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Wolf Sauter

EU Regulation for the Convergence of Media, Telecommunications, and Information Technology:

Arguments for a Constitutional Approach?

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CONTENTS

1. Introduction

In recent years, digitisation, as well as developments in transmission, storage and network technology, have greatly increased the social and economic relevance of electronic communications. These developments have both promoted and benefited from the rapid growth of global flows of data and trade. At the same time, they have given rise to technological convergence between the hitherto discreet economic sectors of information technology, media, and telecommunications. Increasingly, this is matched by convergence in markets, services, and ownership patterns.

Economic and technical convergence is one of the mainstays of the Information Society that the EU, notably the EC Commission, seeks to promote. Correctly or otherwise, it is widely believed that the results of the convergence process will transform our economies, and 'changes the way we work together and the way we live together'. In EC Commissioner Bangemann's September 1997 speech to the International Telecommunications Union (ITU) on 'a new world order for global communications', he identified convergence as the key development that will shape the Information Society, together with 'the irrelevance of geographical borders and distance as a result of global telecommunications networks'.[1] As such, convergence is also of considerable significance for European integration at large: following the completion of the 1992 project, and in particular since the 1993 Delors White Paper on *Growth, Competitiveness and Employment*, the Information Society project has become one of the leading themes of European integration.[2]

Promoting the Information Society and the underlying convergence process may require far-reaching regulatory reform, as there is a growing gap between sector-specific regulation at various levels, and the reality it seeks to regulate: convergence is undermining both the applicability of sector-specific regulation, and purely national legislation. Clearly, the market and technological developments involved have failed to provoke a similar degree of convergence of the legal norms: the applicable regulatory regimes vary widely, both between

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1 Martin Bangemann, "A New World Order for Global Telecommunications – The Need for an International Charter", Speech presented at Telecom Inter@ctive 97, International Telecommunications Union, Geneva, 8 September 1997 (http://www.ispo.cec/be/infosoc/promo/speech/geneva.html).

2 COM(93) 700, *White Paper on Growth, Competitiveness and Employment: The Challenges and Ways forward into the 21st Century*.

the sectors involved, and between the Member States. Although the platform of Community regulatory proposals related to the Information Society has increased dramatically, current EU efforts (except for those concerning the telecommunications sector) are mostly at a preliminary stage.

Designing regulation for convergence is problematic for at least three reasons:

- The industry sectors that are subject to convergence start from very different levels and methods of regulation. The telecommunications sector is liberalised, supervised by independent national regulators, within a comprehensive EU law framework, subject to general antitrust review. The broadcasting sector remains heavily regulated nationally, with minimal EU rules in place, and without mandatory arm's length control. Information technology has generally escaped regulation at either level. Hence, current regulation is highly asymmetrical.
- Regulation for convergence is problematic from an institutional perspective. The dual problems of the requisite scope and level of regulation pose themselves with particular urgency in this area, where market developments regularly outpace attempts at regulatory reform.
- These problems are compounded by the lack of a coherent legal framework within which these problems can be addressed, other than the general – and diffuse – category of existing EU norms.

Hence, the issues of why, at what level, to what degree, and in which form convergence requires regulatory intervention, are of considerable relevance to public authorities, undertakings and European citizens alike.

The general objective of this paper is to provide some building blocks toward a framework for discussion on the regulatory needs that may arise. It also intends to contribute toward an analysis of the current state of this discussion, and of the specific regulatory proposals concerned. The broader purpose behind this is to examine convergence as a potential object of further sustained and extensive study. Does convergence provide a useful prism for a study of contemporary legal problems of European integration? Specifically, this paper seeks to establish whether regulation for convergence could be studied from a constitutional perspective, and, conversely, whether a constitutional approach would contribute to resolving current issues of regulatory design and scope.

- First, we will discuss the concept of the Information Society, and sketch the nature of its relation to convergence.

- Second, we will examine the regulatory issues raised by the 1997 *Convergence Green Paper* and its recent follow-up communication.[3]

- On this basis, the third and final section will consider whether a constitutional approach may be required to determine how regulation for convergence should take shape.

As this paper is intended *inter alia* to inform a wider discussion of the question whether further research in this direction appears worthwhile and feasible, we will at this stage not follow a rigorous – and rigid – theoretical approach. Quite possibly, discussion will reveal that we should limit ourselves, adjust our perspective, or look in a different direction altogether. Yet, this is precisely what we intend to find out. Hence, our conclusions are general and tentative in nature, and do not seek to project beyond the limited purpose of the paper as defined here.

2. The Information Society

2.1 *The Information Society as an Integration Project*

In the EU, legal developments concerning electronic communications are now generally addressed in the context of the so-called 'Information Society.' Initially the Information Society concept, sponsored primarily by EC Commissioner Bangemann, emerged as a counter initiative to the 'Information Superhighways' concept developed in the US in the context of the National Information Infrastructure (NII) project sponsored by Vice President Gore from the early 1990s onward.[4] However, since then the Information Society has

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3 COM(97) 623, *Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation: Towards an Information Society Approach*; and SEC(98) 1284, *Summary of the Results of the Public Consultation on the Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors: Areas for further Reflection*.

4 Cf. e.g. Kubicek, H., Dutton, W.H., and Williams, R., eds. (1997), *The Social Shaping of Information Superhighways: European and American Roads to the Information Society* (Frankfurt: Campus). For the earlier process of Transatlantic and European regulatory competition cf. Scott, C. (1996), Institutional Competition and Coordination in the Process of Telecommunications Liberalization, in: McCahery, J., Bratton, W.W., Picciotto, S., and Scott, C., eds., *International Regulatory Competition and Coordination* (Oxford: OUP).

rapidly become one of the main projects promoted by the EC Commission in its drive to frame the future of European economic and political integration both conceptually and in fact. In this sense, it ranks alongside such projects as Economic and Monetary Union, Eastward enlargement (and, less visibly, reform of the institutions and decision making processes of the Union).

As a major EU project with significant motivational force, the Information Society is intended foremost to capture the public imagination, and to rally the advocates of integration. It is promoted as a Community interface between. On the one hand, the global forces of technological development and the social and economic changes that are associated with this and, on the other hand the desires and needs of European citizens and consumers. Its promise is that of a brave new world of economic growth and expanding employment - an 'on-line' global economy that will lift Europe out of its current economic woes. As befits a programme of such heroic ambitions, its outlines are deliberately kept vague: there is no clear definition of what exactly the Information Society entails.

Although forward looking in its ambitions, and generally upbeat in its rhetoric, the Information Society is also defensive in nature, in a dual sense. First, it raises the spectre of a global competition for competitive advantage in emerging high-technology markets. These markets are believed to be characterised by first-mover advantage, placing Europe at risk of being left behind by the US in particular, and possibly by other countries as well. Second, it assumes that unless initiatives are taken at EU level, the Member States will move ahead in their separate directions individually, thereby undermining European integration itself. If the economy of the future will truly be an electronic one, such developments would critically undermine the very relevance of traditional market integration. This concern is reflected, *inter alia*, in the extension of the transparency mechanism to measures affecting the information society.[5] The threat of the irrelevance - and of destructive regulatory competition between the Member States - is further raised by the fact that the Information Society is likely to undermine the effectiveness of national territorial jurisdiction. (In particular, the latter might tempt companies to serve their EU customers from lightly regulated Member States.)

These two defensive mechanisms are linked, as fragmentation is equated with failure, or in any event raises the threats of inefficiency and irrelevance: from an Information Society perspective, the EU Member States must hang together, or be hanged separately. This familiar line of reasoning reveals another

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5 *Directive 98/48/EC amending directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations* (OJ 1998 L217/18); *Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations* (OJ 1998 L204/37).

important dimension of the genealogy of the Information Society: EU industrial policy. This is an industrial policy that may generally be liberal in its effects, but habitually uses the language of competitive advantage with alarmist undertones.

2.2 The Emergence of the *Information Society Project*

With Euratom, the Community has evidently nurtured high-technology ambitions from its earliest days. Yet, it started out on the wrong foot when, failing to identify the relevant sectors and hampered by the prevalent Cold War obsession with atomic power, it drew a line from coal to the energies of the future as being self-evidently centred on nuclear technology – thereby missing its chance to address economically (and paradoxically even militarily) more relevant sectors until the integration process emerged from the troubled 1970s. (Not to mention the related complete failure to develop a sensible EU energy policy until today.) Like coal, it appeared that atoms provided a dual use good for war and peace alike. Today, it appears that both energy sources are now becoming fully redundant practically simultaneously.

Hence, the immediate background to the Information Society project can instead be traced back to the run-up to the 1992 internal market programme in the early 1980s, in particular its R&D dimension. Information technology and communications immediately became the focal point of the various integration initiatives in R&D that preceded – and paved the way for – the 1987 Single European Act. This is due primarily to the fact that, from the late 1970s onward, industrial actors (initially primarily in the consumer electronics and components industries) realised that their protected national markets could not sustain globally competitive information technology firms. They feared impending obsolescence due to their inability to match the pace of information technology developments in the US and Japan. The consistent efforts of these repentant national champions to marshal Community support met with a receptive response from the EC Commission, itself keen to move out of the twilight of coal, steel, agriculture, and atomic energy, into the new dawn of an Information Age.

The 1992 project aimed, in significant measure, to enhance the competitiveness of high technology industries in Europe by means of completing the common market for goods and services, by stimulating industrial restructuring in the information technology and telecommunications industries (e.g. by mergers and acquisitions, standardisation, liberalisation of public procurement, and research and development co-operation), and by co-ordination of external trade policies. Social science research has demonstrated that industry backing of these elements (e.g. by the Davignon Roundtable of European Industry) played a pivotal role in promoting acceptance of the internal

market programme and the Single Act by the governments of the key Member States.[6] High profile industry representatives engaged in 'reverse lobbying' of their respective governments to push through positions they had previously formulated jointly with the European Commission.

The re-invigoration of the integration process and reform of the EEC's instruments and decision making mechanisms that culminated in the internal market programme and the Single Act, combined with the emergence of trans-national coalitions of private industrial interests, next enabled the EC Commission to push through comprehensive regulatory reform of the telecommunications sector. Key to this process was the liberalisation of national telecommunications markets – the main sources of European competitive advantage and buying power in high technology – by means of the EU competition rules. As a result, although the media sector has remained intractable, and the early efforts to stimulate the consumer electronics industry that spawned the Community's R&D efforts have failed (and in any event, computing software has overtaken semiconductor manufacturing as the perceived cutting edge economically), the internal market has now successfully been extended to cover the telecommunications sector. Completing a ten-year *tour de force*, a comprehensive regulatory framework for full competition came into force EU-wide on January 1, 1998.

Remarkably, this internal EU liberalisation finds an external parallel in the WTO agreement on basic telecommunications that has come into force on February 27, 1998.[7] This agreement builds in significant measure on the consensus reached on internal liberalisation by the EU. The WTO basic telecommunications agreement further cements global liberalisation, adding common regulatory principles to specific market opening commitments and to the application of the most-favoured nation principle to the telecommunications sector. Significantly, this was the first sector-specific agreement to be completed successfully under the new WTO rules. Both internal and external telecommunications liberalisation formed significant steps toward a liberal trading regime for communications. Unfortunately from the Information Society perspective, this liberalisation is limited to telecommunications – and specifically excludes broadcasting.

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6 Cf. Sauter, W., (1997), *Competition Law and Industrial Policy in the EU* (Oxford: Clarendon), especially chapter 2, and the sources cited there.

7 Enser, J. (1997), European Telecommunications Policy and the WTO, in: Cafruny, A. and Peters, P., eds., *The Union and the World: The International Political Economy of a Common European Foreign Policy* (London: Kluwer), pp. 285 ff.

2.3 The Widening Scope of the Information Society Project

Convergence has played a role in the Information Society project from the outset, i.e. at least since the 1993 *White Paper on Growth, Competitiveness and Employment - The challenges and ways forward into the 21st century* (the closing statement of Delors' Commission presidency),[8] and the seminal 1994 Bangemann Report on *Europe and the Global Information Society*.[9] In particular the latter document sought to harness the broad impetus of the internal market programme, and especially the resulting shake-up of the telecommunications sector, in order to promote future-oriented policies in the information technology and communications sectors in general. Yet convergence only relatively recently appeared on the Community agenda as a subject for broader debate, and, ultimately, political action. Roughly, this timing coincided with the completion and entry into force of the legislative package ensuring full liberalisation of telecommunications services and networks on January 1, 1998, and the WTO telecommunications agreement mentioned above. This does not appear to be a coincidence: with telecommunications liberalisation practically completed, at least some of the legislative groundwork relevant to convergence is now in place. This allows the EC Commission to shift its attention to new targets. With limited human resources and political capital, it must focus on where it can most effectively exploit existing leverage - and pace the policy making process.

Another factor explaining recent Community activism are ongoing technological and market changes that both require a regulatory response in real terms, and continue to make headlines. The Internet is rapidly becoming the new frontier of the communications market, and the widespread availability of broadband communications appears on the horizon – and both developments are creating virtual markets and new forms of trading in their wake. The perception is spreading that this is where increasingly significant trade flows will move. Hence, the EU is increasingly concerned that it should secure front-line involvement in these developments. This concern regards both the position of European industry in the market for new services, and its own role in the market for regulatory intervention. Hence, at one level, the EC Commission is attempting to carve out a key role for EU regulatory principles in various international fora. At another, it is gearing market interests to promote a new

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8 Note 3, above.

9 *Europe and the Global Information Society: Recommendations to the European Council*, in Bull. EC Supplement 2/1994; elaborated in COM (94) 347, *Europe and the Global Information Society: An Action Plan* (Bull. EC Supplement 2/1994): as well as the "rolling action plan" COM(96) 607, periodically updated.

vision of a network society – or Information Society – as a metaphor for a fully re-tooled European model. Both will involve reshaping national legal rules.

Remarkably however, the external and internal strategies do not appear to be fully integrated. For example, the Transatlantic dialogue on an 'international charter' for electronic commerce over the Internet has scarcely been embedded in the internal discussion concerning the regulatory approach to convergence. Whereas for telecommunications, internal liberalisation opened up the way for a global agreement, for now, the international approach to the on-line economy appears to be led by stealth. Perhaps market developments are overtaking regulators to such an extent that an attempt at forward looking top-down management has become unavoidable. The 'iron vanguard' model of government apparently still enjoys considerable credibility in Brussels. Possibly, the strategy of tying one's hands internationally to force through (as such desirable) policies domestically – a familiar ploy of the Member States – is being applied. Yet, the Commission is in no position to carry off such a play. More likely, the international efforts are part of the industrial policy rationale of market creation, and seek agreement on common principles for this purpose. They may simply be unavoidable, and tend to rely on voluntary instruments. In substance, they depend on the common interests of large undertakings globally. In any event, they appear to be moving ahead of internal consensus.

2.4 The Social Dimension of the Information Society

For its realisation, the Information Society project remains almost fully contingent upon the Member States' acceptance of a combination of liberalisation and regulatory reform with measures intended to stimulate the information and communication technology network infrastructure, terminal equipment and services markets (including attempts to promote social acceptance of technological and regulatory change). Essentially, this is approach is simply an extension of EU industrial policy logic to new technologies.

On the one hand, it corresponds with the ambitions of similar projects elsewhere in the world (e.g. the National Information Infrastructure project in the US), and feeds into – and is in turn fed by – various international regulatory initiatives taken at the level of the OECD, G7/8 and WTO. The economic and symbolic significance of communications technology is a mantra of politicians and secular opinion-leaders world-wide.

On the other hand, according to the EC Commission, the Information Society differs from these projects (in particular from the US Information Highways concept) as:

> The term Information Society reflects European concerns with the broader societal and organisational changes which will flow from the information and communications revolution.[10]

Whereas the exact content of the Information Society remains undefined, the European effort reputedly seeks to embed the changes that are expected to result from the widespread application of low-cost information, data-storage, and transmission technologies in a social framework. This social framework is purportedly based on the principle of solidarity and is sensitive to cultural values. These are the features presented as the essence of the European 'model' of society at large, that must be translated to the Information Society. This ambition is reflected in efforts to involve the regions, cities, trade unions, and indeed citizens in the Information Society debate. Nevertheless, there is bound to be friction between such aspirations, and the major business-oriented market creation effort that constitutes the mainstay of the Information Society project.

So far, the Commission's effort to build an epistemic community, and perhaps a coalition for change, appears to be highly successful at least in terms of the attention that the Information Society project is attracting.[11] This is reflected by the plethora of forums, discussion groups and initiatives, staffed with experts and consultants eager to sketch outlines for a post-modern, post-industrial future, a global village of ever increasing but environmentally sound economic growth, that allows (why not) for new forms of citizens' participation and direct democracy. On the one hand, actual proposals now range from the protection of minors against harmful Internet content to standardised digital signatures, universal access to communications services, access to pay-television decoders, and divestiture of cable-television holdings by telecommunications operators, to efforts concerning data privacy protection, encryption, and the promotion of personal mobile satellite communications, flanked by a full range of standardisation, social and economic cohesion, and R&D issues. On the other hand, there are no visible traces of rights to universal service access or media pluralism for new services, and the vision of a coherent overall regulatory framework remains, at best, blurred. Meanwhile, the main

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10 EC Commission, Information Society Project Office: "Introduction to the Information Society: The European Way" (http://www.ispo.cec.ce/infosoc/backg/brochure.html). The obscurity of this reference underlines the fluidity of the concept.

11 An excellent general source of the relevant EU and Member State institutions, policies, and initiatives, with a summary overview of the main legal instruments is The EU Committtee of the American Chamber of Commerce in Belgium (1998), *EU Information Society Guide* (Brussels: EU Committee) – revised annually. The EC Commission's Information Society Project Office web page provides access to most relevant policy statements, studies, and legal instruments (http://www.ispo.be).

effort to link these issues conceptually (if not yet systematically) has occurred in the context of convergence, which will be discussed below.

3. Convergence and the Information Society

3.1 Convergence of Law and Convergence of Technologies[12]

The process of convergence between communications, broadcasting and information technology is key to the Information Society project. It is characterised by (i.e. both driven by, and itself promoting) fundamental technical, economic and social change. However, the concept of convergence is of wider application: convergence as a process whereby distinct national and/or sector-specific systems of legal norms and procedures shed their differences and are assimilated can be related to European integration generally – and indeed to the legal processes that promote globalisation. As such, it forms an essential feature of the EU legal framework.

This is clearly the case, first, concerning the creation of the internal market in general, and integration through EU law in particular. Legal integration constitutes a convergence process in its own right. The integrative influence of market liberalisation on business practices, levelling prices and broadening the availability of goods and services is clear. Further, EU law has forcefully promoted not only market integration, but a Community-wide process of convergence of legal rules, norms, institutions and procedures. This occurred, on the one hand, by means of the direct effect of the Treaty market freedoms, the preliminary reference system which locates the European Court of Justice at the apex of the EU legal system, and the more recent forays into individual rights to damages and effective legal remedies. On the other hand, it was the result of the harmonisation efforts that were usually triggered by fears of unbridled liberalisation. Unlike the convergence between technologies, markets and ownership, convergence through EU law is not mainly a horizontal process: it has an important *vertical*, or hierarchical, dimension. It is predicated upon the supremacy of European law, the implications of which lead to convergence of

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12 For a general technical, legal and economic overview of convergence from a US perspective, see Baldwin, T.F., McVoy, D.S., and Steinfield, C. (1996), *Convergence: Integrating Media, Information and Communication* (London: Sage). For a perspective focused on the EU and its Member States, see the various contributions to Blackman, C., and Nihoul, P., eds. (1998), *Telecommunications Policy*, Vol. 22 No. 3: Special Issue - Convergence Between Telecommunications and Other Media: How Should Regulation Adapt?

existing national law toward the legal norms established at a higher systemic level. Inversely, such convergence takes place through the implementation at national level of EU norms elaborated by way of harmonisation.

Nevertheless, convergence of law clearly has a *horizontal* dimension as well. For, second, whatever is held of neo-functional theories of integration, it cannot be disputed that the introduction of Community policies, norms and procedures, into one sector has often led to spill-over effects to related and hitherto discreet areas, or indeed to other sectors spilling over their traditional boundaries to flow toward the realm of EU legal norms. Without doubt, this process, which allows advances in one area to radiate outward, forms one of the primary dynamic factors of European integration. Moreover, in many instances (e.g. in the case at hand of convergence between telecommunications, media and information technology rules) such convergence is – often consciously – exploited by actors with an interest in liberalisation, or, at a minimum, an interest in benefiting from the size, the relative freedom, and the predictability of the EU legal sphere. Hence, this process is also shaped by the competition between companies for markets, specifically such companies as seek to establish access to broader markets and new markets, where possible on equal or comparable terms as locally or sectorally entrenched firms. It is further stimulated by its broader horizontal context, e.g. that of the multilateral negotiation of a liberal trading regime, as well as Transatlantic regulatory competition and collaboration.

A closer study of both tendencies – that is well documented, albeit not under the heading 'convergence' – may be rewarding in the context of regulatory blueprints for the Information Society. For convergence in the more narrow sense in which it is used here, as between the telecommunications, broadcasting and information technology sectors, reflects both of the two broader tendencies discussed above. In this, it does not differ from any number of economic developments of Community concern. However, it involves these trends in a more unique manner as well. This is the case as promoting the emergence of the Information Society's 'virtual markets' involves dissolving not merely regulatory barriers or monopolistic and cartel-type strangleholds in particular sectors, but traditional notions of tangible exchange and control thereof. As market-creation is involved – in spite of the considerable volume of the existing services upon which convergence is based – the Community must anticipate future regulatory needs in a sense unlikely to be found in a usual harmonisation setting. In principle, this ought to allow for more market-conform regulatory solutions than is ordinarily the case, when existing structures and vested interests exact a heavy toll. For the same reason, this adds considerably to the need to justify regulatory intervention where perhaps none existed before. Also, as a new type of market is concerned – essentially, a digital one, where neither territorial jurisdiction, nor the origination, final destination and originality

of services are self-evident – new methods of regulation may be appropriate. These are precisely the reasons why this paper explores communications convergence as a research topic that may provide further insights for the study of contemporary legal integration generally.

It would go well beyond the scope of this paper and the competence of its author to provide an independent analysis of all the legal problems that convergence raises. Many of the aspects involved, such as the precise definition of appropriate public interest requirements, the requisite level and degree of regulation, and more specialist issues such as those regarding data and privacy protection, intellectual property rights, and standardisation, are too complex to broach here in any depth. The current purpose is therefore limited to providing a basis for discussion. To this end, the recent Commission Green Paper on Convergence, and its follow-up Communication, will be analysed below.

3.2 The Green Paper on Convergence

On 3 December 1997, the Commission issued its *Green Paper on the regulatory implications of convergence between the telecommunications, media and information technology sectors: towards an Information Society approach* (hereinafter: *Convergence Green Paper*).[13] As a Green Paper, this communication is intended to set out the key issues for consultation and the associated policy formulation debate. It will be followed by European Parliament and Council Resolutions on the main points agreed, and Commission proposals for specific legislative action. Most important, it pressurely serves as the basis for discussion on the appropriate regulatory structure for the Information Society. For this purpose, the *Convergence Green Paper* raises nine sets of specific questions for discussion and response by interested parties (constituted primarily by corporations and various social and economic interest groups).

The relevant responses were aggregated and evaluated in a follow-up communication on the public consultation around the *Convergence Green Paper* that came out on 29 July 1998: the *Summary of the Results of the Public Consultation on the Green Paper on the Convergence of the*

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13 COM(97) 623, note 3, above. The discussion of this paper relies on earlier analysis presented at ZERP, and published in part in Sauter, W. (1998), The EC Commission Green Paper on Regulation for Convergence, in: *Utilities Law Review*, Vol. 9 No. 4, pp 167 ff. For the view of one of the principal authors of the Green Paper, see Clements, B. (1998), The Impact of Convergence on Regulatory Policy in Europe, in: *Telecommunications Policy*, Vol. 22, No.3, pp. 197 ff. (Special Issue on Convergence).

Telecommunications, Media and Information Technology Sectors: Areas for Further Reflection (hereinafter: *Consultation Document*).[14] In the latter, the Commission singled out three key issues as the subject for another round of public consultation, closing on 3 November 1998. Only then will the Commission prepare specific proposals. As such, this consultation procedure acts as a proxy for an EU-wide deliberative process. There is some validity in this, as the Commission received over 270 written responses in the first round - many as elaborate as the *Convergence Green Paper* itself. However, although consumer representatives and trade unions did respond, as did telecommunications and media regulators, the bulk of responses came in from undertakings active in the field. The consultation process is loosely structured, and is heavily dependent on correct representation of the balance of opinion by the Commission.

3.3 Premises of the Green Paper

As is usual for such communications, the *Convergence Green Paper* is based on a body of detailed legal and economic analysis (both at Community and Member State level), provided by outside consultants.[15]

From this research, the *Convergence Green Paper* derives its three fundamental premises:

- That a technology and market driven process of convergence is occurring;

- That this process is of pre-eminent potential significance to job creation, growth, regional and global economic integration, as well as overall European competitiveness, and hence of the greatest importance to the EU and its constituent Member States;

- That obtaining the requisite regulatory mix to promote the convergence process is key to maximising the desired benefits thereof.

These premises are of singular importance, as without them, discussing the convergence issue at this point in time – when much remains subject to uncertain future developments – would be moot. Their industrial policy

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14 SEC(98) 1284, note 3, above.

15 Cf. Analysys Ltd. and Squire, Sanders & Dempsey LLP (1998), *Adapting the EU Regulatory Framework to the Developing Multimedia Environment: A Study for the European Commission* (Luxembourg; EC Commission, DG XIII) 4 Vols.

dimension is clear: the objective is to define regulation that will promote market creation, on the assumption this would lead to wider general economic benefits. Presumably, for the EC Commission, pinning down the debate on these three points is half the battle. For present purposes, they will not be disputed. An important *caveat* however must be made: there are no accurate predictions of when convergence will be complete (including how far it will go), or when this process reach its greatest momentum. This is self-evident as its occurrence will depend on uncertain future developments - including regulatory developments: regulation for convergence is to some extent understood as a self-fulfilling prophecy. This should be kept in mind when evaluating regulatory options, and the perceived necessity of regulation.

3.4 Three Levels of Convergence

Convergence, as analysed in the *Convergence Green Paper*, is perceived as taking place simultaneously at three related levels, which build on each other:

- At the level of technology (notably by means of the digitalisation of networks and services in the three sectors involved);
- At the level of ownership (through 'strategic' alliances, mergers, and acquisitions);
- At the level of services and markets ('new' or multimedia services).

The relationship between the three levels is detailed painstakingly in the Commission Consultants' studies.[16] A distinction is made between, on the one hand, convergence of networks as platforms for similar services, and, on the other hand, convergence of consumer devices (e.g. telephone, TV and PC). The *Convergence Green Paper* deals almost exclusively with the former: its focus is on the infrastructure of the Information Society, in the sense of 'the systems of components, networks and services' associated with the telecommunications, media and information technology sectors.

3.5 Competing Regulatory Approaches

Evidently, the ultimate purpose of the *Convergence Green Paper* is to establish EU-wide convergence of the legal norms applicable to the convergence of

16 Note 15, above.

technology, markets and ownership that it postulates. Regulatory convergence would become a fourth dimension of the process, stimulating the other three. Yet, the *Convergence Green Paper* goes about setting the stage in an almost abstract manner. As mentioned, it ignores consumer devices. It also ignores services, and therefore regulatory content: remarkably, the *Convergence Green Paper* does not address in any detail even those regulatory issues on which Community initiatives are already well developed. This includes electronic commerce (e.g. encryption and digital signatures) intellectual property rights, privacy and data protection. Apparently, these issues are to be co-ordinated within a general regulatory framework for convergence in the general context of the Information Society project, and/or at a later stage. Nevertheless, it appears wholly unavoidable that they would provide the substance of regulation. This tactical separation of regulatory form and content is odd, to say the least – especially in view of the fragmented nature of many of the relevant Community initiatives. It may be explained, at least in part, from the fact that so far there is little evidence of convergence of services and content.

The principal issue addressed in the *Convergence Green Paper* is the question which regulatory changes may be necessary to accommodate convergence. Broadly, this concerns the question whether the current systems of separate sectoral regulation, further fragmented along national lines, can survive if the convergence process is to be promoted. Although it does not argue explicitly in favour of any particular option, the *Convergence Green Paper* identifies only two general approaches to this issue:

- The view which holds that current vertical sector-specific regulation, fragmented along national lines, creates a situation of regulatory uncertainty which is a serious impediment to convergence. This pleads in favour of new technology and medium-neutral horizontal regulation, based on a reconsideration of fundamental principles.

- The alternative view, that sees convergence as a phenomenon which is likely to remain limited by persistent sectoral characteristics. This view can largely be ascribed to a perception of the media as the bearers of certain non-negotiable social, cultural and ethical values. The EC Commission presents this view as purportedly favouring a separation between 'the regulation of economic conditions' (e.g. network access and interconnection, and competition policy) and service provision.

It appears to transpire throughout the *Convergence Green Paper* that the EC Commission subscribes to the first, more ambitious and pro-competitive viewpoint (to the extent such views can be accurately attributed to a corporate body). But this would be misleading: the other view, based on separation of

economic conditions and service provision, should be seen as a second-best Commission position, rather than as a faithful representation of actual widespread alternative opinion. The implicit sacrifice of services and content to national regulation in those sectors (broadcasting) currently outside the realm of competitive provision, while imposing a liberal Community regime on (access to) the underlying networks forms a strategic bargain which would constitute a considerable advance beyond the *status quo.* As mentioned above, so far there is in any event little evidence of convergence of services and content: formulating a Community approach here may be premature. Finally, the separation of conduit and content also appears to reflect the recent Commission approach concerning the status of Cable TV networks: by means of a new Article 90 EC Directive, the Commission wishes to ensure both that liberalised telecommunications services will increasingly be provided over such networks, and that such networks shall not be controlled by telecommunications operators – while reserving its views on broadcasting content rules.

3.6 Barriers to Convergence

The *Convergence Green Paper* identifies both existing and potential barriers to convergence. Six actual barriers to convergence are listed:

- access to users (as restricted by monopolies and dominant positions covering essential facilities);
- regulatory restrictions on infrastructure use (e.g. regarding the provision of broadcasting over telecommunications networks);
- prices for telecommunications services and networks (a significant cost-factor for any services provided over these systems);
- availability of content (the increasing scarcity thereof as capacity increases);
- market fragmentation (along national and sectoral lines);
- inadequate protection of intellectual property rights.

Some of these barriers (e.g. for the telecommunications sector generally, as well as concerning intellectual property rights and electronic commerce) have already been addressed under Community law, or are subject to well-defined regulatory initiatives awaiting implementation. Telecommunications prices are

already subject to market forces and competition policy review.

Concerning other barriers, in particular in the media sector, the EU impact has been limited. This mainly reflects the political difficulties involved in addressing these issues. Examples are Article 16 of the Amsterdam Treaty on services of general economic interest, and especially the Amsterdam *Protocol on the System of Public Broadcasting in the Member States*. The latter is designed to deflect any threats to current systems of public funding and provision of such broadcasting activities against Article 90 EC actions. This could be read as an indication that there is a right to public sector broadcasting equivalent to the universal service right in telecommunications, or the rights of access to other utility services (water, energy, transport infrastructure) at uniform affordable prices. Yet, whether the need to include a similar statement as an annex to the Amsterdam Treaty reflects the strength or rather weakness of public broadcasting is an open question. The answer is likely to be that while the public sector broadcasters remain politically influential, they are otherwise increasingly vulnerable (including financially). The protocol is defensive in nature, and does not appear to extend beyond seeking legal protection for mandatory national license fee systems of funding public broadcasting.

The potential barriers identified in the *Convergence Green Paper* are:

- regulatory uncertainty (competence and applicable rules);
- multiple regulatory bodies (between Member States and sectors);
- market entry and licensing (diverging regimes between Member States and sectors);
- access to networks, conditional access systems and content;
- allocation of radio frequency spectrum (scarcity amidst abundance);
- lack of coherence concerning public interest objectives;
- public confidence (e.g. regarding data protection, electronic transactions);
- lack of standards ensuring network interconnection and interoperability.

It is clear from the *Convergence Green Paper* that not all actual and potential barriers are to be subject to regulatory initiatives in the context of convergence. Some have been addressed, and others may be too sensitive at this stage. Also, the role of regulation as such is questioned. One of the oft-touted

consequences of convergence is the future availability, in principle, of an abundance of transmission capacity (notwithstanding temporary bottleneck issues and the continuing scarcity of frequency spectrum as a limited natural resource). Existing regulation is based on cautious management of scarce resources – and for that reason under tight public control. Potentially, this changes the need for regulation, and its nature, in a fundamental way.

Regulation for abundance is related to questions on the degree to which market forces can be allowed free play, and could be relied on to provide solutions to public interest requirements. Although there are no Community norms to guide such decisions, the general preference of recent years – at least at the level of lip-service – for mutual recognition and self-regulation over regulation is clear. This preference is repeated in the *Convergence Green Paper*, with reference to the principles established in this regard in its communication on electronic commerce. Beside the public-private dichotomy there is the issue of which matters should be regulated at Community level, and which at the level of the Member States. Moreover, to put these considerations into perspective, the mobile and ubiquitous nature of communications-based services in a context of global regulatory competition calls into question not only national abilities to regulate, but the effectiveness of regional initiatives as well.

3.7 Key Issues of the New Regulatory Framework

After briefly discussing these caveats, the *Convergence Green Paper* identifies the main issues associated with defining the regulatory framework for convergence as:

- defining the boundaries between sectors and regulators (applicable law and competence);
- market entry and licensing (self-regulation v. standardising licensing conditions);
- access to networks, conditional access systems (e.g. digital TV decoders) and content;
- access to frequency spectrum (pricing and allocation mechanisms);
- standards (finding ways to achieve interoperability);

- pricing (divergent price controls between sectors, and the viability of public broadcasting);

- consumer interests (e.g. free speech v. protection of minors).

Evidently, these issues are linked. For example, pricing and standards are intimately connected with access conditions, and hence in turn with the feasibility of market entry. Licensing presumes the possibility that obligations regarding these key regulatory aspects may be imposed on market participants - including on an asymmetrical basis (as is the case e.g. for telecommunications operators enjoying 'significant market power' - a standard loosely based on Article 86 EC dominance).

3.8 Regulatory Principles

In all cases, the Commission proposes as general principles that regulation should be limited to the necessary minimum, be responsive to users' needs, be clear and predictable, ensure full participation (universal access), and assign a central role to effective independent regulators. Aside from the insistence on independent regulators, these appear to be fairly harmless generalities – unless, that is, such standards could be justiciable in legal review procedures (e.g. based on proportionality, non-discrimination and/or subsidiarity standards).

Remarkably, the *Convergence Green Paper* does not present solutions to any of the key regulatory issues which it identifies. In most cases, the question put is that of the necessary degree of public intervention, which is complicated by the varying degree in which the three sectors are currently under public control. Most problematic however, is the need for defining commonly agreed public interest objectives. A process of defining these objectives - including as individual rights or EU law exceptions - would appear to be a precondition for any sensible discussion regarding the means by in which they could be guaranteed. Among such public interest objectives privacy, data protection, cultural diversity, the protection of minors and public order may ultimately turn out to be less problematic. They may be mature enough for a discussion of means as well as ends. On the other hand, the meaning and scope of universal service access, and the future role of public broadcasting in the sense of guarantees of media pluralism, remain highly contested.

3.9 Alternative Regulatory Options

In time-tried manner, the *Convergence Green Paper* presents three alternative

options for developing the regulatory environment for convergence. One purpose of the consultation process is gauging public and industry support, in order to establish which of these options is feasible in political and practical terms. Another is evidently agenda-setting, and limiting the scope of the debate to a range of coherent options which are all, irrespective of particular policy preferences, in principle acceptable to the Commission.

- The first option relies on *elaborating the existing separate vertical regulatory systems* for telecommunications, broadcasting, and information technology, to meet the demands of new services, on a case-by-case basis. This would have the benefit of predictability (although in many cases this is likely to be a euphemism for bureaucratic inertia and economic stagnation). Fragmentation and delay are seen as the main risks of this approach. It would also lead to regulatory competition between more and less liberal Member States, which would compete for investment and the related benefits. Consequently, jurisdictional issues would abound.

- The second option is that of devising a *new horizontal regulatory model applicable to new services*, superimposed on the traditional separate vertical regulatory systems. Presumably, as services develop over time, they would transcend the vertical systems and move into the new regulatory framework. Here, deciding borderline cases would become the focus of regulatory activity, complicated by the anticipated cross-border nature of many issues (e.g. forum-shopping, and conflicts of law). It appears that this second approach squares with the so-called 'alternative' view that separate regulatory systems could apply to service provision and 'economic issues.'

- The third and most ambitious option would involve a fundamental reassessment of existing regulation, in an attempt to devise a *comprehensive regulatory model comprising both traditional and new services*. The result would be a single horizontal framework. As this approach is also perceived as gradual in nature (specific issues would be regulated in a coherent manner one by one, rather than jointly, in a single stroke), the main difference with the former two options is that it is issue driven (e.g. access) rather than based on a classification of particular services or technologies which may change over time.

There can be no doubt that the Commission's implicit preference is the third option. In some areas, it is arguably already moving toward implementing this strategy in those areas where it has the requisite legal instruments at its disposal (the Article 90 EC telecommunications directives, which it can extend autonomously). This is reflected in particular by its recent proposals on

enforcing legal separation (and possibly divestiture) concerning the provision of Cable TV and telecommunications networks by dominant operators.[17] It further appears that the actual meaning of the third option may be that the experience and methods of competitive regulation for the telecommunications sector (e.g. as developed for access, interconnection and universal service) will be extended horizontally, where possible.

Hence, the *Convergence Green Paper* can be read as an attempt to achieve consensus around a coherent regulatory approach, that is based on the third option of achieving a new comprehensive horizontal regulatory framework. If this first preference fails, a piecemeal approach is likely to occur, which would combine all three approaches. Regulatory competition (as under the first option) and independent Commission action under the competition rules in line with the third option are likely to coincide with the transition of services to the 'new regulation' as proposed under the second option. Such a transition of particular services to a new regime would in any event occur, driven by a combination of external pressures and technological change.

3.10 Follow-up

The time-table announced in the *Convergence Green Paper* concerning its follow-up includes:

- a five month public consultation period concluding 1 May 1998;
- a Commission Communication on this consultation, scheduled for June 1998 (eventually, this appeared in July 1998 and will be followed by a further round of consultation - see the next section below);
- European Parliament and Council Resolutions setting out common positions (if any) following the Commission Communication;
- a Convergence Action Plan proposal by the Commission before the end of 1998 (a date that appears increasingly unrealistic);
- a telecommunications review in 1999 (already independently mandated by the applicable telecommunications-specific legislation in force).

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17 *Draft Commission Directive amending Directive 90/388/EEC in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities* (OJ 1998 C71/23).

In parallel with these steps, various events (e.g. conferences, the presentation of further high-level reports) are to occur. It should be noted that no concrete legislative proposals are sketched in the *Convergence Green Paper* itself. However, as indicated above, in numerous areas the Commission is already in the process of moving into place relevant legislation, with the new Cable TV draft separation directive as the most obvious example.

3.11 The Consultation Document

As mentioned above, the summary of the consultation results appeared in the Commission *Consultation Document* of July 1998.[18] The *Consultation Document* purports not to present a Commission position, but rather to constitute a representative summary of the balance of opinion as reflected in several hundred written comments from a wide range of organisations.

In a number of areas, sufficient agreement was found to allow conclusions to be drawn in the shape of policy proposals at a later stage. Notably, this concerned the three basic regulatory options. Apparently, the great majority of commentators preferred simply the elaboration of the existing sector-specific regulation on a case-by-case basis (Option 1). One reason cited is that as, for instance, the telecommunications law framework is still very new, it would create serious market disturbances if it were to be replaced at the present stage. The benefit of Option 1, as represented in the *Consultation Document,* would be a combination of certainty for investment with the traditional public interest guarantees. Of course this solution represents a double bind: uncertainty on future developments makes it difficult to devise a regulatory framework; whereas uncertainty on future regulation frustrates investment. If the conclusion is, as it appears to be, that sectoral adjustments will be made piecemeal, and hence probably in large part at national level, a risk of divergence between Member States and market fragmentation results. In a similar setting, conflict and regulatory competition are likely to loom large, with EU competition law as the main horizontal framework.

It is not clear whether this apparent widespread preference for Option 1 would preclude the Commission, in its final policy conclusions, from advocating a more radical approach. Significantly however, the *Consultation Document* claims the existence of considerable support for a phased transition from elaborating sector-specific regulation (Option 1) to the comprehensive horizontal approach (Option 3), in particular for networks and infrastructure 'in the medium to long term'. This approach is based on the tactical compromise

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18 SEC (98) 1284, above, note 3.

of surrendering (broadcasting) content, and to extend liberal principles systematically to conduit (i.e. networks, including broadcasting networks). As was mentioned above, it already transpired from the *Convergence Green Paper* that this might emerge as a second-best solution from a Commission perspective, and always formed its fall-back position. Support for the option of devising horizontal rules applicable to new media only (Option 2) was limited to Germany, and is practically dismissed in the *Consultation Document* as needlessly adding another layer of regulation.

The Consultation Documents identifies three issues that were selected for another full round of consultation:

- The first issue is that of *access to networks and digital gateways*, that was widely identified as the key commercial and regulatory concern. As, in principle, the competition doctrine of 'essential facilities' would apply, the *Consultation Document* asks whether sector-specific regulation is required, on the basis of which principles, and for what time-frame. As the Commission has abundant experience with access in the context of telecommunications interconnection, these questions are not wholly innocent in nature. Now the Consultation Document appears to suggest that a combination of Option 1 and Option 3 will form the basis of its forthcoming policy proposals, access is the topic most likely to be the subject of the first proposals for comprehensive horizontal regulation.

- The second issue for further discussion is the perceived *need for a framework for investment in infrastructure, as well as* (somewhat incongruously) *measures to stimulate 'European content' creation and distribution*. This opens up the way for requests for subsidy structures, and hints at the possibility that heavy investment requirements in broadband networks may be used both as an argument in favour of vertical integration and in favour of relaxed views on dominant positions - and hence e.g. against Cable TV network divestiture by the former monopoly telecommunications operators under the competition rules. Whether competition DG IV is likely to be impressed by such arguments in its enforcement practice is doubtful. Yet national competition authorities may be. This discussion item clearly points in a less liberal direction: mainly, toward various side-payments under the headings of culture, and industrial policy. The likely beneficiaries are, evidently, those who might otherwise block a compromise, such as public sector broadcasters and the former telecommunications monopolists.

- Third, additional comments are requested on ways in which *a balanced approach to regulation* could be ensured. This concerns notably the question how market principles can be reconciled with public policy

objectives, and the scope of regulation (e.g. in which areas self-regulation might suffice). In effect, this suggests that all the issues of procedure, principles, and substance on the regulatory front are still open - what was thought had been the subject of the *Convergence Green Paper*. It is impossible to disagree with the fact these issues should be considered carefully. Yet, it is discouraging that at present (platitudes such as 'there should be no more regulation than is necessary' aside) there is still no real sense for how regulation ought to be structured, and why.

Hence, the nature of its follow-up questions in the *Consultation Document* already indicates the contours of a potential compromise solution, much along the lines that could already be detected in the *Convergence Green Paper* itself. It is remarkable in itself that the Commission has decided to launch a second round of consultation. In part, this reflects the Commission's salami tactics apparently aimed to obtain what it wants most: a comprehensive legal instrument for access (Option 3), that would provide a degree of leverage that might compensate for further piecemeal sectoral adjustments (Option 1). This makes sense also because access is the only issue for which there is currently an explicit Treaty basis - albeit limited to telecommunications (Article 129b EC, on Trans-European Networks). Nevertheless, the second consultation round indicates that the debate on the merits of regulation as such, as well as on its scope and principles, is by no means settled.

3.12 Evaluation

For the purpose of leading up to a more general discussion of regulation, and given that the *Consultation Document* has just begun to move the goal posts of the debate, it would not make sense to provide finely tuned conclusions here. Nevertheless, some first critical remarks may be useful.

It is clear that the *Convergence Green Paper* is the result of internal Commission compromise and reflects an assessment of the political feasibility of radical change. This is underlined by the preliminary conclusions of the *Consultation Document.* Full frontal attacks on, say, national public broadcasting regulation, are solicited from interested parties rather than volunteered by the Commission. Hints of new subsidies are held out at likely obstructionists. These elements need not be highlighted further. Some general weaknesses that follow from this guarded stance are the following:

- The *Convergence Green Paper* is unduly focused on the EU dimension, and says little about the wider implications of convergence, which undermine territorially based concepts of jurisdiction. The international - and extranational - dimensions are dealt with summarily. If convergence truly

undermines territorially based concepts of jurisdiction there is a risk of irrelevance here. Given this flaw, the *Consultation Document* evidently says little about such issues. Possibly, the additional query it tabled on regulatory principles may provoke the commentators into a response in the next round.

- It further scarcely discusses the potential for legal change driven by autonomous Commission action, notably under the competition rules. The competition policy competence of the Commission ultimately forced the hand of the Member States in the only area where the Commission can point to any success in dismantling national monopolies to date - telecommunications. This cautious approach may be due to a desire the Commission not to show its hand at this stage. (Also, views are likely to differ between the media and telecommunications DGs X and XIII on the one hand, and competition DG IV on the other.) In this case, the additional questions in the *Consultation Document* on regulatory principles, and on whether the competition rules would suffice for access, may provide further clues.

- Nor does the *Convergence Green Paper* analyse the potential for competitive deregulation or regulatory competition by individual Member States (although their respective regulatory approaches are discussed in detail in the Squire Sanders/Analysis study).[19] Arguably, as is the case regarding Commission competition action (and in particular if some Member States themselves make innovative use of the competition rules), this could become a major engine for change. Presumably, this should be explained by the view at least among some Commission services that separate Member State action will by definition lead to inferior results compared with common action – such as *ex ante* harmonisation. Now that Option 1 - continuing sectoral adjustments, possibly along national lines - is clearly on the table, the relevance of this issue has only increased.

- Finally, the *Green Paper* fails to set out how the various Community initiatives concerning the Information Society, electronic commerce, and convergence are related. Only the broadest of references are provided on this front. There is no systematic approach.

It would be unfair to judge or condemn the EU regulatory effort on the basis of a single discussion paper and a first consultation summary. However, the *Convergence Green Paper* is important. In spite of its weaknesses, the

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19 Above, note 15.

Convergence Green Paper purports to be leading up to what may be a wholesale overhaul of existing national regulation. The *Consultation Document*, although it remains to be supplemented, purports to legitimise, at some level, decisions in this direction.

4. Regulation for Convergence

4.1 Regulatory Options and Regulatory Principles

The assumption of the *Convergence Green Paper* is clearly that regulatory reform will be necessary. This assessment flows logically from its third premise mentioned above, which holds that 'achieving the right regulatory mix' is a precondition for successful market creation. Hence, convergence as such creates regulatory needs. This is problematic in so far as the application of Treaty principles to non-existing markets is difficult to put into practice, and hard to justify. It is hard to justify as any change in policy must, first of all, do no unnecessary harm: how can emerging interests, some of which will prove ephemeral, be weighed against existing ones?

These questions should be kept in mind. Nevertheless, whatever is held of the way the *Convergence Green Paper* addresses the various issues - and, in all fairness, it presents a reasonable summary - an approach should be devised that allows the regulatory options presented to be weighed and evaluated. Likewise, sensible principles for regulation should be defined. The *Convergence Green Paper* itself lists the following general principles:

- Regulation should be limited to the necessary minimum needed to achieve clearly defined objectives.

- Regulatory decisions should be responsive to users' needs, be clear and predictable.

- Regulation should ensure full participation (universal access).

- It should rely on effective independent regulators.

According to the *Consultation Document*, not surprisingly, these principles were widely applauded. The *Convergence Green Paper* also adds, as principles derived from the area of electronic commerce, that 'there must be no regulation for regulation's sake,' that all regulation must be based on the Single Market Freedoms, and meet general interest objectives effectively and

efficiently. Finally, it raises the issue of the role of market forces, as well as that of the balance between sector-specific rules and horizontal (competition) rules. Other issues that come up repeatedly are the need to give priority to self-regulation and flexible, 'technology-neutral,' regulation. Although these points are difficult to disagree with (e.g. 'there shall be no regulation for regulation's sake), they must be systematised and translated into legal terms. Although they are addressed as one of the three follow-up questions in the Consultation Document, there will be little in terms of elaboration until the Commission's actual policy proposals finally emerge after the present round of consultation. A first effort is made below.

4.2 Public Interests v Private Rights under the Current Treaty Framework

The Treaty evidently constitutes the general framework for the regulatory ambitions concerning convergence. Yet the *Convergence Green Paper* makes no effort at all to use this framework systematically. For present purposes, it is not necessary to take up this task: a few general points must suffice. Aside from the provisions on trans-European networks (which establish access, interoperability and interconnection as areas of Community concern), and the Amsterdam protocol on public broadcasting, the Treaty contains no legal norms specifically applicable to convergence. Hence, the general rules should be considered. Here, it should be noted that, whereas the Treaty provides certain trading rights, including free movement, freedom of establishment, and free provision of services, as well as a system of competition rules, it contains little regarding public interest guarantees. In the context of the Treaty, public interest considerations arise primarily in the context of the exceptions provided to the four freedoms. They prompt the Member States to limit or block the exercise of market rights where these may be harmful to such (vaguely defined) interests. Eventually, legitimate public interest reservations generally lead to harmonisation efforts that attempt to standardise them at Community level.

In the Treaty context, private market freedoms and public interest guarantees are not incompatible, even although the latter are largely undefined. The tension between them constitutes a dynamic force, which, over time, favours integration and liberalisation simultaneously. They are linked in the sense that generally, it will be impossible to freely exercise the market freedoms until such time as the relevant public interests have been clearly defined, and the way in which they may be respected and protected is marked out. One example of this are the essential requirements found in harmonisation legislation. Another is universal service, which remained an obstacle to liberalisation while it was vaguely defined, and allegedly promoted by 'natural monopolies.' Once its content had

been agreed, competitive provision of universal service became possible, enabling liberalisation to proceed.[20]

In summary form, the Treaty regime requires regulation to guarantee the functioning of the internal market, under conditions of effective competition, while protecting both legitimate public interests and individual rights. Arguably, convergence requires harmonisation of taxation and liability regimes, of data protection standards and the scope of intellectual property rights. Equally, liberalisation may require a clearer definition of the public interest issues concerned, perhaps as legally enforceable rights, before it can proceed. This should in turn determine the scope and objectives of regulation.

4.3 Levels of Regulation

In theory, the various levels of regulation could range from general (e.g. WTO) and sector-specific global organisations (e.g. ITU) or frameworks (e.g. WARC, GATS, TRIPS) through more narrow organisations such as the OECD and G7, to regional organisations (EU, CEPT, ETSI), and the national level (EU Member States, and other nations) to the sub-national level (e.g. the German Länder, and US States). In practice, all these levels are to some extent involved. The present comments are limited to the Community and Member State levels.

Concerning the division of competence between the EU and the Member States, apart from the principle of attributed powers, the principle of subsidiarity applies. In principle, this requires that only such matters are to be taken up at the EU level that cannot be adequately dealt with nationally. There is still no full consensus on what exactly the subsidiarity test is: effectiveness, efficiency, whether an issue can be handled better at EU level even where national measures would be sufficient by some less than ideal standards, or other. Yet it appears that the relevant criteria can be summed up, cumulatively, as necessity, effectiveness, and proportionality. Clearly, these criteria have an impact on the decision whether regulation is necessary at all. Moreover, such decisions are not left to the EU, or its Courts: the German Constitutional Court, in its infamous Maastricht judgment, made clear that it reserves its claim to deciding on competence issues.[21] The European Court of Justice itself has over

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20 Cf. Sauter, W., (1998), Universal Service Obligations and the Emergence of Citizens' Rights in European Telecommunications Liberalization, in: Freedland, M., and Sciarra, S., eds., *Public Services and Citizenshipin European Law: Public and Labour Law Perspectives* (Oxford: Clarendon).

21 BVerfG, Urt v 12.10.1993 – 2BvR 2134/92 und 2BvR 2159/92, *Manfred Brunner et al. v The European Union Treaty* [1994] 1 CMLR 57.

recent years developed a line of 'subsidiarity' case law, whereby it appears willing to accept that the Member States may freely regulate certain matters irrespective of the market freedoms, if the internal market is not significantly affected. If restraint is shown by the Court of Justice (and demanded by the German Constitutional Court) *ex post*, what is the *ex ante* view likely to be where no market exist?

In view of the market creation dimension of regulation for convergence, the requirements of necessity and proportionality plead in favour of restraint. At a minimum, this would suggest a phased, evolutionary approach, which does not pre-empt national regulation unless there are sound reasons to do so.

4.4 Methods of Regulation

As was mentioned above, liberalisation allowing the realisation of private market freedoms requires the definition of the public interest issues that may impose constraints on these freedoms, so that these constraints may then be limited to the necessary minimum. Once the public interest involved is defined, it can be guaranteed in a number of ways. The legal techniques applied range from hard and comprehensive rules that are imposed uniformly at EU level, to a margin of discretion in national implementation, and self-regulation or various forms of experimentation. In the internal market context generally (at least in theory), preference is given to mutual recognition over harmonisation. In the Information Society, preference may be given to self-regulation. This is appropriate not only in the interest of flexibility, but also as one of the few remedies that have so far been devised against the undermining of territorial jurisdiction. For example, effective new ways of policing the Internet are more likely to emerge in practice than on the basis of regulatory blueprints. The learning process inherent in the development of new services could then feed and inform the law, provided certain basic legal norms to be implemented in this manner (e.g. concerning data privacy protection) were established.

Moreover, a choice for light-handed regulation appears mandated both by subsidiarity and proportionality. Apart from a horizontal dimension (concerning the various levels of government), subsidiarity can also be understood horizontally, as a principle that concerns the division of competence between the public and the private sphere. In this case, it requires that matters which can be dealt with by the market are not subject to regulatory intervention. This principle may well be appropriate until convergence crystallises further. Likewise, proportionality in the strict sense of the least restrictive means test would lead to a preference for self-regulation. The market creation dimension - especially the problem to what extent it is legitimate to regulate non-existent markets - would add to this rationale.

Both principles could be implemented all the more effectively if the fundamental public interest issues were clearly defined at EU level. Self-regulation could then be matched by self-protection, based on strong, legally enforceable rights. This could lead to the constitutionalisation of self-regulation, and counter the threat of regulatory capture that is almost tautological in the case of self-regulation. Such constitutionalisation would address the combined fundamental needs for certainty, and flexibility, that characterise the Information Society.

4.5 Horizontal v Vertical Regulation

The question of the need for horizontal regulation as opposed to vertical, or sector-specific regulation is largely moot here. Convergence of regulation presupposes that, eventually, vertical regulation will disappear. The issue is one of timing, rather than principle. More relevant here, perhaps, is whether there will be separate horizontal regulation for 'economic issues' - mainly infrastructure - and vertical regulation for services and/or content. This is the approach as envisaged in the 'alternative view' of regulation presented by the Commission in the *Convergence Green Paper*. From the *Consultation Document,* it appears to be the likely focus of the forthcoming policy proposals. There is something to be said for ensuring conduit at an early stage and leaving services and content for a later stage, also since the conduit dimensions of access, interconnection and interoperability are the only areas where the Community clearly enjoys competence under the Treaty.

In any event, there will always be a horizontal layer of applicable rules regardless of the shape regulation for convergence will take: the EU competition rules. This is not to say that there are no problems involved in the application of the competition rules in the context of convergence. The problems involved relate, for example, to establishing the relevant market where emerging markets are concerned (potential competition in hypothetical future markets?), and to dealing with cross-ownership issues. At present, the EU has no line of business restrictions or cross-ownership rules, for example regarding infrastructure. However, a first step in this direction appears to be the object of the Cable divestiture Directive.[22] This also indicates what the future relationship between the competition rules and convergence regulation may be. The Commission is likely to use the competition rules both as a means of last resort, whereby it can intervene single-handedly when necessary, and as a monitoring tool, that over time will allow it to develop more refined regulatory tools to deal with certain

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22 Note 17, above.

problems in a standardised manner (for example through secondary legislation).

A phased approach also makes sense as it is not clear whether convergence will ever be achieved as it is imagined today - that is, when regulation for convergence will be necessary. In any event, the nature of the rights and duties involved is likely to evolve over time. For example, universal service was barely developed when EU telecommunications liberalisation first began. Over time however, it came to be defined as an entitlement, with a redistributory dimension. Both elements plead in favour of an evolutionary approach to regulation for convergence. Finally, a phased approach allows predictability and flexibility to be combined.

4.6 The Role of the Law: Toward A Legal Framework

A main question is how the resulting changes will affect the role played by law, in particular in the context of European integration, globalisation, and the possible demise of jurisdiction based on territoriality. The question mirroring that is what role the law should play: which interests it ought to protect, and which it is in a position to protect.

It appears to us that both questions can be usefully addressed in terms of rights. There can be no doubt that regulation for convergence will clearly involve a clash of rights, as does regulation generally. Traditionally, diffuse general rights of the public at large would be contrasted with focused sectoral interests seeking particular gain. An element of this is surely present in the current set-up. However, this is not the entire picture. On the one hand, it appears that market rights. And competition must be both protected and extended in order to allow market creation to occur. The full size of the constituency, even in terms of the firms involved is not known - many of them do simply not exist yet. On the other, public interest issues could be framed as rights - such as those to privacy, media pluralism, and access to communications. At least in some respects, these are of interest not only to individual citizens or consumers, but also to companies seeking a level playing field free from political pressure and the excesses of market power. Finally, as was argued above, the definition of public interest criteria is a precondition to the effective exercise of market rights. In some cases, this should hold where the public interest can be framed in terms of privately enforceable rights. Where individuals derive market rights directly from the Treaty, why should other rights they enjoy be predicated on increasingly obsolescent national rules that can be enforced only indirectly by the Member States, if at all?

For example, EU level access rights to free information provided over public media or under must carry rules do not exist. Nor is basic media

pluralism guaranteed at European level. Finally, there is nothing to ensure that such guarantees as do exist at national level will migrate to apply to the Internet or new services, when these take on sufficient importance as sources of information that, in a democratic society, should be freely available. It is not clear why such a right would not be appropriate. Moreover, as has been seen, defining public interest issues mobilises the dynamic of integration to the simultaneous benefit of private market rights. If such a concept could be defined, it would greatly facilitate broadcasting liberalisation. In this context, it should further be recalled that, in its Maastricht judgement, the German Constitutional Court saw the absence of European media as an indicator of the absence of a European polity that might justify emancipation of EU processes from the tutelage of the 'Masters of the Treaty.' The Court framed the existence of shared information and debate though such media as a precondition for the emergence of legitimacy through effective direct democratic accountability at EU level.[23]

On the basis of the foregoing, it appears there is, at a minimum, a *prima facie* case for framing regulation for convergence constitutionally. This does not mean that it is clear from the outset that all relevant problems can be fully resolved in this manner, or even primarily. Yet certainly, privacy, access to plurality of information and universal service would lend themselves to a more substantive elaboration of EU citizenship rights than what is currently available. (Possibly, part of this function could be achieved if the Community accedes to the European Convention on Human Rights.) Moreover, a constitutional approach would make available an entire range of methods and techniques to resolve the problems posed by convergence, that are well established both among the Member States, are in large part already employed in EU legal discourse, and fit well with the idea of a Community based - *inter alia* - on the rule of law.

Evidently, it remains to be defined more closely how the constitutional approach could be most usefully employed for this purpose, and which methodology would be appropriate. Yet, regardless of any methodological considerations that remain to be elaborated, the constitutional issues that are clearly on the agenda include:

- determining the horizontal and vertical balance of powers between Community and Member States;

- the balance between the public and private spheres;

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23 Note 21, above.

- the balance between public interests and private economic rights, including the definition of these public interests as private rights;

- the role of independent authorities;

- issues of legitimacy, in particular regarding decision making procedures.

On closer and more elaborate examination, other issues of constitutional dimension - perhaps of equal or even greater significance - will no doubt come to the fore.

5. Conclusion

For the EU, the Information Society is not so much a practical reality, or even a coherent program, as an integration project: an effort to construct an epistemic community, to inspire, to set an agenda, and to mobilise resources for change. Although the advocates of the Information Society Project may not have assessed their relative importance accurately, they nevertheless appear to have identified correctly the existence and growing force of certain forces of technical, economic and social change. The Information Society approach seeks to (i) promote the development of these forces as such (as they are seen as offering a particularly attractive escape from current economic, social and political constraints); (ii) to harness them in favour of this change; and (iii) to use the resultant project both as a rallying device, a symbol, and a lever for more wide-ranging change that would affect the EU system generally.

Evidently, these ambitions affect the way in which the component elements of convergence are presented in the present policy debate, e.g. by the EC Commission. Whereas convergence is seen as the key to creating the Information Society, regulatory reform in turn is seen as a precondition to promoting convergence. Again, this is probably a correct assessment. Yet the jury is still out on what level of political support for regulatory change exists, and on what regulatory model - or combination or plurality of such models - would be adopted. Although several alternative regulatory approaches are currently under discussion, they have not yet been framed in terms of EU law. Moreover, as we have argued, a systematic approach is not only missing, but will be extremely difficult to devise unless more fundamental questions are addressed. These regard individual rights and their constraints, the appropriate level of government and the interaction between various levels, as well as the balance between the public and private spheres generally.

On the basis of the preliminary explorations as charted here, it appears that the requisite overall framework for addressing these issues is a constitutional one. That is, it can serve both as a framework of our academic legal analysis, and, ultimately, as the legal framework to be elaborated and employed in real life questions. At a practical level, the constitutional approach to convergence and the emerging Information Society is novel, and will combine the benefits of flexibility and predictability.

To match private market rights and competition, rights to privacy, access to information, to communications, and certain economic freedoms, ought to be considered of constitutional rank in the EU context, as dimensions of European citizenship. The implications of this need to be thought through systematically. Traditionally, the tension between market rights and the public interest has been a productive one, in so far as EU definition of the public interest involved allowed the realisation of private freedoms consistent with the minimum necessary constraints. Only dealing with these issues in this sense will enable effective protection to be combined with the market creation envisaged by the Community, as it will allow the regulatory obstacles to this market creation to be cleared. In the process, the quality of the EU constitution as a political constitution - rather than merely an economic one - is likely to improve.