNION LAW* 66-68 (2d ed. 1995). Folsom explains the general organization of the Commission, which has twelve Directorate Generals, which are allocated a particular area of administrative, legislative, drafting, and enforcement duties. *Id.*

31. *See Maastricht Treaty*, *supra* note 14, art. 90. Although the Maastricht Treaty does not set up the Merger Task Force, the articles give broad discretion to the Commission to "ensure" application of the Treaty. *Id.* The Commission, in furtherance of application of the articles, has set up the Task Force to ensure compliance. *Id.*

32. *See id.* Through fines and directives, the Commission can effectively challenge mergers and joint ventures. *Id.* If the infringements of the competition policies are not brought to an end, the Commission can authorize Member States to take measures (determined by the Commission) to remedy the infringement. *Id.* art. 89.

### III. THE EUROPEAN UNION TELECOMMUNICATIONS WAR FRONT

The EU did not allow privatized telecommunication companies to compete in the telecommunications market until the late '90s. The companies were government-owned monopolies. In 1987, the European Commission released a Green Paper<sup>33</sup> that describes the need for more competition in European telecommunications with the exception of the basic voice telephony.<sup>34</sup> The Green Paper study discovered the trend

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33. See Towards a Dynamic European Economy: Green Paper on the Development of the Common Market for Telecommunications Services and Equipment, COM (87) 290 [hereinafter Green Paper]. The Green Papers that are produced by the Commission are intended to relay information, start debate, and initiate a discussion on possible legislation for that particular area. *Id.* After a Green Paper sets forth its conclusions regarding the discussions, investigations, and other information, a White Paper may be produced. *Id.* A White Paper is a document that proposes legislation for the European Community. *Id.* Once the Commission has proposed a form of legislation through a White Paper, the Council can take it under advisement and vote to incorporate the information into European law. *Id.* The White Paper should not be confused with a Directive. *Id.*

34. *Id.* Around the same time as the Green Paper, the European Commission had set up a group of experts to look at information users and producers in order to decide their needs and future desires. *The European Commission*, available at <http://193.91.44.33/eudocs/en/bangemann.htm> (last visited Sept. 17, 1998). As a result, the Bangemann report was released. *Id.* The main points of the report suggested ten applications: teleworking (the ability to work at home through a PC and a telephone link); distance learning (the ability to continue learning once out of school by not having to attend regular classes); networks for universities and research centers (the ability for European universities and research centers to access one another's libraries and databases); remote processing services for small business (ability to be established with authorities, associations, suppliers, and customers so that transactions can be quicker and easier. Large companies already do this but the report realized that small businesses would greatly benefit from this as well); road traffic management (driver information, routes, road pricing would all be accessible for European Union citizens); air-traffic control (better communication between pilots and air-traffic control centers by creating a single, trans-European air-traffic control system); health-care networks (the ability to consult with specialists throughout the European Union, a larger pool for transplant options, and the general ability for doctors, hospitals, rehabilitation centers, and health insurance organizations to exchange varied information); electronic tendering (the ability to tender for public contracts over an electronic process); Trans-European public administration network (the ability to exchange tax and customs information, statistics, social security information, and other such correspondence used in the progression of the European Union); and City information highways (general abilities over the network such as catalogs providing home delivery, home-banking, or studying a language from home). *Id.* The key to the Bangemann report is that the system is not that of the Internet. *Id.* Instead, it takes telecommunications one step further by calling for a network that is linked through the television set and each European Union member state will be connected to this network (thus calling into question whether or not it will only be accessible for EU members and not other foreign states). *Id.*

towards the privatization of telecommunications in order to promote growth, advancement, and competition.<sup>35</sup> The Green Paper examined how the same government agency within the Member States owns the telecommunication systems and equipment, set the prices, and granted approval for the provision of the services.<sup>36</sup> If the EU were to keep up in the telecommunications race, according to the Green Paper, the industry would have to allow for competition.<sup>37</sup> In 1995, the Directorates-General IV used its Article 90 power to issue Open Network Provision Directives (ONP directives) relating to a variety of issues: prices and standards for leased lines,<sup>38</sup> requirements for voice telephony,<sup>39</sup> and the requirement to remove all restrictions in negotiations for interconnection agreements.<sup>40</sup>

Two earlier directives have played an important part in limiting the Member States' ability to grant or authorize monopolies in the telecommunications area. The first directive, The Terminal Equipment Directive,

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35. Green Paper, *supra* note 33, at 10. The European Union analyzed the AT&T divestiture of the "baby bells" and realized the impact this would have on U.S. competition. *Id.* The divestiture would help spur new growth and competition in the long distance market. *Id.* The EU wanted the liberalization of its markets and the elimination of state monopolies to have a similar effect. *Id.*

36. *Id.* at 11. Since the same agency was in charge of regulating prices and providing services, it did not have much incentive to change the services provided nor the cost to the consumer. *Id.* Service remained poor, very little technological advance took place, and the monopoly served its own interests. *Id.* Essentially, since no checks or balances existed to help control the agency, that agency would do whatever it chose to do in order to serve its own self interests. *Id.*

37. *Id.* at 68.

38. See Council Directive 92/44, 1992 O.J. (L 165) 24. This Directive expressly states that if the leased line terminates outside of the European Union, then the Directive does not apply. *Id.* If one of a networked lease line terminates outside of the European Union, then this Directive does not apply to that line either. *Id.*

39. See Council Directive 95/62, 1995 O.J. (L 321) 6. This directive has been a source of confusion however for it does not adequately define what the term "special network access" refers to despite the fact that the Directive draws a distinction between requirements of interconnection and a "special network access." *Id.* It would appear the term refers to those who are attempting to get into the market as new service providers however the European Commission has not made the definition clear. *Id.* This directive declares that a potential service provider, who requests public network facilities access from a dominant operator, should be supplied that access in accordance to cost orientation. *Id.* If the telecommunications providers, who have network facilities, are requesting access, then this should be deemed a commercial negotiation and is considered interconnection. *Id.*

40. See Council Directive 97/33, 1997 O.J. (L 199) 32. This Directive requires that major telecommunication companies who have a significant market share, or any operator with a twenty-five percent market share in a geographic area meet any and all reasonable requests for interconnection. *Id.*

requires that members establish free competition for telecommunications equipment; telecommunication administrators are not allowed to regulate and commercially distribute the equipment.<sup>41</sup> This directive went a long way to accomplishing the Green Paper's goal of reducing the number of exclusive rights that have been granted in Member States. In 1988, there were 35 companies that had such rights and by the end of 1991, only Italy still had granted exclusive rights in this field.<sup>42</sup> The second directive, The Telecommunications Services Directive,<sup>43</sup> defines each member state's limit in granting exclusive rights as well as limits the extent to which the members may require special licensing conditions within its borders in order to operate.<sup>44</sup>

#### IV. MAKING SURE THERE IS MORE THAN ONE ARMY TO COMPETE IN THE EUROPEAN UNION

Under an Article 86 analysis, the European Commission will look at a merger to see if the undertaking achieves a dominant position and if the undertaking abuses that dominant position.<sup>45</sup> A dominant position is that of "economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and . . . consumers."<sup>46</sup> The dominance must occur in a relevant market, relevant market being defined from the

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41. Commission Directive 88/301/EEC, 1988 O.J. (L 131) 73. Any previous owners of exclusive or special rights to import, sell, and lease terminal equipment, any previous owners of the exclusive or special right to market certain services, and any previous owners of exclusive or special rights to make connections to the public network and/or maintain terminal equipment are no longer owners of such right and each member state must abolish such rights. *Id.*

42. See Zepos, *supra* note 10, at 211. See also Butcher, *supra* note 10.

43. See Commission Directive 90/388/EEC, 1990 O.J. (L 192) 10. This Directive focuses on the competition in markets within each member state. *Id.* The principal goal was to grant private interests the right to compete with the national operators in the provision of non-voice services. *Id.* The operator's were still allowed to keep their exclusive rights to provide voice services for this was the foundation and infrastructure of the Member States. *Id.* Basically, the Commission allowed the exclusive rights to stand with regard to voice services within a member state but any other telecommunication service, telex, cable, etc., was to be open to more competition and could not be given exclusive or special rights in the Member States. *Id.*

44. INTERNATIONAL CHAMBER OF COMMERCE, BUSINESS GUIDE TO TELECOMMUNICATIONS LIBERALISATION IN THE EUROPEAN COMMUNITY 5, 6-9 (1992).

45. Maastricht Treaty, *supra* note 14, art. 86.

46. Case 85/76, Hoffman-La Roche v. Commission, 1979 E.C.R. 461, 520.

viewpoint of both the service or product and its geographical context.<sup>47</sup> This test looks at the market in which the particular product or service can be regarded as interchangeable or substitutable by the consumer, with another product or service, based on the characteristics, price, and intended use of the product or service.<sup>48</sup> Article 86 prohibits the abuse of a "dominant position within the common market or in a substantial part of it."<sup>49</sup> A substantial part of the market must be determined by looking at the "pattern and volume of the production and consumption of the said product as well as the habits and economic opportunities of vendors and purchasers."<sup>50</sup> In determining dominance, the European Commission will look at three factors: the actual market share, the market data on the coverage of the network, and the control of essential facilities.<sup>51</sup>

## V. THE UNITED STATES TELECOMMUNICATIONS WAR FRONT

The United States has also been trying to improve potential markets and competition for its own corporations. Before the passage of the 1996 Telecommunications Act, the FCC established a test by which it will begin reviewing applications of those seeking to enter the American Telecommunications market.<sup>52</sup> The FCC believed that this new ECO Test would achieve three goals. The first goal was "to promote effective competition in the U.S. telecommunications services markets."<sup>53</sup> The second goal was

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47. Case 247/86, *Societe Alsacienne et Lorraine de Telecommunications et d'Electronique Alsatel v. SA Novasam*, 1988 E.C.R. 5987. Thus, the relevant market for a computer chip would not include the soft drink market or the clothing industry. *Id.* The geographical context could be important as well. *Id.* If the anti-competitive behavior is exhibited in a Member State, the accused company has a dominant position in the Member State and the market is generally focused in that particular Member State, then the geographic context could be solely that Member State rather than expanding to include the whole European Union. *Id.*

48. Communication from the Commission on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector—Framework, Relevant Markets, and Principles, 1997 O.J. (C 76) 9 [hereinafter Communication from the Commission].

49. Maastricht Treaty, *supra* note 14, art. 86.

50. *Suiker Unie UA v. Commission*, 1975 E.C.R. 1663, 1666.

51. Communication from the Commission, *supra* note 48.

52. *FCC Adopts New Rules on Foreign Carrier Entry into U.S. Markets*, Report No. DC 95-137, IB Docket No. 95-22 (Nov. 28, 1995) available at 1995 WL 702273 [hereinafter *FCC Adopts New Rules*].

53. *Id.* The FCC wanted to make sure the competition level in the United States was protected so that new investors, new companies, and new ideas could flow freely and to encourage technological advances. *Id.* Only through the competitive nature of the system would the United States Telecommunication services remain at their top level. *Id.*

to prevent anti-competitive conduct.<sup>54</sup> The third goal was to “encourage foreign governments to open their telecommunications markets to U.S. companies.”<sup>55</sup>

To support these goals, the ECO Test used four factors to determine whether or not a foreign market was open to the U.S. companies.<sup>56</sup> If the foreign applicant’s market were closed to the U.S., then the foreign applicant would not be accepted into the U.S. market.<sup>57</sup> The first of the four factors focuses on the foreign applicant’s legal market barriers to foreign entities (i.e., the U.S.) entering their market.<sup>58</sup> The second factor determines whether or not interconnection is allowed under “reasonable and non-discriminatory charges, term and conditions.”<sup>59</sup> The third factor looks at competitive safeguards within the foreign system to help protect foreign interests.<sup>60</sup> The last part of the test looks at whether or not the foreign country has a regulator to protect those competitive interests and the competitor.<sup>61</sup>

By creating the ECO Test based on some authority the FCC argues it has over foreign companies, the FCC is creating the ability to control international competition reforms.<sup>62</sup> The FCC<sup>63</sup> founds its authority for its

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54. *Id.* The anti-competitive conduct was a deterrence to the technological advances needed to keep American ahead and closely relates to the first goal of the ECO Test. *Id.*

55. *Id.* The American markets were quite competitive and the advances made by American companies were continuously improving. *Id.* However, American companies needed to be allowed to expand into other markets if the United States it to allow foreign competitors into American markets. *Id.*

56. *Id.* This ECO Test applies to those foreign investors who are attempting to acquire a controlling interest or more than twenty-five percent controlling interest in a U.S. carrier. This test also does not apply to broadcasters, only carriers. *Id.* An interesting caveat is that the test does not apply to those who only want a co-marketing agreement that has no exchange of property or money with the foreign entity. *Id.*

57. *Id.* If no foreign ownership was allowed in the applicant’s country, then the application was denied. *Id.*

58. *FCC Adopts New Rules*, *supra* note 52. If the barriers were unreasonable, an applicant would be denied. *Id.* For example, if a foreign company had to reapply every year and pay a high application fee, then the FCC might see this as an unreasonable barrier and deny the application. *Id.*

59. *Id.* Although a competitor is allowed into the foreign applicant’s market that does not mean that the opportunity is reasonable and fair. If the opportunity was fair and allowed for good terms, then the market was deemed to be open. *Id.*

60. *Id.* If a market was open, the country should have safeguards to protect foreigners and their investments. *Id.* This good faith indicated that the country did want to encourage foreign investment rather than just allowing foreigners in to satisfy some requirement. *Id.*

61. *Id.* If a country has safeguards, then the fact that the country actually relies on them is a higher level of good faith satisfaction. *Id.*

62. Market Entry, *supra* note 2.

discretion in Section 1 of the 1934 Communications Act, which had given it the ability to create a "rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonably charges."<sup>64</sup> The FCC also relies on Section 2 of the 1934 Communications Act for foundation for its authority that covers all interstate and foreign communication, which originates or is received outside of the United States.<sup>65</sup> Section 3 limits the FCC's authority to the communication or transmission by defining "foreign communication" as "communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States."<sup>66</sup>

By creating the ECO Test, the FCC is dealing more with commerce and investment rather than communication.<sup>67</sup> The FCC stated that its goal of anti-competitive conduct and its goal of encouraging foreign markets to open to American companies supports its authority to create and use the ECO Test under Section 214 of the 1934 Communications Act.<sup>68</sup> The FCC, in hopes of establishing some connection, however tenuous on any part of the Communications Act of 1934, attempts to draw support for its blatant declaration of authority.

The FCC has eliminated the ECO Test during its consideration of foreign applicants who are WTO members.<sup>69</sup> Now, the FCC has gone back

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63. The FCC was created for the purpose of regulating interstate and foreign communication by wire and radio. 47 U.S.C. § 151 (1994).

64. Market Entry, *supra* note 2.

65. 47 U.S.C. § 152 (1994).

The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A of this chapter. *Id.*

66. *Id.*

67. *FCC Adopts New Rules*, *supra* note 52.

68. Market Entry, *supra* note 2.

69. *See In re Rules and Policies*, *supra* note 8. Those members of the WTO who are Fourth Protocol signatories are allowed in under MFN status. *Id.*

to the drawing boards, creating the Open Entry Standard in order to comply with the WTO agreement.<sup>70</sup> This new standard does not require that the foreign participant come from a country who has a high degree of commitment to the WTO pact, rather, they simply must be a member of a WTO member nation.<sup>71</sup>

Because of the Open Entry Standard, the FCC felt the need for competitive safeguards<sup>72</sup> that will be activated through very specific conduct on the part of an authorized foreign participant.<sup>73</sup> After the applicant gets through the Open Entry door, the FCC focuses on the public convenience and necessity of the entity,<sup>74</sup> and whether that entity's participation in the American market will affect "national security, law enforcement, or obligations arising from international agreements to which the United States is a party."<sup>75</sup>

## VI. INTERNATIONAL AGREEMENTS SPANNING BATTLE LINES

Both the EU and the U.S. attempt to liberalize their markets to allow for more competition in this global system. The WTO's Fourth Protocol has helped tremendously and each signatory has begun to implement the agreement in some way. Some members of the WTO agreement have not

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70. *Id.* The FCC rules and policies notes the benefits the Americans will receive because the WTO has opened up the telecommunications industry to provide for competition within more markets. *Id.* Throughout the report, the FCC continues to claim that the elimination of the test will lessen the burden on foreign applicant applying to the U.S. for there is less regulation and a reduction in time and expense since the test has been eliminated. *Id.*

71. *Id.* By not requiring any specific level of commitment, the FCC hopes the U.S. will lead the way to opening up telecommunication markets by strictly following the Fourth Protocol. *See id.* There is a great amount of international pressure on all WTO members to open their markets to all telecommunication competition from WTO members. *Id.* In this report, the FCC realizes that if the U.S. treats each WTO member differently because of their individual commitments to the Fourth Protocol, then the purpose of opening markets to all will be greatly undermined. *Id.* The FCC feels that by repealing the ECO Test as used on WTO members, the U.S. markets will be opened to all members. *Id.*

72. *Id.*

73. *Id.* The FCC believes that through the safeguards behavior such as price discrimination and price squeezes will be greatly deterred. *See id.* But these requirements will only be in effect when that foreign entity has entered the American market. *Id.* Despite the fact that the ECO test has been removed, the FCC still has to give authorization to a foreign participant before that entity is allowed to engage in the U.S. telecommunications market. *Id.*

74. *See* 47 U.S.C. § 214(a) (1994).

75. *See* In re Rules and Policies, *supra* note 8.



committed to fully opening their markets as of yet<sup>76</sup> while others are currently phasing in their agreements.<sup>77</sup>

Both the policies of the U.S. and the EU are trying to ensure greater access for their respective country's companies while improving services for their individual citizens. This internationalization of markets will mean faster networks, better service, lower prices,<sup>78</sup> as well as a wider choice of suppliers, products and services.<sup>79</sup> Because of the WTO's Fourth Protocol, the opening of markets means increased competition. Larger telecommunication companies will be seeking to forge alliances in order to venture out into the new markets yet being able to maintain its stronghold within its home market.<sup>80</sup> Global agreements will become especially important when dealing with clients and their needs. Clients will want to deal with one company that can service all of their needs, rather than hassling with many companies.<sup>81</sup> Alliances are not only becoming strategic but they are becoming a necessity.<sup>82</sup>

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76. *Id.* The report does cite some concerns that some members of the WTO have not fully committed to the agreement. The Rules and Policies identify ten WTO members who will follow the Fourth Protocol in part or at a future date. *Id.*

77. *Id.* The Rules and Policies cite a WTO Telecom Release, which reports that twenty-five governments will be implementing the commitments stated in the Fourth Protocol. This represents only forty percent of the WTO Members. *Id.*

78. See *Semiconductor Industry*, CREDIT SUISSE WORLD INDUS. REP., Aug. 1, 1996, at 2. "There is only one remedy for declining prices: the creation of added value and new services. In this context, many telecoms operators are targeting the market for multinational companies. Subscribers are to be offered more than just a telephone service." *Id.*

79. See Alan Cane & David Owen, *A Clear Line to Europe*, FIN. TIMES, Sept. 27, 1996. See also Chris Boam, Comment, *Giving the Phoenix Wings: The Deutsche Telekom/France Telecom/Sprint Alliance*, 5 COMMLAW CONSPECTUS 73 (1997).

80. See *Telecommunications*, *supra* note 78. "The big telecoms operators are encountering stiffer competition on their domestic markets in particular. They are having to defend their traditional market while also being forced to expand abroad to bolster their earnings." *Id.*

81. See SA'ID MOSTESHAR, EUROPEAN COMMUNITY TELECOMMUNICATIONS REGULATION 50 (1993). See also Boam, *supra* note 79.

82. See Alan Cane, *Era of The Supercarrier*, FIN. TIMES, Sept. 27, 1996, at 17. International corporations are realizing the benefits of the technology at hand and are beginning to require worldwide availability of the services provided so that all of their branches and affiliates may have a uniform network functioning, flexible options such as billing and billing breakdown, and the ability to monitor the service and its traffic. See also Boam, *supra* note 79.

## VII. INTERNATIONAL RULES FOR THE CONDUCT OF TELECOMMUNICATION WAR

The passage of the Fourth Protocol has opened markets to allow international companies to zone in on other foreign markets in order to preserve their ability to compete. Not seeking international partnerships or just being an incumbent service provider can greatly deprive a company of its market share.<sup>83</sup> In the past decade, the world has seen the announcement of many international mergers, such as Global One<sup>84</sup> and the possible merger with AT&T and British Telecommunications (BT).<sup>85</sup> The need for an international framework for the telecommunications industry is needed more now than ever before. The FCC's ECO Test is outdated. The WTO has formed a foundation for authority, and all that is needed is for the WTO to take one more step and form a committee that will govern telecommunications agreements. An international committee would further support principles and goals already set forth in the WTO agreements.

## VIII. FIGHTING THE TELECOMMUNICATION WAR ON TWO FRONTS

The WTO agreement is significant for many reasons: decrease in rates,<sup>86</sup> increase in telecommunication service suppliers,<sup>87</sup> and it allows for more international mergers, partnerships, and other agreements. In 1994, Deutsche Telekom and France Telecom announced that they were to form

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83. See Cane, *supra* note 82. See also Boam, *supra* note 79.

84. Fran Littlewood, *Business: Telecom Giants Take Over World*, THE EUROPEAN, Aug. 3, 1998, at 1.

85. *Id.*

86. See *In re Rules and Policies*, *supra* note 8. The FCC believes that the agreement will help eliminate monopolies thus allowing resale, enhance competition, and just allow the supply-and-demand theory to take over and begin to regulate the rates in the market.

87. See Fourth Protocol, *supra* note 5. Through the elimination of monopolies, the markets will open up thus allowing foreign investment to come into areas, which it was previously denied. *Id.* New suppliers will come into the market and build systems that are up-to-date requiring a company to supply the actual equipment. *Id.* Incumbent service providers will need to keep up thus needing equipment to replenish their own systems and keep current. *Id.* Foreign investors will be attracted to the booming telecommunications areas, especially in developing countries. *Id.* Overall, investors will begin to provide capitol to those service providers, who are either updating their systems or creating whole new systems who will in turn pay for the equipment supplied by yet another kind of telecommunications supplier (namely the equipment providers). *Id.* The flow of capitol will help create new jobs and allow the economies to strengthen and grow. *Id.*

an alliance and thus notified the European Commission.<sup>88</sup> Deutsche Telekom and France Telecom announced that they would buy 20% of Sprint, thus including an American company in this joint venture, which was to be called Global One.<sup>89</sup> The companies planned a three-pronged attack: businesses, common carriers, and consumer services would be tackled.<sup>90</sup> Global One eventually received both FCC<sup>91</sup> and European Commission<sup>92</sup> approval for its venture and went ahead with its agreement. This agreement received approval before the WTO agreement was agreed upon, thus the old school of market analysis applied.

The major obstacle to the Global One agreement was the liberalization of both markets.<sup>93</sup> However, with the creation of the Fourth Protocol and the calling for the liberalization of all signatories' telecommunications markets, this obstacle has virtually been eliminated.<sup>94</sup> Previous analyses of the international mergers have concerned themselves with the ability to enter foreign markets and the monopolistic nature of government-owned telecommunications providers within the EU.<sup>95</sup> The adoption of the

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88. Boam, *supra* note 79, at 84.

89. *Id.* at 85-90.

90. *Id.* at 85.

91. Sprint Corp. Petition for Declaratory Ruling Concerning Section 310 (b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, 11 F.C.C. Record 1,850 (Dec. 15, 1995) (amend.) [hereinafter Sprint Corp.]. On December 15, 1995, the FCC ruled that the investments of DT and FT did not need prior approval. *Id.* at 1855-57. Plus, Germany and France did agree to a timetable that would liberalize their monopolistic nature in their respective home markets allowing room for competition in their markets. *Id.* at 1860-61. The FCC restricted Sprint from conducting any new international circuits until this liberalization was complete and would not be allowed to receive any special privileges from DT or FT. *Id.* at 1868-69. The FCC required Sprint to file reports keeping the FCC informed of the status of the German and French markets so that the FCC would know the liberalization developments in those markets. *Id.* at 1871-72.

92. Commission Decision of 17 July 1996 Relating to a Proceeding Under Article 85 of the EC Treaty and Article 53 of the EEA Agreement (Case No. IV/35.337-Atlas), 1996 O.J. (L 239) 23 [hereinafter July Commission Decision]. The European Commission gave it final approval on July 17, 1996. *Id.* The opinion called for a non-discriminatory access and interconnection to any third party competitor. *Id.* The Commission had given Atlas exemption under Article 85(3) but the approval for only for five years. *Id.* After this, the Commission would review the status to see if any anti-competitive effects could be seen. *Id.* Two phases required that Atlas/Global One would not offer any value-added service until Germany and France had granted two alternative telecom infrastructure licenses and the second phase allowed GT and FT to unite Atlas into their public switched data network but only if the respective markets were fully liberalized. *Id.* See also Boam, *supra* note 79.

93. See Sprint Corp., *supra* note 91.

94. See Fourth Protocol, *supra* note 5.

95. See Boam, *supra* note 79; See also Sprint Corp., *supra* note 91. Both of these point to the traditional ECO Test structure for analyzing the agreements for potential authorization

WTO's Fourth Protocol requires the signatories to comply with a variety of regulatory requirements, namely: prevention of anti-competitive practices,<sup>96</sup> standard interconnection terms,<sup>97</sup> unburdensome universal service,<sup>98</sup> public licensing criteria,<sup>99</sup> and a regulatory body.<sup>100</sup> Thus, had the WTO agreement existed at the time of the Global One venture, the FCC would have given its approval with far less restrictions.<sup>101</sup>

On July 26, 1998, AT&T<sup>102</sup> and BT announced they will be creating a \$10 billion global venture.<sup>103</sup> The joint venture will not only combine the

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of the agreement. *Id.* Antitrust issues are important as well; however, the FCC was very concerned with the ability for American companies to compete in the international markets and their decision was partly based on whether or not the American company, through the agreement with its EU counterpart, would give that specific American company special concessions. *See* Boam, *supra* note 79. If this was so, then other American telecommunications competitors would be at a great disadvantage essentially not allowing them to compete giving Sprint (through Global One) a monopoly for an American company performing international connections. *Id.* The European Commission was also greatly concerned with the liberalization of the markets because of the effect this international agreement would have on the other European Union telecommunication providers. *See* July Commission Decision, *supra* note 92.

96. *See* Fourth Protocol, *supra* note 5. Each signatory must take active measures to insure that major suppliers will not engage in anticompetitive practices such as the withholding of technical information necessary to providing telecommunication services. *Id.*

97. *Id.* Signatories must provide the ability for foreign suppliers to connect to the public switch networks. *Id.* Under this agreement, the Member States must do so in a timely fashion, under nondiscriminatory terms, at cost-oriented rates, and at any of the technically available points in the system. *Id.* The procedures for accessing the public network must be made public as well as any agreements for major suppliers. *Id.*

98. *See id.* Each signatory has the right to define the universal service it wishes to maintain but those obligations must not be more burdensome than necessary to achieve the universal service goals.

99. *Id.* All of the licensing criteria that are necessary for the member's telecommunication network must be made public as well as any terms and conditions that are used to grant licenses. *Id.* Any denial of licenses must be accompanied by a reason. *Id.*

100. *Id.* The regulatory body must be separate from any major supplier and must be impartial. *Id.* Before the liberalization of the EU Member States' telecommunications services providers, many EU members had a national monopoly that not only provided the services but also regulated prices and quality. Green Paper, *supra* note 33. The European Commission realized how detrimental this was to the individual EU economies and called for the separation of service providers and regulatory bodies. *Id.* The WTO must have been influenced by this phenomenon. *See* Fourth Protocol, *supra* note 5.

101. *See* Sprint Corp., *supra* note 91.

102. The European Commission Green Paper on the Liberalisation of Telecommunications, Infrastructure and Cable Television Networks: Part II—a Common Approach to the Provision of Infrastructure for Telecommunications in the European Community, COM (94) 682 [hereinafter Green Paper Part II]. It should be noted that the divestiture of AT&T was a major catalyst in the European telecommunications industry. *Id.* Part II of the

assets of each company but also allow the fusing of operations, such as use of their international networks, international products, and international traffic.<sup>104</sup> The mere announcement of the merger neither guarantees its success nor its acceptance.<sup>105</sup> Three governmental bodies will have to approve the merger: Oftel,<sup>106</sup> the European Commission,<sup>107</sup> and the FCC.<sup>108</sup>

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European Commission Green Paper on the Liberalisation of Telecommunications, Infrastructure and Cable Television Networks (a Common Approach to the Provision of Infrastructure for Telecommunications in the European Community) points to the Modified Final Judgment (where AT&T had agreed to dispose of the local telephone companies) and realized how this would bring a new energetic spirit to the United States telecommunication industry. *Id.* The proposals of the Green Paper hoped to learn from the break-up up the AT&T and the Bell companies and influence the European Union policies. *Id.* A renewed spirit of competition would allow other companies to provide services within the individual Member States thus bringing about a reduction in costs to the consumer as well the increase in need for technological updating. *Id.* The governmental monopolies provide the service as well as set the rates. *Id.* These agencies control the entire process allowing an unfair advantage at the expense of the consumer. Green Paper Part II at 682. Because of this complete control, the companies felt no need to keep up with the technological advances that have been put reached in the past few years. *Id.* Because competition will force companies to vie for consumers, they will contend for the best products and services to gain that extra edge. *Id.* This, the Green Paper argues, will eventually allow the European Union to become more current and eventually progress to the forefront of telecommunication advances. Green Paper, *supra* note 33.

103. AT & T News Release, *AT & T, BT to Form \$10B Global Venture to Serve Customers Around the World*, at <http://www.att.com/press/0798/980726.cha.htm> (last visited Sept. 12, 1998).

104. *Id.* A major goal of the venture is to allow international customers to use one company to service all of their needs through the joining of the companies. *See id.* Because customers will be able to use one company to service their needs, rather than several, the customers will be benefiting from less hassle and will be happier with their service providers. *See id.*

105. Fran Littlewood, *Business: BT/AT&T: Now For the Regulators*, THE EUROPEAN, Aug. 3, 1998, at 5.

106. *Id.* Oftel is the telecommunication regulator in Britain. *Id.* After the announcement of the planned merger, Oftel held some preliminary meetings with both British Telecom and AT&T over the specifics of the venture. *Id.* Oftel serves only to look at the impact on the British consumer and should not be confused with any European Union regulatory body. *Id.*

107. *See generally* Maastricht Treaty, *supra* note 14. The European Commission, under the European Economic Community Treaty, has the authority to look into potential violation of the EU's anticompetitive law. *Id.* Once it receives official notification of any possible mergers, the European Commission will specify a time period for which other parties will be able to object to the merger. *Id.* After the time period passes, the Commission will consider those objections in conjunction with its own study of the market positions for each company and then render a decision either approving or rejecting the merger. Littlewood, *supra* note 84.

Learning from the mistakes of its predecessor, Global One, the new AT&T and BT alliance has begun to woo those governmental bodies<sup>109</sup> and take advantage of the current phase of international law and agreements. The WTO agreement enhances the AT&T and BT venture because each market is deemed open; therefore the FCC will not apply the ECO Test and the relevant market (for competition analysis) expands to include the whole international system.

#### IX. CREATING A PEACEFUL FRAMEWORK FOR THE TELECOMMUNICATIONS WAR

When companies take on a global joint venture, the agreement must meet the scrutiny of each company's home country's domestic laws and requirements.<sup>110</sup> In the telecommunications industry, this can become quite messy because individual investigations and analysis must take place in order for this joint venture to have the proper authority.<sup>111</sup> This process

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108. 47 U.S.C. § 152. Under the Sherman Antitrust Act, the Communications Act of 1934, the Communications Act of 1996, and the Foreign Entry Order of 1997, the FCC has the power to investigate mergers for any potential monopolistic inclinations. *Id.* The antitrust laws, the FCC regulations, the 1934 and 1996 Communication Acts, and state regulatory laws govern the whole of telecommunication law in the U.S. *Id.* There are two structures at work in the American telecommunication industry: the state and federal systems. *Id.* The FCC will have control over the interstate and foreign wire and radio communications. *Id.* The states, on the other hand, have authority over intrastate structures and communications. 47 U.S.C. § 153. If a line is used both intrastate and interstate, then both governments have jurisdiction over that line. *Id.* The FCC will have jurisdiction over regulatory and antitrust conflicts and when the federal regulation defeats a state regulation. *U.S. v. AT&T*, 461 F. Supp. 1314 (D.D.C. 1974). This dual nature of the regulation of the telecommunications industry has created controversies and issues; however these issues are beyond the scope of this article.

109. Littlewood, *supra* note 105.

110. *Id.* The AT&T and BT deal will require that both the EU and US be notified of the venture. *Id.* The EU must allow time for third parties to voice any objections. *Id.* Across the ocean, the U.S. Department of Justice and the FCC will study the agreement and analyze potential competition threats. *Id.*

111. Karel van Miert, *Meet Europe's Trust Buster: European Competition Policy in a Transatlantic Perspective*, available at <http://www.econstrat.org/vanmiert.htm> (last visited Nov. 11, 1998). "Because nowadays, in talking about competition policy, it's not good enough to talk about what's happening in the European Union or in the U.S., because more and more cases will take place having a transatlantic dimension which needs to be looked into by several competition authorities." *Id.* Van Miert continues on to say that more and more cases are requiring that competition authorities from many nations work together on an increasing basis. *Id.* On June 4, 1998, an agreement was signed between American and EU authorities that would allow one or the other to investigate competition cases. *Id.* In fact, the Microsoft case is being investigated in America, rather than by both agencies. *Id.*

would consume time, money, and resources of each individual group.<sup>112</sup> Additionally, this red tape would discourage smaller companies from forming together because of the time and cost involved.<sup>113</sup> Lastly, the many bodies of law interacting to govern international agreements would only serve to confuse potential joint ventures and make it more difficult to structure a partnership, joint venture, or alliance in such a way to agree with each body of law. To avoid confusion, wasted resources and headaches, the WTO should take a more definitive step and propose a treaty by which all signatories would be able to allow an international body to govern international joint ventures. This international body would manage the agreements, analyze potential competition threats, and regulate acts of the international joint ventures so that any anti-competitive behavior can be stopped and/or punished.

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This agreement applies when a case appears in both groups (U.S. and EU) but the agency where the case has its "main origin . . . or is producing its main effects from the point of view of competition," then that agency will take the case. *Id.* However, merger and acquisition cases remain outside the scope of the agreement. *Id.* Because each nation is under obligations by other sources, these types of cases could not be included. *Id.* Nations who participate in forming the WTO international telecommunications committee would have to legislate within the individual nation allowing for the delegation of authority to the WTO. A simply agreement between nations would not be enough. Each nation would have to individual legislate to give up authority.

112. Ilene Knable Gotts and Sarah E. Strasser, *Notification Rules Are Complex: Failure to Navigate Overlapping National Rules When Negotiating a Merger May Scuttle the Deal*, THE NAT'L L. J., May 4, 1998, at C-11. "Some jurisdictions have fixed filing fees—e.g., \$45,000 in the United States and, generally, \$25,000 (about U.S. \$17,500) in Canada—regardless of the transaction's value. Others, such as Germany, impose fees that vary with the transaction's size and market effects." *Id.* If two small companies formed an agreement, the conglomerate would have to pay the filing fees for each country. *Id.* If two large companies formed an agreement, depending on which nations they had to inform, this conglomerate would have to pay the same amount. *Id.* Larger companies can better handle the fee than smaller companies with less profit and assets. *Id.* Although the filing fee may seem relatively small, these fees can add up when involved with a number of different nations. *Id.*

113. Cane & Owen, *supra* note 79. Boam, *supra* note 79. Smaller carriers will have to decide between a lost identity or being a medium fish in a small pond. In other words, the carrier will be forced to ally itself with a major carrier who is venturing out into the international alliance scheme and potentially losing its identity. Cane & Owen, *supra* note 79. Or, the carrier will be forced to focus on a much smaller market and find some way to get into a profitable niche. *Id.* The combination of assets enable the merged companies to expand operations and enter into the otherwise restricted markets. *Id.* Smaller companies who choose not to merge will be greatly confined to those markets it already has a foot in. *Id.* However, it is predicted that incumbent companies will lose part of their clientele during the international alliances. Market shares will most likely fall during the transitional periods. *Id.* Smaller companies will most likely have to adjust by reducing their targeted markets and balance profit and targets. *Id.*

Applying to many countries for authorization for a joint venture consumes money, time, and resources.<sup>114</sup> It is likely lawyers in each country must be consulted in order to figure out which laws govern, how those laws are applied, and how to structure an agreement to fit the laws.<sup>115</sup> The committees reviewing the agreement must spend time analyzing the venture and speculate as to how the venture will affect competition within the market. Each committee will send back a decision to the companies accepting, denying, or suggesting changes that if implemented will give authorization.<sup>116</sup> The companies must then restructure the agreement to fit into the committee decisions but must take into account all the committees' suggestions,<sup>117</sup> which would require consulting lawyers and restructuring the agreement, thus driving the expenses higher. If only one body had to be consulted, the resources, expenditures, and time would be considerably less.

By allowing an international regulatory body to form, smaller companies who are unfamiliar with the international system will be given greater access. Rather than being daunted by the overwhelming nature of a global system, a smaller company could seek a joint venture with a small company of another nation; both could apply to the one committee, and

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114. Department of Justice, *Overview—Antitrust Division*, available at <http://www.usdoj.gov/art/overview/html> (last visited Nov. 11, 1998). The guidance the Department of Justice provides to the business community helps "lower the costs to business of complying with the law by reducing uncertainty about the parameters of legal behavior. It saves money for both business and the government by helping companies to structure and organize their operations in accordance with the law, thus avoiding the need for expensive litigation." *Id.* If the WTO took on a similar role such as guiding companies through international agreements, the "uncertainty about the parameters of legal behavior" would be virtually non-existent. *Id.*

115. *Id.*

116. Boam, *supra* note 79. The Global One agreement went through many stages before it got full authorization. *Id.* The FCC restricted the alliance until the German and French markets became more open to foreign competition. *Id.* After five years, the FCC would look at the markets to see if more foreigners were allowed to enter. *Id.* If not, then the FCC would no longer authorize the alliance to do business in the United States. *Id.* The EU Commission was concerned that the alliance would give Duetsche Telekom and France Telecom a dominant position within the European market. *Id.* DT made some concession and sold part of its holdings in order to appease a potential blockage from the Commission. *Id.*

117. *Id.* For example, in the Global One alliance, after the Department of Justice/FCC considerations were handed down and then the EU Commission sent warning letters, Global One had to go back to the drawing board. *Id.* Although the whole agreement was not scrapped, the companies had to focus on what was needed to pass the standards and requirements set forth by the two national governments. *Id.* Each suggestion had to be considered and then incorporated into the agreement. *Id.*



then receive authority.<sup>118</sup> Individually, nations want to protect their markets and domestic corporations while still seeking out opportunities for those same companies to engage in combat in the markets of other countries.<sup>119</sup> By not working together, the countries are counteracting the very competition they wish to foster.

This counterproductive behavior also serves to confuse the international companies. Each governing body of law must be studied, and the agreement must be drafted so as to fit within the confines of each group of laws. It must then be sent to each country's regulatory body. The global system, as evidenced by the quick changes in the agreements, is not conducive to long processes for joint ventures. Joint ventures are tentatively agreed upon, but within a few months one venture may become permanent whereas another will only fall through. Many might argue that because of this highly unstable system, the long process only serves to make sure that strong and secure agreements go through. However, if an international regulatory body did exist, the quicker analysis would allow companies to get back to the drawing room quicker to make their agreement stronger rather than having to wait on receiving authorization or suggestions from all the countries. An agreement can receive authorization from one country, suggestions for another, and a denial from a third. This situation would not be as difficult to contend with, as compared to a situation in which a company could get suggestions from two different governing bodies, such as the EU and the U.S., the group of suggestions are contradictory, and authorization depends on the implementation of the suggestions.

#### X. ADVANCING THE LINE: WTO'S NEXT STEPS

The telecommunications market, by its very nature, lends itself to an international body of law. The telecommunications industry requires international cooperation and thus will be a good baby step into international teamwork. Since many countries will scorn the idea of handing over

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118. Littlewood, *supra* note 105. Smaller companies might be able to vie for position nationally but internationally they could be lost. *Id.* To compete on this level, it will take a lot of capitol and assets to get involved. *Id.* This is a major concern for both U.S. and EU competition analysis. *Id.* But if more time and money is needed to notify certain committees, these smaller companies will not even try to get involved in the international telecommunications war. *Id.* It is the smaller companies who need to form alliances with other smaller companies from other countries in order to gain capitol, to get a foothold into those other countries' markets, and to receive support to compete against the larger, more experienced corporations. *Id.*

119. Green Paper, *supra* note 33.

power to an international organization, especially markets and financial systems, the WTO might need to ease into an international competition regulatory body. After countries agree and sign, the WTO can then form a regulatory body to govern the agreements as well as watch for anti-competitive behavior.<sup>120</sup>

The structure of the treaty will be very delicate. The Fourth Protocol already opened the markets of the countries. A "Reference Paper,"<sup>121</sup> distributed by the WTO Secretariat, contained principles concentrated on by the Negotiating Group on Basic Telecommunications. The group negotiated these pro-competitive regulatory principles, and many countries adopted them.<sup>122</sup> Establishing a regulatory body to govern potential competition effects and possible anti-competitive behavior only takes the WTO's principles one step further. Signatories have agreed to open markets, many have agreed to the regulatory principles, and now all they have to do is hand over authority to one committee, to govern and implement that which they have already agreed to.

A committee should be formed when an international joint venture is being attempted. This committee should be in charge of investigating the joint venture for any anti-competitive ramifications, anti-trust violations and other such merger and joint ventures that each nation investigates. The members of the committee should be determined by the nationality of

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120. WTO Agreement, *supra* note 4. One of the basic functions of the WTO is to administer WTO agreements. *Id.* It also is a forum for trade negotiations. *Id.* In order to make sure a market is open, the WTO needs to monitor national trade policies. *Id.* All signatories are required to open markets to all other members. *Id.* Many signatories have also signed on to the "Reference Paper" so not only do these members share the idea that markets should be open, but they are share ideas on how and why to foster competition. *Id.*

121. Sherman, *supra* note 7, at 357. The Reference Paper was not issued as a formal WTO document but many countries did adopt the principles anyway. *Id.* Although the principles are really only applicable to the former monopolies in many countries (such as those seen in the EU), they can be expanded to govern those who are already in the market and those who are trying to come in the market. *Id.* The principles are mainly concerned with protecting competition so monopolies do not form and those who want to compete can. *Id.* "The principles relate to anti-competitive behavior, interconnection, universal service, transparency of licensing criteria, independence of the regulator and allocation of scarce resources." *Id.*

122. *Id.* Those countries, as of February 26, 1997, are: Argentina, Australia, Austria, Belgium, Brunei, Bulgaria, Canada, Chile, Colombia, Cote d' Ivoire, Czech Republic, Denmark, Dominica, Dominican Republic, El Salvador, Finland, France, Ghana, Germany, Greece, Grenada, Guatemala, Hong Kong, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Korea, Luxembourg, Malaysia, Portugal, Romania, Senegal, Singapore, Slovak Republic, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad and Tobago, United Kingdom, United States, and Venezuela.

the parties to the joint venture and then three other representatives who are determined by the members who represent the home country of the joint venture parties. For instance, if a U.S. telecommunication company were to join forces with an Irish telecommunication company, both the U.S. and Ireland would have a member on the committee. In turn, those two members would choose three other members from the WTO. The interests of the countries who are directly involved via corporations formed under their laws will be involved and have the opportunity to directly influence the determination. More objective parties will also be involved so that an eye can still be kept on the greater international purpose to be served.

Overall, the WTO needs to further the Fourth Protocol and the principles in the "Reference Paper" by adopting an international regulatory body to govern international joint ventures. This "one-stop shopping" would end confusion, ease red tape, lessen wasted resources, and further the goal of advancing global technology.

#### XI. THE WAR IS WON

The WTO's pact liberalizing the telecommunications market will prove to be a highly intelligent move towards the furthering of a global telecommunications system.<sup>123</sup> Resistance would have been futile for the inherent nature of the system calls for international cooperation. Global One opened the door and the AT&T/BT alliance will help alleviate some of the country's fears that the market shall lose its competitiveness. Each country needs to realize that major international alliances, although greatly lowering the ability for smaller new competition to enter the market, is necessary to allow for constant update and progress in this field. Major capitol is needed to fund research and development as well as to implement the new technology.<sup>124</sup> Smaller providers will be pushed out of the market and will not be able to compete on a global scale unless the WTO steps in to help foster competition. Competition will still abound and no one supercarrier will be able to snuff out all other international competition thus creating a monopoly. An international committee is necessary to referee the telecommunication war to provide a safe haven for competition and the WTO is just the organization for the job.

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123. Fourth Protocol, *supra* note 5. In its approval of the MCI-WorldCom merger, the Chairman of the FCC, William Kennard said: "Once this merger is consummated, the industry will once again be poised just a merger away from undue concentration." *FCC Doubts Future Long-distance Mergers*, Reuters (Sept. 14, 1998), at <http://www.news.com/news/0-1005-204-333190.html>.

124. Littlewood, *supra* note 84.