The Law of the World Trade Organization and the Communications Law of the European Community: On a Path of Harmony or Discord?

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This article presents an overview of the law of the World Trade Organization (WTO) relevant to telecommunications services and correlates this body of law with the current regulatory framework for electronic communications networks and services in the European Community (EC). The latter has been adapted to meet the challenges of technological and market developments in communications, epitomized by the processes of digitization, enhanced transport networks and convergence. The novel solutions embodied in the EC electronic communications regime, notably, a new design of the Significant Market Power mechanism, a projected withdrawal of sector specific regulation and an affirmation of the principle of technological neutrality, pose interesting questions as to the conformity of this reformed EC communications law with the WTO rules on telecommunications services and the obligations of the European Communities and their Member States. Looking beyond the WTO legal compatibility test, essential questions regarding the need for evolution of the WTO telecommunications rules are raised. The present paper contributes to the ongoing debate in that context in light of the EC experience.

I. INTRODUCTION

Telecommunications are in essence a transnational technology.1 Since the invention of the telegraph and telephone (in 1844 and 1876, respectively), their function as a means of communication and transport of information has barely been limited to national boundaries.2 Indeed, looking back, it appears that the goal of

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innovators has always been to provide a connection between rather than within
countries. The current process of digitization, which renders all types of data, be it
audio, text, still or moving images, expressible in a line of zeros and ones and the
emergence of sophisticated fibre-optic networks make this transnational nature of
telecommunications even more pronounced. Beyond the level of technology, at the
level of markets and economic transactions, globalization has significantly intensified
the use of these networks, while also increasing their value and importance.

From a legal perspective, the transnational nature of telecommunications has
demanded considerable coordination and cooperation between countries, which has
been mirrored in their regulation at the international level. Clear proof of the need for
cooperation is the fact that the first intergovernmental organization, the International
Telegraph Union, was founded in 1865 specifically to address it. Subsequently,
numerous telecommunications-relevant treaties and conventions under public
international law and less formal agreements have come into being, dealing with the
treatment and use of common natural resources, standardization and development.

The communications industry is, however, not static. Indeed, the technological
developments of the last three decades, epitomized above all by the above-mentioned
digitization and enhancement of networks, have utterly transformed its characteristics
and mechanisms. The dynamics of communications technologies and the newly
realized potential of the telecommunications sector and its contribution to economic
growth induced a change in the regulatory paradigm for telecom networks and
services. At the national level, this triggered the processes of liberalization and re-
regulation of telecommunications markets. These developments have had natural

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5 It was as early as 1891 when the first submarine telephone cable was laid between England and France. It
was operated by the Central Telegraph Office in London and enabled telephone conversations between specially
equipped booths in London and Paris. The first transatlantic telephone call was made in 1915 and connected
Virginia and Paris but was only experimental. In 1926, Bell Laboratories and the British Post Office engineered the
first transatlantic two-way communication.

6 The International Telegraph Union was transformed into the International Telecommunication Union
(ITU) in 1932 (combining the International Telegraph Convention of 1865 and the International Radiotelegraph
Convention of 1906). In 1947, the ITU became a specialized agency of the United Nations and almost all
sovereign countries are members (currently 189 members). The ITU’s principal function is to promote the
efficient use of telecommunications services and to harmonize national interests. It is further responsible for the
international coordination of the use of the radio spectrum (including for non-telecommunications purposes such
as broadcasting, navigation and radar). On the ITU, see Walden, as note 1 above, pp. 346–369; Christian Koenig
WTO and the ITU as a Yardstick for EC Law”, in Christian Koenig, Andreas Bartosch and Jens-Daniel Braun
(eds), EC Competition and Telecommunications Law (The Hague, London and Boston: Kluwer Law International,
2002), pp. 19–49; BobJoseph Mathew, The WTO Agreements on Telecommunications (Berne, Frankfurt and Brussels:
Peter Lang, 2003), pp. 29–40.

7 For an analysis of the technological developments in telecommunications and on dynamism as an intrinsic
characteristic of communications markets, see Mira Nenova, EC Electronic Communications: Can Competition Law
Do It All? (London: Cameron May 2007), at ch. 1.

8 See, e.g., European Commission, Green Paper on the development of the common market for
telecommunications services and equipment: Towards a dynamic European economy, COM(1987) 290 final, 30
June 1987. The 11th EC Communications Report (European Commission, European electronic communications
regulation and markets 2005, COM(2006) 68 final, 20 February 2006, p. 2) shows that the market was worth €273
billion in 2005 and the overall revenue growth continued strong at levels of between 3.8 and 4.7 percent.
repercussions for the global regulatory environment as well. As elements of these repercussions, the negotiating and standard-making processes and ultimately, the “classical” sources of international telecommunications law have been reshaped.

Two important changes have occurred in this context. First, a new cluster of stakeholders corresponding to the shift in market structures emerged, thereby increasing the significance of market players in the decision-making processes (as opposed to Nation-States as decision-makers).8 Second, and perhaps more importantly, there was a shift in the regulatory mandate for telecommunications. Because of their increased significance in a globalized networked environment, they needed to be properly addressed “as a distinct economic activity, a tradable service, rather than simply as a medium or a conduit for conducting trade”.9 The issue of market access as the emerging primary concern in international communications law could not be tackled appropriately in the realm of the ITU. WTO, in contrast, provided an apposite negotiations and regulatory forum10 and, as we shall see below, comprehensively addressed different issues of communications markets’ regulation, while also affirming the liberalization trend as a sound approach to telecommunications policy.

It is beyond the scope of this article to analyse the multitude of bodies regulating in the field of communications on the regional and global levels, or to discuss their documents and intricate relationships.11 This article seeks rather to explore the relationship between the law of the WTO and the European Community regulation as far as it relates to telecommunications services. Such an analysis is needed for (at least) three reasons.

First, because the EC communications law has changed. The 2002 framework for electronic communications networks and services is a novel regulatory model that attempts to respond to the most recent (and prepare for future) technological and market developments in communications. As such, it is crucial to know whether it and its 2007 update still fit harmoniously into the global regulatory model provided by the WTO.

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9 Walden, as note 1 above, p. 347.
Second, and in more concrete terms, because WTO law is binding upon the European Communities and their Member States as signatories to the WTO Agreements, it is necessary to explore whether the evolution of the EC communications rules may lead to a breach of the obligations of the Communities.

Third, and finally, considering the staggering speed of the development of communications and the far-reaching processes of digitization and convergence, it is interesting (and important) to contemplate the design of an adequate multi-layered regulatory model for the communications sector. As a contribution to this wide-ranging discussion (which cannot be dealt with exhaustively here), this article provides some thoughts on the adequacy of the current WTO communications rules by comparing them to the more advanced model of EC electronic communications law. Taking into account that the WTO is emerging as the most significant international forum, these thoughts may be valuable for the future shaping of the WTO and EC communications regimes, and generally, for the future development of the communications industry as essentially transnational.

This article addresses the above issues in four parts. The first part provides an overview of the WTO instruments relevant to telecommunications services. The second briefly explores the effects of WTO law on the EC legal order and the EC commitments for telecommunications services. The third part analyses the relationship between the communications rules of the European Community and their WTO counterparts and seeks to establish whether they form a harmonious or rather a discordant pair. Section IV provides the conclusions and a few speculations on the future.

II. The World Trade Organization

The WTO was established in April 1994 as part of the final act embodying the results of the Uruguay Round of multilateral trade negotiations and building upon the General Agreement on Tariffs and Trade (GATT) 1947. It became operational on 1 January 1995 and over the past ten years has grown to be the most influential organization on a global level, regulating not only trade in goods, services and trade-

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12 On the legal effect of WTO law upon the EC legal order, see section III.A. below.
15 General Agreement on Tariffs and Trade of 30 October 1947, annexed to the Final Act of the United Nations Conference on Trade and Employment, Havana 1947 (entered into force 1 January 1948; subsequently rectified, amended, or modified by the terms of legal instruments, which had entered into force before the date of entry into force of the WTO Agreement).
related aspects of intellectual property rights but also broader issues. As stated in Article III of the founding Marrakesh Agreement, the functions of the WTO are, *inter alia*: (i) to facilitate the implementation, administration and operation of the adopted multilateral trade agreements; (ii) to provide a forum for negotiations among its Members and a framework for the implementation of the results of such negotiations; and (iii) to administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). This dispute settlement mechanism, with the authority to enforce the obligations accepted by the Members under the covered agreements, is a unique feature of the WTO and one that has contributed substantially to its positioning at the forefront of intergovernmental organizations.

The law of the WTO is contained in multiple agreements (attached as annexes to the WTO Agreement) that can be structured into three main pillars, namely: the GATT, the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). While the GATT applies to telecommunications equipment and the TRIPs Agreement to certain aspects of communications activities related to intellectual property, the WTO instrument most immediately relevant for communications is the GATS.

A. GENERAL AGREEMENT ON TRADE IN SERVICES

The General Agreement on Trade in Services (GATS), similarly to the GATT, is aimed at protecting equality of competitive opportunities for companies in domestic markets, regardless of their origin and the origin of their services, and at facilitating the...
progressive liberalization of these markets. The approach and structure of the GATS, however, differ from those of the GATT, since the object of regulation, that is services, is essentially different from goods.

Part II of the GATS comprises a number of fundamental “General Obligations and Disciplines” which apply to all “measures by Members which affect trade in services”,24 with the notable exception of those “supplied in the exercise of governmental authority”.25 The core of these general obligations is the most-favoured-nation (MFN) obligation, formulated in Article II:1 GATS. Pursuant to the latter, each Member is obliged to “accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like service and service suppliers of any other country”. As established through the case-law, the MFN treatment implies a prohibition of de facto, as well as de jure discrimination between like foreign services and service suppliers.26

In contrast to the GATT,27 however, where the MFN principle bears no individual exemptions, the GATS has a more flexible approach.28 Thereby, each Member may specify that the MFN would not be applicable to certain measures, provided that those are listed in and meet the conditions of the Annex on Article II Exemptions (the so-called “opt-out” approach).29 The application of this opting-out was nonetheless limited and exemptions were allowed only until the date of entry into force of the WTO Agreement, that is, 1 January 1995.30 They were further subject to review after a five-year period31 and in principle, should not have exceeded a total duration of ten years.32

25 See Article I:3(b) GATS. The following para. (c) clarifies that, “a service supplied in the exercise of governmental authority” means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers”. For an interpretation, see Markus Krajewski, Public Services and Trade Liberalization: Mapping the Legal Framework, 6 Journal of International Economic Law 2 (2003), 347 et seq.; Eric H. Leroux, What Is a “Service Supplied in the Exercise of Governmental Authority” Under Article I:3(b) and (c) of the General Agreement on Trade in Services, 40 Journal of World Trade 3 (June 2006), 345±385.
26 See Appellate Body Report, EC—Bananas, as note 24 above, para. 234. For further analysis, see Cottier and Oesch, as note 16 above, pp. 835 et seq. and 829 et seq.
27 Cottier and Oesch, as note 16 above, pp. 346 et seq.
29 See Article II:2 GATS. Exemptions concerning telecommunications services (mostly on accounting rates) have been made, inter alia, by Argentina (Doc. GATS EL/4); Bangladesh (Doc. GATS EL/8); Brazil (Doc. GATS EL/13(Suppl. 1); India (Doc. GATS EL/42(Suppl. 1); Pakistan (Doc. GATS EL/67(Suppl. 1); Turkey (Doc. GATS EL/79) and the United States (Doc. GATS EL/90(Suppl. 2). The EC has listed none.
30 Members can now only exempt a measure from the application of the MFN treatment under Article II:1 GATS by obtaining a waiver pursuant to Article IX:3 of the WTO Agreement (see Annex on Article Exemptions, at para. 2).
31 Annex on Article II Exemptions, at paras 3±4.
32 Annex on Article II Exemptions, at para. 6. All exemptions granted should have thus ended in January 2005. This did not however happen. In fact, many Members have explicitly stated in their exemption lists that particular exemptions would last more than ten years.
The general GATS obligations, as formulated in Part II, are supplemented by specific commitments accepted by individual Members in the so-called “Schedules of Specific Commitments” appended to the GATS. These schedules show the positive commitments (“opting-in”) of a Member with regard to national treatment and market access according to the modes of supply identified in Article I GATS, and the conditions, terms and limitations of these commitments. In practice, the schedules represent a codification of the conditions in a specific national market upon which a foreign service provider can rely in addition to the general obligations. They also constitute the basis for further negotiations. A Member can modify or withdraw a commitment only after a three-year period from the date it entered into force and as a modifying Member has to bear the consequences of the modification undertaken.

Members may further negotiate additional commitments with respect to measures affecting trade in services not subject to scheduling under Article XVI GATS (market access) or Article XVII GATS (national treatment), regarding, for instance, qualifications, standards or licensing matters. Such specific commitments are

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33 It is beyond the scope of the present paper to discuss all GATS provisions that have an influence on telecommunications services, such as domestic regulation, government procurement and public monopolies. For comprehensive analyses, see Michael H. Ryan, Trade in Telecommunications Services: A Guide to the GATS, 3 Computer and Telecommunications Law Review (1997), 95–104; Mark Clough, Trade and Telecommunications (London: Cameron May, 2002), pp. 31 et seq.; David Luff, “Current International Trade Rules Relevant to Telecommunications Services”, in Damien Geradin and David Luff (eds), The WTO and Global Convergence in Telecommunications and Audio-Visual Services (Cambridge: Cambridge University Press, 2004), pp. 34–42; Marco C.E.J. Bronckers and Pierre Larouche, “The WTO Regime for Telecommunications Services”, in Marco C.E.J. Bronckers and Gary N. Horlick (eds), WTO Jurisprudence and Policy: Practitioners’ Perspectives (London: Cameron May, 2004), pp. 553 et seq.

34 The “national treatment” obligation, articulated in Article XVII GATS, prescribes that, “each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of service, treatment no less favourable than that it accords to its own like services and service suppliers”. Although only a specific commitment under GATS, the meaning of “national treatment” remains the same as under GATT. See Appellate Body Report, EC—Bananas, as note 24 above, at para. 241.

35 “Market access” is articulated in Article XVI GATS. Pursuant to the latter, the commitments for access made by a Member are to be applied on an MFN basis subject to the terms, limitations and conditions specified in its Schedule. In addition, in sectors where a Member has committed itself, it must refrain from adopting or maintaining (unless otherwise specified in the Schedule) six particular types of measures. These are defined in litera (a) through (f) of Article XVI: (a) limitations on the number of service suppliers; (b) limitations on the total value of service transactions or assets; (c) limitations on the total number of service operations or on the total quantity of service output; (d) limitations on the total number of natural persons that may be employed; (e) measures which restrict or require specific types of legal entity or joint venture; and (f) limitations on foreign capital participation.

36 The modes of supply of a service are: (a) from a territory of one Member into the territory of any other Member (cross-border mode); (b) in the territory of one Member to the service consumer of any other Member (consumption abroad mode); (c) by a service supplier of one Member through commercial presence in the territory of any other Member (commercial presence mode); and (d) by a service supplier in one Member, through presence of natural persons of a Member in the territory of any other Member (presence of natural persons mode).

37 Pursuant to Article XX GATS, each schedule specifies: (i) terms, limitations and conditions of market access; (ii) conditions and qualifications on national treatment; (iii) undertakings relating to additional commitments; (iv) where appropriate, the time-frame for implementation of such commitments; and (v) the date of entry into force of such commitments.

38 Article XIX:4 GATS.

39 Article XXI GATS.

40 See note 37 above.

41 Article XVIII GATS.
notably those made under the Reference Paper on basic telecommunications services that is examined below.\footnote{See section II.C. below.}

A characteristic of all of the provisions outlined above is that they apply across the board to all service sectors\footnote{See above the remarks at the beginning of the current section. See also Cottier and Oesch, as note 16 above, p. 821.} and by their nature are not specifically targeted at telecommunications (although the commitments made by a Member in its schedule are essentially sector-based). Within the law of the WTO, there are, however, also some specific instruments on telecommunications that, building upon the principles of GATS, create a fairly comprehensive system of international communications rules. They allowed for more far-reaching and finely tuned commitments, which, on the one hand, proves the importance of telecommunications markets and on the other hand, supports our initial thesis of the need for enhanced cooperation in telecommunications.

Before examining the telecommunications specific WTO Agreements, a brief note of clarification is needed. This clarification concerns the categorization of telecommunications services into basic or value-added, which runs through all communications related provisions of the WTO and defined (and still does) the process of negotiation and committing in the field of telecommunications services.

The distinction between basic and value-added telecommunications services does not originate in the WTO negotiations themselves but rather from US telecommunications law. It can be traced back to the so-called Computer Inquiries,\footnote{Second Computer Inquiry, Docket 20828, Final Decision, FCC 80-189, 77 FCC 2d 384, 7 April 1980; Third Computer Inquiry, CC Docket 85-229, Report and Order, FCC 86-252, 104 FCC 2d 958, 15 May 1986.} when the division was instrumental in delineating the jurisdiction of the Federal Communications Commission (FCC).\footnote{See Bronckers and Larouche, as note 10 above, at pp. 16–18.} Therein, basic services were defined as “… the offering of transmission capacity for the movement of information”, while enhanced (or value-added) services were identified as “any offering over the telecommunications network which is more than a basic transmission service”.\footnote{The above definitions can be found at paras 93 and 97, respectively, of the Second Computer Inquiry (as note 44 above, emphasis added), as referred to by Bronckers and Larouche, as note 10 above, p. 17.}

The Draft Model Schedule,\footnote{Formulated by negotiators during 1993, prior to the conclusion of the Uruguay Round, the Draft Model Schedule was included in a formal document as an attachment to Negotiations on Basic Telecommunications, Note by the Secretariat, TS/NGBT/W/1, 2 May 1994. It was later slightly revised and reissued as Draft Model Schedule of Commitments on Basic Telecommunications, Informal Note by the Secretariat, Job, No 1311, 12 April 1995. Of significance to the negotiations on basic telecommunications were also two Notes by the Chairman of the Group on Basic Telecommunications: Notes for Scheduling Basic Telecom Services Commitments (S/GBT/W/2/Rev.1, 16 January 1997) and Market Access Limitations on Spectrum Availability (S/GBT/W/3, 3 February 1997), both attached to the final Report of the Group on Basic Telecommunications (S/GBT/4, 15 February 1997).} used for negotiating in telecommunications, built upon the W/120 services sectoral classification model,\footnote{See WTO, Services Sectoral Classification List, WTO Doc.MTN.GNS/W/120, 10 July 1991.} which was the basis for the GATS negotiations and derived from the United Nations Central Product Classification (CPC).\footnote{See UN Provisional Central Product Classification (CPC), UN Statistical Papers, Series M, No 77, Ver.1.1, E.91.XVII.7, 1991.} Without providing explicit corresponding definitions, the
Draft Model Schedule simply imported by reference the CPC classification and following the US distinction mechanism, listed as basic telecommunications services: voice telephone; packet-switched data transmission; circuit-switched data transmission; telex; telegraph; facsimile and private leased circuit services and other (litera (a) to (g) and (o) of W/120). The remaining telecommunications services of the W/120 sectoral classification list were framed as value-added services and encompass electronic mail; voice mail; online information and data base retrieval; electronic data interchange (EDI); enhanced/value-added facsimile services (including store and forward, store and retrieve); code and protocol conversion; on-line information and/or data processing (including transaction processing) (litera (h) to (n) of W/120).

Table 1 provides a visualization of the dichotomy between basic and value-added telecommunications services.

<table>
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<tr>
<th>Telecommunication Services</th>
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<tr>
<td><strong>Basic</strong></td>
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<tr>
<td>a. Voice telephone services</td>
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<td>b. Packet-switched data transmission services</td>
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<td>c. Circuit-switched data transmission services</td>
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<td>d. Telex services</td>
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<td>e. Telegraph services</td>
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<td>f. Facsimile services</td>
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<tr>
<td>g. Private leased circuit services</td>
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<tr>
<td><strong>Value-Added</strong></td>
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<tr>
<td>h. Electronic mail</td>
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<tr>
<td>i. Voice mail</td>
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<tr>
<td>j. Online information and data base retrieval</td>
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<tr>
<td>k. Electronic data interchange (EDI)</td>
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<tr>
<td>l. Enhanced/value-added facsimile services, incl. store and forward, store and retrieve</td>
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<tr>
<td>m. Code and protocol conversion</td>
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<tr>
<td>n. Online information and/or data processing (incl. transaction processing)</td>
</tr>
<tr>
<td><strong>Other</strong></td>
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<tr>
<td>o. Other (analogue/digital cellular/mobile telephone services; mobile data services; paging; personal communications services; satellite-based mobile services (incl. e.g. telephony, data, paging and/or PCS); fixed satellite services; VSAT services; gateway earthstation services; teleconferencing; video transport; trunked radio system services.</td>
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Source: WTO, Services Sectoral Classification List, MTN.GNS/W/120, 10 July 1991.
Having clarified this basic WTO terminology, we can now turn to the first telecommunications specific WTO document, which was initially intended to regulate only value-added telecommunications services. This instrument is the *Annex on Telecommunications*, adopted during the Uruguay Round and attached as an integral part of GATS 1994.

B. **THE ANNEX ON TELECOMMUNICATIONS**

1. **Scope of the Annex on Telecommunications**

"Recognizing the specificities of the telecommunications services sector and, in particular, its dual role as a distinct sector of economic activity and as the underlying transport means for other economic activities", the Annex on Telecommunications defines as its objective: to elaborate "upon the provisions of the Agreement [GATS] with respect to measures *affecting access to and use of public telecommunications transport networks and services*". The Annex thus applies to all measures that affect access to and use of public telecommunications transport networks and services, as defined in its Section 3, while excluding explicitly "measures affecting the cable or broadcast distribution of radio or television programming".

It is important to stress at the outset that the Annex on Telecommunications does *not* in itself contain or lead to any market access or national treatment obligations for telecommunications services beyond the commitments that the Members had already made in their respective schedules. It comes into effect only once a Member has offered a specific commitment in a given service sector. As made clear by Section 2(c)(i), "[n]othing in this Annex shall be construed to require a Member to establish, construct, acquire, lease, operate, or supply telecommunications transport networks or services, *other than as provided for in its Schedule*". Thus, as Bronckers and Larouche point out, the Annex on Telecommunications is in a sense "comparable to the general GATS obligations which apply in addition to the specific commitments made in schedules" and serves "... as a 'bonus' to the specific commitment in a given sector".

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54 GATS, Annex on Telecommunications, at Section 1.
55 Ibid. (emphasis added). See also Section 2(a) of the Annex.
56 Section 3(a) defines "telecommunications" as "the transmission and reception of signals by any electromagnetic means". The subsequent paragraph identifies "public telecommunications transport service" as "any telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally... [including] inter alia telegraph, telephone, telex, and data transmission typically involving the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information". "Public telecommunications transport network" is then defined as "the public telecommunications infrastructure which permits telecommunications between and among defined network termination points".
57 Section 2(b) of the Annex on Telecommunications.
59 Bronckers and Larouche, as note 33 above, at p. 527.
60 Ibid., at p. 528.
With the benefit of hindsight, one could say that in practice the Annex, despite being an act on telecommunications, concerned mostly liberalized non-telecommunications services (such as banking, insurance or other financial services), which, to perform effectively, required access to and the use of communications networks and services. It also applied to value-added telecommunications services, since it was for these that Members had committed at the time of the adoption of the Annex on Telecommunications in 1994.

Nonetheless, one should not simply conclude upon this basis that the scope of application of the Annex is solely directed at value-based telecommunications services. Indeed, as clarified by the Panel in Mexico—Measures Affecting Telecommunications Services, the scope of the Annex does also include basic telecommunications services, when commitments for these had been made. The Panel stated in this regard that, “[i]t would ... be unreasonable to suppose that the access and use of public telecommunications transport networks and services that is essential to the international supply of basic telecommunications services was not intended to be covered by the Annex”.

2. Contents of the Annex on Telecommunications

The core provision of the Annex on Telecommunications is contained in its Section 5. It ensures that foreign suppliers of services are accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions. In addition to this general rule, Section 5(b) provides for a more specific obligation to ensure access to and use of public telecommunications transport networks and services by allowing foreign suppliers:

(i) to purchase or lease and attach terminal or other equipment, which interfaces with the network and which is necessary to supply a supplier’s services;

(ii) to interconnect private leased or owned circuits with public telecommunications transport networks and services by allowing foreign suppliers:

61 Panel Report, Mexico—Telecommunications Services, as note 50 above.
62 On the scope of application of the Annex on Telecommunications, see Panel Report, Mexico—Telecommunications Services, as note 50 above, in particular at paras 7.273–7.288.
63 Ibid., at para. 7.288.
64 Annex on Telecommunications, at Section 5(a). The Annex on Negotiations on Basic Telecommunications clarifies that, “[t]he term ‘non-discriminatory’ is understood to refer to most-favoured-nation and national treatment as defined in the Agreement, as well as to reflect sector-specific usage of the term to mean ‘terms and conditions no less favourable than those accorded to any other user of like public telecommunications transport networks or services under like circumstances’.” See also Panel Report, Mexico—Telecommunications Services, as note 50 above, at para. 7.329 et seq.
65 With regard to “reasonable” terms and conditions, the Panel found in the Telmex Report that, “... rates which exceed cost-based rates to this extent, and whose uniform nature excludes price competition in the relevant market of the telecommunications services bound under Mexico’s Schedule, do not provide access to and use of public telecommunications transport networks and services in Mexico ‘on reasonable ... terms’”. Consequently the Panel found that Mexico had failed to meet its obligations under Section 5(a) of the GATS Annex on Telecommunications by failing to ensure that US service suppliers were accorded access to and use of public telecommunications transport networks and services in Mexico on reasonable terms. See Panel Report, Mexico—Telecommunications Services, as note 50 above, at para. 7.334.
telecommunications transport networks and services or with circuits leased or
owned by another service supplier; and
(iii) to use operating protocols of the service supplier’s choice in the supply of any
service, other than as necessary to ensure the availability of telecommunications transport networks and services to the public generally.

The “access” obligations of Section 5 are however “subordinated to . . . and qualified
by” certain restrictions. The latter are formulated in paragraphs (c) and (f) of Section 5
and can be imposed only if necessary: (i) to safeguard the public service responsibilities
of suppliers of public telecommunications transport networks and services, in particular
their ability to make their networks or services available to the public generally; (ii) to
protect the technical integrity of the public networks; or (iii) to ensure that service
suppliers of any other Member do not supply services unless permitted by the
commitments in the Member’s Schedule.67 The conditions may specifically include:
(i) restrictions on resale or shared use; (ii) requirements to use specified technical
interfaces, including interface protocols, for interconnection with such networks and
services; (iii) requirements, where necessary, for the interoperability of such services;
(iv) type approval of terminal or other equipment; (v) restrictions on interconnection of
private leased or owned circuits; or (vi) notification, registration and licensing.68

3. Interim Observations on the Annex on Telecommunications

Although the Annex on Telecommunications does not of itself create a right to
supply a service where no commitments exist, it substantially facilitates market access
for committed service sectors and thereby “ensures a level playing field for services
suppliers who depend on the access to telecommunications, which could otherwise
turn into a non-tariff barrier to trade”.69

The level of commitments embodied in the Annex is understandable if seen in the
context of the period of its adoption. At the time of the Uruguay talks, only value-
added telecommunications services were provided by private undertakings operating in
a competitive environment and basic telecommunications were still public monopolies
in almost all Member States. A full liberalization of these services was unimaginable.70
Against this background, the Annex was an appropriate tool, which struck “a fragile
balance between the needs of users for fair terms of access and the needs of the

66 Ibid., at para. 7.308 (emphases in the original).
67 Annex on Telecommunications, at Section 5(c).
68 Ibid., at Section 5(f). Pursuant to para. (g), a developing country may impose other conditions “necessary to
strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation
in international trade in telecommunications services”. See also Panel Report, Mexico—Telecommunications Services, as
note 50 above, at para. 7.388.
69 Mathew, as note 4 above, at p. 77.
70 See Kelly Cameron, “Telecommunications and Audio-Visual Services in the Context of the WTO:
Today and Tomorrow”, in Damien Geradin and David Luff (eds), The WTO and Global Convergence in
regulators and public telecommunications operators to maintain a system that works and that meets public service objectives”.71

Now that a significant number of Members have included basic telecommunications in their schedules of commitments and after the broad interpretation of the Section 5 obligations by the Telmex Report, the role of the Annex of Telecommunications may be enhanced rather than diminished.72 Even after the further-reaching commitments made under the Fourth Protocol and the Reference Paper (discussed below), the Annex on Telecommunications remains relevant where: (i) a WTO Member has made no commitments under the Fourth Protocol; (ii) a Member has made commitments under the Fourth Protocol but has not committed to the principles of the Reference Paper; (iii) for issues falling outside the scope of the Reference Paper; (iv) when a Member has committed in a service sector other than telecommunications, for foreign service suppliers in that sector when dealing with the incumbent telecommunications operator; and finally, as originally designed; (v) for value-added telecommunications services. Since the Annex on Telecommunications is applicable to all Members (in contrast to the Fourth Protocol and the Reference Paper), it remains a useful instrument for guaranteeing access to foreign markets.73

C. THE FOURTH PROTOCOL

The Annex on Telecommunications was not the end of the negotiations in the field but provided an interim solution74 until the core issues of basic telecommunications could be adequately addressed. At the conclusion of the Uruguay Round, the Members adopted a decision to enter into voluntary negotiations on the liberalization of trade for the provision of basic telecommunications services.75 Pending the conclusion of these negotiations, Members were granted an MFN exemption for measures affecting the provision of such basic telecommunications.76

The negotiations took place under the auspices of the Negotiating Group on Basic Telecommunications (NGBT) and were scheduled to conclude no later than 30 April

72 Cottier and Oesch, as note 16 above, at p. 880.
73 Confirming the above, the Panel noted in Mexico—Telecommunications Services that, “. . . although the obligations in the Annex and the Reference Paper may overlap in certain respects, there are clear differences between the two instruments. First, the Annex sets out general obligations for access to and use of public telecommunications transport networks and services, applicable to all Members and all sectors in which specific commitments have been undertaken. Reference Paper obligations, as additional commitments, are applicable only by Members that have included them in their schedules, and they apply only to basic telecommunications. Second, while the Annex applies to all operators of public telecommunications transport networks and services within a Member, regardless of their competitive situation, the Reference Paper obligations on interconnection apply only with respect to ‘major suppliers’. Third, the Annex broadly deals with ‘access to and use of public telecommunications transport networks and services’, while the Reference Paper focuses on specific ‘competitive safeguards’ and on ‘interconnection’”. See WTO Panel Report, Mexico—Telecommunications Services, as note 50 above, at para. 7.331 (emphases in the original).
74 Cameron defines it as a “status quo agreement”. See Cameron, as note 70 above, at p. 21.
75 See GATS, Decision on Negotiations on Basic Telecommunications, 15 April 1994.
76 See GATS, Annex on Negotiations on Basic Telecommunications.
1996. By then, however, the talks had resulted in offers from only 48 governments and some Members (in particular the United States) saw the packages as not yet sufficient for a successful completion of the talks. At the meeting in April 1996, the then WTO Director-General Renato Ruggiero, despite the lack of finalization of the negotiations, insisted on preserving the achieved so far. Consequently, the results of the talks were attached to a Protocol (the Fourth Protocol to the General Agreement on Trade in Services) and a one-month period was granted (15 January to 15 February 1997) during which Members could re-examine their positions on market access and national treatment, and modify their attachments to the protocol. A new body—the Group on Basic Telecommunications (GBT)—was formed for implementing this extension of the negotiations. The bargaining continued and the talks were eventually finalized on 15 February 1997.

The agreement reached thereby is generally known as the Agreement on Basic Telecommunications. It consists of a series of schedules of specific commitments concerning basic telecommunications. Such commitments were submitted at the time by 69 Members, the 15 EC Member States submitting one schedule. The commitments supplemented or modified the existing Members’ submissions and were annexed to the existing schedules through the above-mentioned Fourth Protocol, which forms an integral part of GATS. The Fourth Protocol entered into force on

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77 The main opposition came understandably from the United States, which was already substantially ahead in the process of liberalizing its telecommunications markets and insisted that the other WTO Members commit to opening their markets. The US justified its refusal to conclude an agreement with the claim that a critical mass of market access commitments had not been reached, in particular from developing countries. See Bronckers and Larouche, as note 33 above, at p. 523.


79 See Decision on Commitments in Basic Telecommunications, S/L/19, 30 April 1996.

80 The European Commission authorized by the Council submitted to the WTO the final schedule of commitments on behalf of the European Community and its Member States on 14 February 1997.

81 The newly formed Group on Basic Telecommunications agreed to modify the rules on participation in meetings (in comparison to the rules of NGBT), so that all WTO Members had a full voice in its activities (governments under accession participated upon request as observers). The negotiations also received important political support at the WTO Ministerial Meeting in Singapore, December 1996. See WTO Ministerial Declaration, Singapore 1996, WT/MIN(96)/DEC. In the end, 32 of the 34 offers of April 1996 were revised, and 21 new offers were submitted. For an overview of the schedules of specific commitments attached to the Fourth Protocol, see Bronckers and Larouche, as note 10 above, at pp. 21–22.

82 Supplementary to the Schedules, the Chairman of the Group on Basic Telecommunications issued two explanatory notes clarifying certain issues applicable to the scheduling of commitments. See Note by the Chairman of the GBT, Notes for Scheduling Basic Telecom Services Commitments and Note by the Chairman of the GBT, Market Access Limitations on Spectrum Availability, both as note 47 above.

83 Since the conclusion of the Fourth Protocol, five of the initial signatories have improved their commitments (Guatemala, Morocco, Pakistan, Switzerland and Venezuela). Fifteen new WTO Members (Albania, Armenia, China, Croatia, Estonia, Georgia, Jordan, the Kyrgyz Republic, Latvia, Lithuania, Macedonia, Moldova, Nepal, Oman and Taiwan) made commitments on basic communications in the course of their initial schedules of specific commitments. For a qualitative analysis, see Bronckers and Larouche, as note 33 above, at pp. 530 et seq.

84 Council Decision 97/838/EC concerning the conclusion on behalf of the European Community of the results of the WTO negotiations on basic telecommunications services, as note 13 above.

85 Article XX:3 GATS.
5 February 1998, although its entry was initially planned for 1 January 1998—the same date as the entry into force of the EC Full Competition Directive.

1. **The Reference Paper**

A major breakthrough of the Fourth Protocol was the adoption of the now almost “legendary” Reference Paper as an additional commitment incorporated into the Members’ schedules. It is indeed, as we shall see below, a special instrument within the WTO legal structure and of particular importance to the global telecommunications regime.

2. **Scope of the Reference Paper**

The scope of the Reference Paper is explicitly limited to basic telecommunications services, as provided in the Paper itself. This is a limitation that has been confirmed by the *Mexico—Telecommunications Services* Panel Report, although the rationale for this is somewhat unclear and not necessarily logical, since value-added telecommunications had already been liberalized at the time of the adoption of the Reference Paper. Before beginning our analysis of the Reference Paper and in the context of defining its scope, it is important to recall a point made above, namely that the Paper falls under the category of “additional commitments”, which Members can make pursuant to Article XVIII GATS. As such, first, one should bear in mind that the Reference Paper attached to each Member’s Schedule of Commitments, although

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86 In a number of schedules, the Member’s commitments for particular services are to be “phased in”. For these, while the schedules entered formally into force on the date of the Fourth Protocol as a whole, the actual implementation date for such commitments was that specified in the schedule.


89 Of the parties to the Fourth Protocol, only Ecuador and Tunisia entered no additional commitments under the Reference Paper. Bolivia, India, Malaysia, Morocco, Pakistan, the Philippines, Turkey and Venezuela adopted only parts of it. Bangladesh, Brazil, Mauritius and Thailand have agreed to follow the Reference Paper at a later date. See note 84 above.

90 See Reference Paper, at “Scope”.

generally alike, may in fact differ from country to country and should therefore be considered individually. Second, as an additional commitment, the Reference Paper could neither lessen nor derogate the general GATS principles. Neither could any possible interpretation violate them.

3. Contents of the Reference Paper

The contents of the Reference Paper are best described as a mixture of competition law and sector specific rules. In terms of competition rules, the Reference Paper defines two key notions, namely those of major supplier and of essential facilities and prescribes certain competitive safeguards as formulated in Section 1. In terms of sectoral regulation, its most significant provision is that regarding interconnection in Section 2. We briefly consider the nature and impact of these concepts and the rest of the rules of the Reference Paper in the following Sections.

(a) Definitions

Pursuant to the Reference Paper, a “major supplier” is defined as “a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of its position in the market”. The Reference Paper defines “essential facilities” as “facilities of a public telecommunications transport network or service that: (a) are exclusively or predominantly provided by a single or a limited number of suppliers; and (b) cannot feasibly be economically or technically substituted in order to provide a service.”

The Panel Report in Mexico—Telecommunications Services provided significant (albeit equivocal) guidance on the concept of “major supplier.” In its considerations as to whether the Mexican incumbent Teléfonos de Mexico DA de CV (Telmex) constitutes a “major supplier”, the Panel applied a three-step test and examined: (i) the “relevant market”; (ii) whether Telmex had “the ability to materially affect the terms of participation” in that market and finally, (iii) whether this ability resulted from “control over essential facilities” or “use of its position in the market”. As a first step, the Panel identified the relevant market for basic telecommunications services on the
basis of the demand substitution criterion and found (without much ado) that the
"relevant market for telecommunications services' for the services at issue—voice, switched data and fax—is the termination of these services in Mexico".99

As to the second point, the Panel considered the arguments of the United States
that the notion of "can materially affect the terms of participation (having regard to
price and supply)" corresponds to the concept of "market power", as used by the US
competition authorities and its Mexican equivalent of "substantial power". The United
States further submitted that in determining whether a firm has market power, the US
antitrust authorities normally examined factors such as market share, barriers to entry,
capacities of firms in the market, availability of substitutes and opportunities for
coordinated behaviour among firms.100 The Panel did not however follow any of these
lines of analysis and based its conclusion simply upon the text of Mexico's International
Long Distance (ILD) Rules granting Telmex the sole right to negotiate settlement rates.
The Panel found consequently that,

"... since Telmex is legally required to negotiate settlement rates for the entire market for
termination of the services at issue from the United States, ... it has patently met the definitional
requirement in Mexico's Reference Paper that it have 'the ability to materially affect the terms of
participation', particularly 'having regard to price'".101

Having established this, the Panel was also able to reach a conclusion on the third
element of the "major supplier" test (point (iii) above), since Telmex's ability to impose
uniform settlement rates on competitors was the very "use" of its special "position in
the market", granted to it under the ILD Rules.102 Consequently, the Panel found that
Telmex was a "major supplier", "with respect to termination of the services at issue, in
that it has the ability to materially affect the price of termination of calls from the
United States into Mexico, as a result of its special position in the market, which allows
it to set a uniform price applying to all its competitors on terminating calls from the
United States".103

Interestingly, in its further analysis under Section 1 of the Reference Paper, the
Panel, without much deliberation, applied a peculiar syllogism and stated that, "[t]he
practices at issue involve not only Telmex, but all the other Mexican suppliers who are
gateway operators. Since we have already found that Telmex alone is a 'major supplier'
within the meaning of Section 1, and that the practices at issue involve acts of all the
Mexican suppliers who are gateway operators, we can conclude also that Telmex and all
the other Mexican gateway operators are together a 'major supplier'".104 Hence, the
Panel found the existence of a cartel and considered it banned under the Reference
Paper.

99 Ibid., at para. 7.152.
100 Ibid., at para. 7.153, referring to the first submission of the United States, at paras 79–81.
101 Ibid., at para. 7.155 (emphasis in the original).
102 Ibid., at para. 7.158.
103 Ibid., at para. 7.159.
104 Ibid., at para. 7.227 (emphasis in the original).
The Panel had unfortunately no occasion for elaborating upon the second test for finding a “major supplier”, where the ability to materially affect the terms of participation in the relevant market stems from control over essential facilities. In the context of examining the Reference Paper, it is however noteworthy that the Paper sees the control over facilities as “a problem analytically separate from that of large market positions”.\(^\text{105}\)

(b) **Section 1**

The concept of “major supplier”, as identified above, is a key trigger for the obligations enshrined in the Reference Paper. Pursuant to Section 1 thereof, such a supplier must bear certain appropriate measures for the purpose of preventing anti-competitive practices, whether current or future. Such anti-competitive practices include in particular: (i) cross-subsidization; (ii) use of information obtained from competitors with anti-competitive results; and (iii) “not making available to other service suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services”.\(^\text{106}\)

The Telmex Panel pointed out that this list is by no means exhaustive and the examples given do not represent all anti-competitive practices within the scope of the provision. Turning to *The Shorter Oxford English Dictionary* and the *Merriam-Webster Dictionary* for guidance, the Panel concluded that, “the term ‘anti-competitive practices’ is broad in scope, suggesting actions that lessen rivalry or competition in the market”.\(^\text{107}\) The Panel went on to state that the given “examples do however illustrate certain practices that were considered to be particularly relevant in the telecommunications sector. The first example—on cross-subsidization—indicates that ‘anti-competitive practices’ may also include pricing actions by a major supplier. All three examples show that ‘anti-competitive practices’ may also include action by a major supplier without collusion or agreement with other suppliers. Cross-subsidization, misuse of competitor information, and withholding of relevant technical and commercial information are all practices which a major supplier can, and might normally, undertake on its own”.\(^\text{108}\) It was further established that the concept of “anti-competitive practices” also encompasses horizontal coordination, as examined in the light of the definition of “major supplier” and Section 1.1 of the

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\(^{105}\) Bronckers and Larouche, as note 33 above, at p. 536.


\(^{107}\) Ibid., at para. 7.230.

\(^{108}\) Ibid., at para. 7.232 (emphases in the original).
Reference Paper. Practices required under a Member’s law could equally qualify as “anti-competitive practices.”

The concept of “appropriate measures”, which the major supplier(s) should bear are not elaborated upon in the Reference Paper. It provides no guidance either as to exactly what these types of measure might be, or as to their appropriateness. In the Telmex Report, the Panel had limited opportunity to deliberate upon this term and its contents, since Mexico’s measure was found in itself to legally require the anti-competitive conduct. The Panel did nonetheless state that the word “appropriate” in its general dictionary sense, should be understood as “specially suitable, proper” and in that sense, pointed out that “appropriate measures” are those that are suitable for achieving their purpose—in this case that of ‘preventing a major supplier from engaging in or continuing anti-competitive practices’. Section 1 thus allows for a degree of flexibility as to the precise content of the “appropriate measures” and this may include rules of antitrust, as well as of a sector specific nature.

(c) Section 2

Section 2 of the Reference Paper imposes an important obligation on major suppliers of public telecommunications transport networks and services to enable interconnection with their networks and services “at any technically feasible point in the network”. Such interconnection should be provided:

(i) under non-discriminatory terms, conditions and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;
(ii) in a timely fashion, on terms, conditions and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled; and

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109 The Panel based its wider interpretation on the Members’ competition legislation, on some international instruments addressing competition policy, such as Article 46 of the 1948 Havana Charter for an International Trade Organization and the OECD Council Recommendation Concerning Effective Action Against Hard Core Cartels (C[M][98][7]/PROV). It also made reference to the work of the WTO Working Group on the Interaction between Trade and Competition Policy (see Report [2002] of the Working Group on the Interaction between Trade and Competition Policy to the General Council [WT/WGTCP/6] and Report [2003], [WT/ WGTCP/7]). See Panel Report, Mexico—Telecommunications Services, as note 50 above, at paras 7.234-7.238. It is important to note that the aforementioned Havana Charter never in fact came into effect.

110 Panel Report, Mexico—Telecommunications Services, as note 50 above, at paras 7.239-7.245. In their submissions as a third party to the latter case, the European Communities expressed a different position. They pointed out that the fixing of a uniform price cannot be an anti-competitive practice since uniform prices were required by law and that if Mexico chose not to allow competition between telecommunications on a certain matter, there was no scope for anti-competitive practices relating to that matter, since it is not possible to restrict competition where competition is not allowed. See European Communities’ third party submission, in particular at paras 49 and 53.

111 Panel Report, Mexico—Telecommunications Services, as note 50 above, at paras 7.265-7.269. See also note 110 above.

112 ibid., at para. 7.266. See also note 110 above.


114 Id.

115 ibid., at para. 7.267.
(iii) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

The Panel had the opportunity to examine in detail the terms “cost-oriented”, “reasonable” and “having regard to economic feasibility”, which were contentious in the Telmex dispute.\textsuperscript{116} It found notably that, “the increasing and wide-spread usage of incremental cost methodologies among WTO Members supports the interpretation of the term ‘cost-oriented’ as meaning the costs incurred in supplying the service, and that the use of long term incremental cost methodologies, such as those required in Mexican law, is consistent with this meaning”.\textsuperscript{117} It further clarified that, the

\ldots qualification of “cost-oriented rates” by the word “reasonable” would not \ldots permit costs to be included in the rate that were not incurred in the supply of the interconnection service. Thus, contrary to Mexico’s position, the general state of the telecommunications industry, the coverage and quality of the network, and whether rates are established under an accounting rate regime, are not relevant to determining a proper cost-oriented rate.\textsuperscript{118}

Ultimately, “having regard to economic feasibility” was interpreted in the sense that, “the major supplier is entitled to rates that allow it to undertake interconnection on an ‘economic’ basis, that is, to make a reasonable rate of return”.\textsuperscript{119}

Finally with regard to interconnection, but in terms of more general policy prescriptions, the Reference Paper obliges the committed Members to make the interconnection procedures publicly available and the interconnection agreements subject to transparency requirements, so that the “major supplier will make available either its interconnection agreements or a reference interconnection offer”.\textsuperscript{120} Service providers must also have (at any time or after a reasonable period of time which has been made publicly known) recourse to an independent domestic body to resolve any disputes that may arise in respect to interconnection.\textsuperscript{121}

(d) Other provisions

The other four provisions (Sections 3–6) of the Reference Paper address universal service, licensing, regulators’ independence and scarce resources. They apply not only to undertakings falling under the category of “major supplier” but encompass some basic

\textsuperscript{116} Ibid., in particular at paras 7.160 et seq.
\textsuperscript{117} Ibid., at para. 7.177.
\textsuperscript{118} Ibid., at para. 7.183.
\textsuperscript{119} Ibid., at para. 7.184. This explanation was also supported by the negotiating history of the provision, which adapted the language of the EC Interconnection Directive. See Directive 97/33/EC of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), OJ L 199/32, 26 July 1997. Article 7(2) therein provides that, “[c]harges for interconnection shall follow the principles of transparency and cost orientation. The burden of proof that charges are derived from actual costs including a reasonable rate of return on investment shall lie with the organization providing interconnection to its facilities”.
\textsuperscript{120} Reference Paper, at Section 2.4.
\textsuperscript{121} Reference Paper, at Section 2.5.
regulatory principles for telecommunications applicable to all. In respect to universal service, the Paper allows the Members to define the type of universal service obligation they wish to maintain and states that such obligations will not be regarded as anti-competitive per se, provided that they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary. In respect to licensing, where a licence is required, all licensing criteria and the terms and conditions of individual licences must be made publicly available, as well as the reasons for denial of a licence. Further, although the need for, or the form of, a regulatory body in the field of telecommunications is not discussed, the Reference Paper imposes an obligation upon Members to ensure that such regulators are “separate from, and not accountable to, any supplier of basic telecommunications services”. Finally, with regard to allocation and use of scarce resources (including frequencies, numbers and rights of way), any procedure relating to these is to be carried out in “an objective, timely, transparent and non-discriminatory manner”.

4. **Interim Observations on the Reference Paper**

The above discussion suggests that the Reference Paper is a unique legal document. In terms of content, although it is only six Sections long, it represents (together with the Fourth Protocol and the attached schedules of commitments) an immense step forward in the opening of the telecommunications markets and has rendered telecommunications “one of the best-covered service sectors of the GATS”. Furthermore, it ensured that the advantages of the former monopoly operators were not used to the detriment of new entrants during the precarious process of liberalizing telecommunications.

In terms of design, “[i]t is the first to spell out what regulatory measures are considered appropriate” for telecommunications at a global level. Defining “ends” rather than “means”, the legal principles of the Reference Paper could thus be used by the Members as a basic model for further shaping of their respective national regulatory environments.

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122 Reference Paper, at Section 3.
123 Reference Paper, at Section 4.
124 Reference Paper, at Section 5.
125 Reference Paper, at Section 6.
126 According to the US Trade Representative, the 56 countries that committed to the Fourth Protocol and the Reference Paper and permitted foreign ownership or control of all telecommunications services and facilities, account for 97 percent of the total basic telecommunications services revenue of WTO Members. See Annex to the Statement of Ambassador Chaffe Barshetky on Basic Telecom Negotiations, USTR, 15 February 1997, as referred to by Bronckers and Larouche, as note 10 above, at p. 22. For a critique, see Drake and Noam, as note 88 above, at pp. 812–818.
127 Drake and Noam, as note 88 above, at p. 806.
128 See Bronckers and Larouche, as note 10 above, at p. 23. In that sense, the role of the Reference Paper can be compared to that of the Open Network Provision (ONP) framework during the liberalization of EC telecommunications markets, albeit at the international level.
Another particular design feature of the Reference Paper is the inclusion of competition law-like provisions, as discussed above. Although one could argue that there are other provisions in the WTO framework that touch upon antitrust issues, the Reference Paper contains the most “elaborate” rules in this context so far, including core concepts of competition law related to dominance and abuse of market power.

Despite the presence of these antitrust notions, it would be an exaggeration to state that the Reference Paper provides a comprehensive competition law framework for telecommunications networks and services. First, as mentioned above, it is not a purely antitrust act, but rather a mixture of competition provisions and sector specific rules, with a prevalence of the latter. Second, from a competition law perspective, the Reference Paper is incomplete and often vague, since certain aspects of antitrust such as excessive pricing or collusive behaviour are not dealt with. Third, it is not very clear whether the concepts of “major supplier” and “essential facilities” correspond to the strict standard of market power established under EC or US antitrust. If we take, for instance, the concept of “essential facilities”, the two-tier test suggested by the Reference Paper does not match the rather stringent “essentiality” test, as formulated by the case law of the EC Courts or the US Supreme Court, especially after the recent case of *Trinko*. A facility that “cannot feasibly be economically or technically...

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130 See, for instance, Articles 8 and 31(c) and (k) of the TRIPs and Article 9 of the Agreement on Trade-Related Investment Measures (TRIMs). See also Roland Weinrauch, *Competition Law in the WTO* (Vienna and Graz: Neuer wissenschaftlicher Verlag, 2004), pp. 131–150, and Background Note by the Secretariat, *The Fundamental WTO Principles of National Treatment, Most-Favoured-Nation and Transparency*, WT/WGTCP/W/114, 14 April 1999.

131 Bronckers and Larouche, as note 10 above, at p. 43; Holmes, Kempton and McGowan, as note 88 above, at p. 765.


133 For a critique of the Reference Paper, see Drake and Noam, as note 88 above, at pp. 817–818; Bronckers and Larouche, as note 10 above, at pp. 23 et seq.; Fredebeul-Krein and Freytag, as note 88 above, at pp. 628 et seq.; Blouin, as note 88 above, at pp. 140 et seq.; Larouche, as note 132 above, at pp. 342–343; Luff, as note 22 above, at pp. 1067 et seq.; Marsden, as note 88 above, at pp. 228 et seq.; and Geradin and Kerf, as note 88 above, at pp. 146 et seq., who also suggest a model for improvement of the Reference Paper in the direction of more precision, simplicity and flexibility.

134 Marsden, as note 88 above, at p. 231.


136 *Verizon Communications Inc v. Law Offices of Curtis V. Trinko, LLP*, 540 US 682 (2004). The US Supreme Court drew, among others, three important conclusions in *Trinko*: (i) first, it substantially narrowed down the possibilities for granting mandatory access and held that its ruling in *Aspen Skiing* (*Aspen Skiing Co v. Aspen Highlands Skiing Corp*, 472 US 585 (1985)), which is normally identified as the epitome of the essential facilities doctrine, was “at or near the outer boundary of Section 2 liability”. Indeed, it dismissed the EFID itself as “crafted by some lower courts”; (ii) second, the Court argued that mandatory access may conflict with one of the objectives of antitrust by reducing incentives to invest; and (iii) third, it found that if antitrust courts were to grant access to essential products or services, this would force them to act as “central planners”, since they would essentially need to engage in pricing and other regulatory discussions for which they are ill-suited. See Geradin, as note 135 above.
substituted” does imply a lower threshold, although arguably a future Panel or Appellate Body decision could strengthen this test. It could also be pointed out that at the time of the adoption of the Reference Paper, the concept of “major supplier” as a trigger for asymmetric regulation was related, at least in the EC context, to a mechanism of finding significant market power in telecommunications markets, which was equated to a market share of 25 percent.

These shortcomings of the Reference Paper could again (as with the scope of commitments under the Annex on Telecommunications and essentially with every agreement based on negotiations) be understood if seen through the prism of the moment of its adoption. This period, in early 1997, was one of “transition” of both the telecommunications industry and the markets. Few countries had as yet liberalized their domestic telecommunications markets and the historical national monopolists were still dominant if not de jure, at least de facto. The vagueness and the flexibility of the Reference Paper allowed for accommodation of the different regulatory philosophies of the countries involved and for an actual agreement on basic telecommunications to be reached. Despite its shortcomings, the Reference Paper could be seen as a step in the right direction for the development of telecommunications. First, because it provides a proper basis and a flexible mode for further commitments in the field of telecommunications. Second, and perhaps more importantly, because its principles are binding under GATS, they could be tested through the WTO dispute settlement system.

Proof of this is the already mentioned, and so far the only, Panel decision in the field of telecommunications services Mexico—Measures Affecting Telecommunications Services. Therein, the provisions of Reference Paper were widely interpreted and

137 Reference Paper, at Definitions, para. 2.
138 Bronckers and Larouche, as note 33 above, at p. 536.
140 Even in the European Community, which was well ahead in the deregulation of the telecommunications sector, public voice telephony was still not liberalized at the time and the date for the full liberalization was set at 1 January 1998.
141 See Laura B. Sherman, Wildly Enthusiastic about the First Multilateral Agreement on Trade in Telecommunications Services, 51 Federal Communications Law Journal (1999), 73.
concepts, such as “major supplier” and “anti-competitive practices” were given a more specific definition and a clear antitrust connotation.143

It might seem that the Reference Paper could be used as the basis for settling competition law disputes in telecommunications. Perhaps even in the absence of general competition rules within the WTO framework,144 the Paper might provide for a sufficient (if not fully comprehensive) telecommunications regulation, if there were enough Panel and/or Appellate Body decisions to cover and elaborate upon all significant aspects of competition in telecommunications markets.

However, it is important to ask whether such a development would be positive. The above broad interpretation of the text of the Reference Paper could be construed as a violation of Article 3.2 DSU, which states that, “[r]ecommendations and rulings of the DSB [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements”.145 Indeed, the vagueness of the Reference Paper entails a risk of “suboptimal interpretation”146 and may endanger legal certainty and legitimate expectations.147 The Panel Report Mexico—Telecommunications Services is a confirmation of this angst. The approach and the analyses of the Panel were at times rather simplistic and showed a lack of ability to deal with complex competition law issues.148 A reference to dictionaries for interpreting antitrust concepts, such as “anti-competitive practices”,149 is arguably not the appropriate methodology.150 Although the Vienna Convention on the Law of Treaties does prescribe a search of the “ordinary meaning” of the terms, it is to be done “in their context” and in the light of the object and purpose of the treaty at issue.151 Furthermore, the Panel’s interpretation lacked coherence, ranging from a simple verbatim interpretation of the text to a rather broad teleological one (such as notably, the finding of a cartel).

Moreover, the application of competition law in the telecommunications sector is a complex exercise that requires not only an interpretation of the terms used, but also thorough economic analysis.152 The experience both in the EU and in the United

143 See section II.C. above; and Bronckers and Larouche, as note 33 above, at pp. 540 et seq.
144 Fox, as note 142 above.
147 Bronckers and Larouche, as note 33 above, at p. 552.
148 Marsden, as note 142 above, at pp. 4 et seq.
149 Panel Report, Mexico—Telecommunications Services, as note 50 above, in particular at paras 7.229 et seq.
150 Marsden, as note 142 above, at p. 5.
151 Article 31(1) of the Vienna Convention on the Law of the Treaties (8 ILM 679, 1969, entered into force 27 January 1980) states that, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. See Marsden, as note 142 above, at pp. 7–8. See, generally, on the interpretation of WTO law norms, Gabrielle Marcoux, Conflict of Norms and Conflict of Jurisdictions, 35 Journal of World Trade 6 (December 2001), 1081–1131.
152 See, e.g., Pierre A. Buigues and Patrick Rey (eds), The Economics of Antitrust and Regulation in Telecommunications (Cheltenham: Edward Elgar, 2004). See also Burri Nemova, as note 6 above, at ch. 4. For a comprehensive presentation of the economic issues related to the finding of dominance, see Robert O’Donoghue and Jorge Atlan Padilla, The Law and Economics of Article 82 EC (Oxford and Portland, OR: Hart Publishing, 2006).
States shows multiple difficulties related to analysing telecommunications markets, which stem from their intrinsic characteristics as a network-bound, dynamic and converging sector, prone to bottlenecks and leverage of market power.\(^{153}\)

In that sense, although there is room for interpreting and consolidating the Reference Paper, the question is where the limits of this interpretation lie: for instance, can the Reference Paper, as a mixed set of rules, be overstretched to cover situations that are not contained in it, such as notably a cartel ban? The opinions on this differ. Some consider that if the drafters of the Reference Paper had meant to ban cartels, they would certainly have mentioned it,\(^{154}\) whereas others submit that the Panel correctly found price-fixing and market-sharing arrangements to be hard-core violations of competition law within the scope of the Paper.\(^{155}\)

It is, in any case, questionable whether the Panel or the Appellate Body (or any Court\(^{156}\)) are proper fora for resolving intricate telecommunications-specific or antitrust issues. We should bear in mind that, “[t]he primary responsibility to clarify and improve the Reference Paper rests with the WTO membership, at the negotiating table. The same is true for the elaboration of competition law principles. If the WTO membership fails to assume this responsibility, dispute settlement on the basis of the Reference Paper remains a second-best solution to make the necessary progress”.\(^{157}\)

III. THE WTO LAW ON TELECOMMUNICATIONS AND THE EC TELECOMMUNICATIONS LAW

As mentioned at the beginning of this article, the European Communities\(^{158}\) and their Member States are Members of the WTO and signatories to the Agreements

\(^{153}\) See, e.g., the European Commission’s position expressed in its Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ C 165/6, 11 July 2002.

\(^{154}\) Marsden, as note 142 above, at pp. 8–9. See also Kathy Y. Lee, The WTO Dispute Settlement and Anti-Competitive Practices: Lessons from Trade Disputes, University of Oxford Centre for Competition Law and Policy Working Paper (L) 10/05 (2005), at pp. 30 et seq.

\(^{155}\) Bronckers and Larouche, as note 33 above, at p. 540; Fox, as note 142 above.

\(^{156}\) See Trinko, as note 136 above.

\(^{157}\) Bronckers and Larouche, as note 33 above, at p. 552. See, also, Armin von Bogdandy, “Law and Politics in the WTO—Strategies to Cope with a Deficient Relationship”, in Jochen A. Frowein and Rudiger Wollrich (eds), Max Planck Yearbook of United Nations Law, Vol. 5 (Leiden and Boston: Martinus Nijhoff, 2001), pp. 609–674. The question is not straightforward even in the realm of the EC, which constitutes a supranational entity. For an analysis, see Burri Nenova, as note 6 above, at ch. 4.

\(^{158}\) Both the European Communities and all the Member States of the European Union are full Members of the WTO. It is clear from Articles IX, XI and XIV of the WTO Agreement, that it is the European Communities, and not the European Community or the European Union, which is a Member of the WTO. The explanation for this peculiarity can be found in EU constitutional law. The European Communities, and not the European Community, is a WTO Member since at the time of the negotiations it was unclear which of the then three Communities (European Economic Community, European Community for Coal and Steel and Euratom) had the necessary competence to conclude the WTO Agreement. In Opinion 1/94 ([1995] I CMLR 205; [1994] ECR I-5267) the European Court of Justice established that only the European Community needed to be involved in the WTO. However, the EC’s clarification of the legal situation came after the WTO Agreement had been signed. The European Union is not a WTO Member, since in 1994, at the time of the conclusion of the WTO Agreement, it had no competence to conclude international agreements.
adopted within its framework. As such, they are bound by these documents as part of the international legal order. The law of the European Community is accordingly influenced by the law of the WTO. To what extent will be briefly discussed below, since the status of the EC’s commitments is of importance to the EC communications regulatory framework and to our objective of correlating the two regimes.

A. EFFECT(S) OF THE WTO LAW ON THE EC LEGAL ORDER

WTO law neither obliges the Members to impose “direct effect” in their domestic legal system, nor elaborates upon this effect. It is for the domestic law to establish concrete parameters of the relationship between WTO law and domestic law. In the EC context, the final Recital of the Council Decision adopting the WTO Agreements of the Uruguay Round states that, “… by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts”. Despite the clarity of the latter statement, the question of the effect of WTO law on the Community’s legal system is far from straightforward and is, in any case, much disputed.

159 See Council Decision 94/800/EC, as note 13 above. At that time, only 12 countries were Members of the EC, namely: Belgium, Germany, Denmark, Spain, France, the Netherlands, Luxembourg, Ireland, Italy, Portugal, Greece and the United Kingdom. The EC goods and services schedules apply to these countries, whereas there are schedules under their own names for the countries which joined the EU in 1995 (Austria, Finland, Sweden) and for the 10 countries (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic, Slovenia), which joined in May 2004.

160 The term “direct effect” is used here in the sense that a private person may base a claim in the domestic courts (national or EC) against another private party or the State based on the State’s obligations existing under an international Treaty. Other terms used often as synonyms for “direct effect” or with subtle differences are “direct applicability”, “invocability” and/or “self-executing effect”. On the definition of “direct effect”, see, e.g., Helen Keller, Rezeption des VoÈlkerrechts (Berlin: Springer, 2003), at pp. 13 et seq.

161 There is one exception, namely Article XX:2 of the Agreement on Government Procurement, which provides for judicial review based on the agreement. See Panel Report, United StatesÐSections 301±310 of the Trade Act of 1974, WT/DS152/R, 22 December 1999.


163 Council Decision 94/800/EC, as note 13 above, as Recital 15.

The direct effect of GATT 1947 was tested and rejected by the European Court of Justice (ECJ) in the *International Fruit* judgment. This position remained unchanged after the establishment of the WTO and despite the development of the elaborate system of dispute settlement. In *Portugal v. Council*, the ECJ considered that the WTO Agreements were based on the "principle of negotiation", which distinguished them from other international agreements that were recognized as having direct effect. The Court noted further that the major trading partners of the EC had not given direct effect to the multilateral agreements, and such an effect granted by the EC would effectively disadvantage the Community in future negotiations. The Court concluded therefore that, "...having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions."

This negative view of the Court’s decisions by no means suggests that the WTO law is irrelevant within the EC legal order. Quite the contrary: first, there is the general principle of *pacta sunt servanda*, as expressed in Article 26 of the Vienna Convention on the Law of the Treaties. Pursuant to it, "every treaty in force is binding upon the parties to it and must be performed by them in good faith. No State may invoke the provisions of its domestic law as justification for its failure to perform an international treaty". In that sense, Article XVI:4 of the WTO Agreement obliges each Member to ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

Second, Article 300(7) of the EC Treaty implies that international agreements enjoy supremacy over the Community’s secondary law and the law of the Member States. “[The law of the WTO] is consequently endowed with the power to derogate national law and must be taken into account by Community authorities in the creation and interpretation of secondary law.”

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166 See note 20 above.
168 Ibid., at paras 43 et seq. For the US counterpart rejecting direct effect of the WTO Agreements, see Section 102(a) of the US Implementing Bill, The Uruguay Round Agreements Act, 103D Congress, 2nd Session, House Document 103-316, Vol. 1, 1994, 659.
170 See note 151 above.
172 See, e.g., Appellate Body Report, *Brazil—Export Financing Programme for Aircraft (Recourse by Canada to Article 21.5 of the DSU)*, WT/DS46/AB/RW, 21 July 2000. There, at para. 46, the AB stated that, “a WTO Member’s domestic law does not excuse that Member from fulfilling its international obligations”.
174 Cottier and Oesch, as note 16 above, at p. 200.
Third, the law of the WTO affects the European legal order through the principle of consistent interpretation.\textsuperscript{175} As the ECJ noted in \textit{International Dairy Agreement},\textsuperscript{176} where the EC had entered into an international agreement, the provisions of secondary Community legislation “must, so far as possible, be interpreted in a manner that is consistent with those agreements.”\textsuperscript{177} In \textit{Hermès International v. FHT Marketing},\textsuperscript{178} the Court held further that national courts, when interpreting a Community measure that falls within the scope of a WTO agreement, must apply national legislation “as far as possible, in the light of the wording and the purpose” of the agreement.\textsuperscript{179} As the WTO rules are often more detailed than the existing national provisions, “they provide ample guidance as to the proper interpretation of national law”\textsuperscript{180} and could thus have considerable influence.

Finally, there are two constellations in which the WTO law has been granted direct effect, as found in \textit{Fediol}\textsuperscript{181} and \textit{Nakajima}.\textsuperscript{182} In these two cases, the ECJ stated that the GATT 1947 rules could have direct effect where (i) the adoption of the measures implementing obligations assumed within the context of the GATT is at issue and (ii) where a Community measure refers expressly to specific provisions of GATT. This specific applicability was confirmed with respect to the WTO Agreements in the judgment of \textit{Petrotub} of 9 January 2003,\textsuperscript{183} as well as in the \textit{Microsoft} decision of 2004.\textsuperscript{184}

Considering the foregoing, one could conclude that the WTO law has generally been denied direct effect in the EC legal order and Member States are presently without the possibility of bringing action against the acts of the EC institutions violating WTO provisions.\textsuperscript{185} Likewise, individuals cannot bring actions against States.\textsuperscript{186} Nonetheless, the

\textsuperscript{175} See, e.g., Cottier and Schefer, as note 164 above, at pp. 88 et seq.
\textsuperscript{176} Case C-61/94, \textit{Commission v. Germany (International Dairy Agreement)}, as note 173 above.
\textsuperscript{177} Ibid., at para. 52.
\textsuperscript{179} Ibid., at para. 28 (emphasis added).
\textsuperscript{183} Case C-76/00 P, \textit{Petrotub SA and Republica SA v. Council} [2003] ECR 79, in particular at para. 54. For a different view, see Kaupfer and Bronckers, as note 164 above, at pp. 1326–1327.
\textsuperscript{184} Commission Decision of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty, Case COMP/C-3/37.792, \textit{Microsoft}, C(2004) 900 final. At para. 1053, the Commission stated that, “…[i]t is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules”. In this case, these conditions are not satisfied and Microsoft can therefore not invoke the TRIPS Agreement or the TBT Agreement to challenge the legality of this Decision” (footnotes omitted).
\textsuperscript{185} In the context of Article 230(2) EC.
\textsuperscript{186} See the ECJ judgment in \textit{Dior} (as note 169 above). One should, however, note that in its recent judgment in the \textit{Biret} cases, the ECJ left open the possibility of an action for damages based on an EC measure, which was found to be inconsistent with the WTO obligations by the WTO Dispute Settlement Body if the damage occurred after the end of the reasonable period of time for implementation of the ruling of the DSB. See Judgment of the Court of 30 September 2003, \textit{Biret International SA v. Council}, Case C-95/02 P, and Judgment of the Court of 30 September 2003, \textit{Biret International SA v. Council}, Case C-94/02 P. For a comment, see Armin von Bogdany, \textit{supra} note 164.
effect of the WTO law on the European legal environment is profound with “elements not only of collision, but also of peaceful coexistence and even cooperation”.187

B. SPECIFIC COMMITMENTS OF THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES

Having discussed the WTO instruments applicable to telecommunications services and their effect upon the EC legal order, it is essential to know to what extent the European Communities and their Member States have committed themselves in the field.

Upon examination, the EC Schedule of Specific Commitments188 reveals an almost full commitment of the Community regarding both basic and value-added telecommunications services, including a commitment to the Reference Paper. The few restrictions are limited to one or two Member States, and most of them have already expired. Only one sub-sector remains beyond the scope of commitments; this is, in terms of the W/120 classification, “enhanced/value-added facsimile services, including store and forward, store and retrieve”. No MFN exemptions regarding telecommunications have been made.

A specific characteristic of the EC Schedule is the inclusion of an additional clarification to the definition of telecommunications services. The emphasis of this clarification is on the exclusion of broadcasting189 from the scope of the commitments, so that they “do not cover the economic activity consisting of content provision which require telecommunications services for its transport. The provision of that content, transported via a telecommunications service, is subject to the specific commitments undertaken by the European Union and their Member States in other relevant sectors”.190 This peculiarity reflects a heated political discussion and has to do with the willingness of the EC to keep the audiovisual sector out of the overall liberalization commitments for the sake of protecting certain cultural values.191

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187 von Bogdany and Makatsch, as note 164 above, at p. 150.
188 European Communities and their Member States, Schedule of Specific Commitments, Trade in Services, Supplement 3, GATS/S/31/Suppl. 3, 11 April 1997.
189 Broadcasting being defined as “the uninterrupted chain of transmission required for the distribution of TV and radio programme signals to the general public, but not covering contribution links between operators”.
190 European Communities and their Member States, Schedule of Specific Commitments, Trade in Services, Supplement 3, as note 188 above, at p. 2.
In the context of the ongoing Doha Round of negotiations\(^{192}\) and the request-offer mechanism\(^{193}\), the initial conditional offer of the European Communities\(^{194}\) made only few changes to the commitments outlined above.\(^{195}\) The offer of the EC revised in 2005\(^{196}\) however has significant novelties. These are not necessarily further-reaching commitments, although certain new commitments have been made (e.g., telecommunications services have been excluded from multiple limitations on horizontal commitments and differences in committing between Member States have been reduced). The novelties are mainly in the terminology used for categorizing telecommunications services.\(^{197}\) The existing “basic versus value-added” dichotomy has been abandoned and a new delineation has been adopted. This novel approach of the EC is symptomatic of the changes within the Community regulatory regime for electronic communications and is elaborated below in section III.C.3.

C. WTO TELECOMMUNICATIONS RULES VIS-À-VIS EC TELECOMMUNICATIONS RULES

Now that we have taken stock of the WTO telecommunications rules and the commitments of the European Communities, it is interesting to consider how, precisely, this body of law correlates with the EC electronic communications regime and whether they create a harmonious or a discordant pair. The first step in this analysis is a brief introduction to the core principles of EC communications law. This will be followed by a discussion of arguments demonstrating harmony (section III.C.2.) and arguments exposing discord (section III.C.3.).

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\(^{192}\) WTO, Doha Ministerial Declaration, WT/MIN(01)/DEC/W/1, 14 November 2001.

\(^{193}\) Our analysis here focuses only on the offers of the European Communities. In terms of requests, in their proposal for commitments in the field of telecommunications services, the EC hopes for reciprocal commitments in the sector and suggests that all Members commit for Modes 1 (cross-border supply), 2 (consumption abroad) and 3 (commercial presence) all sub-sectors and all modes without restrictions, including as an additional commitment the Reference Paper in its entirety. Improvement and facilitation of the temporary movement of natural persons are suggested under Mode 4 (presence of natural persons) and elimination of the Members’ MFN exemptions related to satellite services and accounting rates. See Communication from the European Communities and their Member States, GATS 2000: Telecommunications, S/CSS/W/35, 22 December 2000 and Communication from Australia, Canada, the European Communities, Japan, Hong Kong, China, Korea, Norway, Singapore, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu and the United States, TN/SW/50, 1 July 2005.

\(^{194}\) Communication from the European Communities and its Member States, Conditional Initial Offer, TN/S/O/EEC, 10 June 2003, at pp. 80-84.

\(^{195}\) The existing limitations on market access with regard to certain Member States were substantially reduced. Full commitments are also offered in the previously not covered sub-sector of “enhanced/value-added facsimile services, including store and forward, store and retrieve”. The additional definition for telecommunications in the sense of exclusion of broadcasting was preserved as such.

\(^{196}\) For the Doha Round of negotiations in services, between 31 March 2003 and 15 September 2005, 69 initial offers were submitted. From 19 May 2005 to 8 November 2005, Members submitted 30 revised offers (Australia, Bahrain, Bolivia, Brazil, Chile, China, Chinese Taipei, Colombia, Egypt, European Communities and its Member States, Honduras, Hong Kong China, Iceland, India, Japan, Korea, Liechtenstein, Macao China, Mexico, New Zealand, Norway, Peru, Singapore, Suriname, Switzerland, Thailand, Turkey, United States and Uruguay).

Main Tenets of EC Communications Law

EC communications law could be characterized by its unique multi-level and “multifarious” structure. It is a complex system, within which several bodies of law have to be considered. These comprise: (i) the EC competition rules; (ii) the communications sector specific regulation; and (iii) the obligations of the European Communities as party to the WTO Agreements, which were highlighted above. In addition, the level of national legislation of the Member States implementing the EC primary and secondary law is also relevant.

In the following sections, we shall focus on the EC communications specific regime, first, owing to the obvious space constraints of the paper and secondly and more importantly, since Community rules take precedence over the national ones and are directly applicable. Under the present EC specific regime for electronic communications, we mean the framework put in place in 2002 and its 2007 update building upon the foundations and the achievements of the 1998 regulatory package, which “managed” the process of liberalization and re-regulation of European telecommunications markets. The 2002 regime consists of one Framework Directive, four Specific Directives (adopted by the Council and the European Parliament) and one Commission Directive. It covers the regulation of electronic communications.
communications services, electronic communications networks, associated facilities and associated services. This means, in essence, that it applies to all transmission networks and services, including broadcasting networks and the Internet, which were previously not part of the telecommunications regulation.

The underlying objective of the 2002 regulatory framework was to meet the challenges of convergence and ensure sustainable competition under the new technological and post-liberalization market conditions. In the pursuit of this objective, the EC defined a few novel regulatory principles and mechanisms. The core elements of these can be identified (in random order) as follows:

(i) separation of content and networks in the regulatory scheme;
(ii) expansion of the regulatory scope and regulation of all networks and transport-related services;
(iii) greater reliance on competition law rules as opposed to sectoral rules, including new design of the sector specific regulation;
(iv) withdrawal of sector specific rules through market-by-market sunset clauses; and
(v) pursuit of technological neutrality.

All of the above principles have essentially changed the nature and the structure of the EC communications regime. It is now more flexible and the regulatory intervention has been substantially reduced and refined. The Significant Market Power (SMP) regime is perhaps the most revealing of the novelty and the reach of the reform. The SMP mechanism, which is similar in function to the “major supplier” identification for applying \textit{ex ante} definite asymmetric rules, has now been aligned with EC competition law. This alignment means, above all, that the concept of SMP, which

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208 For the definitions, see Article 2 of the Framework Directive.
209 The Commission’s Competition Directive specifies (at Recital 7) that, the “new definitions [of electronic communications networks and services] are indispensable in order to take account of the convergence phenomenon by bringing together under one single definition all electronic communications services and/or networks which are concerned with the conveyance of signals by wire, radio, optical or other electromagnetic means (i.e., fixed, wireless, cable television, satellite networks). Thus, the transmission and broadcasting of radio and television programmes should be recognized as an electronic communication service and networks used for such transmission and broadcasting should likewise be recognized as electronic communications networks”.
210 Hence, the new name “electronic communications” coined by the EC legislator, to replace “telecommunications” as used under the previous regulatory framework.
212 For a full-scale analysis of the present EC regime for electronic communications, see, e.g., Nihoul and Rodford, as note 129 above; and Koenig, Bartosch and Braun, as note 4 above.
was previously rather mechanically bound to a market share of 25 percent of the telecommunications operators,\(^{214}\) is now linked to the concept of dominance, as formulated by the law and practice of the European courts. Thus, pursuant to Article 14 of the Framework Directive, “an undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors customers and ultimately consumers”. \(^{215}\)

The actual application of the SMP rules and the finding of dominance follow the standard antitrust methodology of market definition\(^{216}\) and examination of the competitive constraints upon undertakings active in these markets.\(^{217}\) If an undertaking is found to be in a dominant position in a certain electronic communications market, that market is deemed not to be effectively competitive. The national regulatory authorities (NRAs), which are in charge of applying the SMP mechanism under the supervision of the European Commission,\(^{218}\) must subsequently impose appropriate specific regulatory obligations upon the dominant undertaking (or undertakings) chosen from the options provided in the Access Directive and in the Universal Service Directive. The available remedies encompass transparency; non-discrimination; accounting separation; obligations for access to and use of specific network facilities and price control and cost accounting, and could be flexibly designed by the NRAs (with a minimum of one remedy).\(^{219}\) Conversely, if the market is found to be effectively competitive, the NRA must withdraw any obligation that may be in place and should not impose a new obligation.\(^{220}\)

\(^{214}\) See note 139 above.


\(^{216}\) After an initial market selection made by the European Commission in a Recommendation. As made clear by Article 15(1) of the Framework Directive, which is the legal basis of the Commission’s Recommendation, it identifies “ . . . those product and service markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the Specific Directives, without prejudice to markets that may be defined in specific cases under competition law”. For the current Recommendation, see Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC, OJ L 114/ 45, 8 May 2003.

\(^{217}\) Because of the ex ante nature of the analysis, there are some differences in comparison to an analysis under Article 82 EC. Most notably, there is a difference in the perspective of the analysis, which is a forward-looking one. There is furthermore no need for finding an abuse as would normally be required under antitrust. See note 213 above.

\(^{218}\) There is a special procedure ensuring coordination between the national and the Community levels. This procedure is formulated in Article 7 of the Framework Directive and allows the Commission to veto certain key measures of the NRAs. Of the 229 cases assessed by the Commission up to 30 September 2005, it adopted veto decisions in only four cases. See European Commission, Communication on market reviews under the EU regulatory framework: Consolidating the internal market for electronic communications, COM(2006) 28 final, 6 February 2006.


\(^{220}\) Article 16 of the Framework Directive.
The above process is repeated periodically to ensure that the obligations are adapted to the market evolution and in the hope that ultimately, all sector specific obligations will be withdrawn and competition law will become, similarly to other economic sectors, the sole regulatory mechanism. One can thus conclude that the current EC sectoral regime for electronic communications is a *sui generis* hybrid regulatory model (in the sense that sectoral rules are based on antitrust law and practice), also containing a mechanism for gradual withdrawal of the sectoral regulation.

2. Harmony

The WTO telecommunications rules and the EC regime, although they are separate bodies of law with different natures and at different levels, are both influenced and defined by the specific characteristics and the development of telecommunications markets. They have evolved in parallel and reflect the common underlying objective of liberalizing telecommunications. That the date of entry into force of the EC Full Competition Directive and of the Fourth Protocol was the same is not a coincidence. Indeed, one of the reasons for the success of the EC liberalization endeavour in the telecommunications sector in the 1990s was the affirmation of this liberalization trend at the global level and the inclusion of telecommunications in international trade law.

Following this pattern of development, the 2002 electronic communications package would appear to be in line with the law of the WTO and the commitments made by the EC under its framework, because they were essentially created in parallel. Indeed, the EC communications instruments may be a good example of the above-mentioned “peaceful coexistence and cooperation” between the two regimes.

A first sign of this cooperation is that the EC telecommunications rules often make explicit reference to the commitments of the Community in the context of the WTO (for instance, in Recital 29 of the Framework Directive, Recital 3 of the Universal Service Directive, Article 8(3) of the Access Directive and in paragraphs 116 and 125 of the Commission Guidelines on market analysis and assessment of significant market power). Furthermore, in terms of content, the principles introduced at the Community level are consistent with those of the WTO. The key concepts of “interconnection”, “non-discrimination”, “transparency” and “reasonable terms and conditions”, as contained in GATS, the Annex on Telecommunications and the Reference Paper are reflected in the rules of the EC framework. A relevant example
is that the *Telemex* Panel Report relied on the EC definition of “interconnection”, as contained in Article 2(b) of the Access Directive.\footnote{See Panel Report, *Mexico—Telecommunications Services*, as note 50 above, at para. 7.111.}

A more concrete instance of the cooperation between the two regimes is the key concept of “major supplier”. The latter is explicitly included in the EC framework. The Commission Guidelines on market analysis state that: “[t]he EC and its Member States have given commitments in the WTO in relation to undertakings that are ‘major suppliers’ of basic telecommunications services. Such undertakings are subject to all of the obligations set out in the EC’s and its Member States’ commitments in the WTO for basic telecommunications services. The provisions of the new regulatory framework, in particular relating to access and interconnection, ensure that national regulatory authorities (NRAs) continue to apply the relevant obligations to undertakings that are major suppliers in accordance with the WTO commitments of the EC and its Member States”.\footnote{Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications, as note 226 above.}

The definition of a “major supplier” in the Reference Paper, which is “framed in ‘competition law’ terms, that is generally, by reference to relatively indeterminate notions”,\footnote{Bronckers and Larouche, as note 10 above, at p. 26.} (such as control over essential facilities or use of the undertaking’s position in the market) appears to connect well to the formulation of significant market power under the current EC communications regime, as sketched above. Paul Nihoul and Robert Rodford define this consistency between the WTO and the European rules as a “‘triple consistency’, since (i) the obligations imposed on markets and relating to access, and/or interconnection, are similar in the two bodies of the law; (ii) these obligations must be imposed, depending on the case, on the same undertakings, that is, those which, as a result of their market power, may influence market conditions; and (iii) the definition given to “major supplier” in the Reference Paper is identical for the regulatory sector specific principles introduced in the Paper, and for the competition rules formulated therein.\footnote{Nihoul and Rodford, as note 129 above, at para. 3.394.}

We argue however that there may be some “loopholes” in this “triple consistency”. We have mentioned that the test of identifying a “major supplier”, albeit inspired by antitrust rationales, seems to require less market power than the test of dominance under EC competition law.\footnote{Clough, as note 33 above, at p. 67. See also Bronckers and Larouche, as note 33 above, pp. 535 et seq. and 569.} Consequently, although it could be maintained that in most situations the Community framework for electronic communications (in particular the application of the SMP regime) will lead to an outcome consistent with the international trade rules, the possibility that divergence may occur cannot be excluded. Article 8(3)(vii) of the Access Directive is a proof of this hypothesis.\footnote{Although it does not give a specific explanation as to when such a divergence between the concepts of major supplier and SMP operator might occur in practice.}
significant market power within the meaning of Articles 1416 of the Framework Directive but would still fall within the “major supplier” category. In such cases, the NRAs will, exceptionally, impose sector specific obligations upon these undertakings in order to be in line with the Reference Paper commitments of the Community. Thus, one can conclude that the “harmonious” relationship between the EC communications rules related to control of market power and those of the WTO is ultimately secured by a special sectoral rule serving as a “safety-net”.

Furthermore, it is possible that the WTO commitments of the EC, without being in discord with the European framework, would curtail certain aspects of its flexibility. The choice of remedies imposed on SMP operator(s) (that would also qualify as “major supplier”), for instance, might be limited. Under the Reference Paper, Members are obliged to ensure that major suppliers grant interconnection to other operators at cost-oriented rates, whereas under the Community regime, NRAs have the discretion in that regard and may or may not impose cost-orientation according to their judgment of adequacy of the measure for the case at issue. This reduction in the flexibility of the EC regulatory framework is unfortunate, since the pursuit of more flexibility to respond to new situations and less stringent regulatory intervention was the very reason for its review in 2002.

3. Discord

As discussed in section II of this article, the telecommunications specific framework within the law of the WTO has some peculiar characteristics. We argue that these may have far-reaching implications for the development of international trade in communications and, as we shall see below, could come to be in discord with some of the positions of the current EC electronic communications regulation and its future design, in particular.

(a) Basic versus value-added telecommunications services

The first such peculiarity is the built-in division between basic and value-added telecommunications services that runs through all provisions of the WTO telecommunications regime, as discussed above. Building upon the W/120 services classification model, the schedules of commitments listed certain categories of telecommunications services as basic or value-added without giving explicit definitions. The W/120 categorization was furthermore inconsistently applied and there are substantial variations among the Members in the implementation of the categorization. This is first, because of the flexibility of the schedules model adopted for basic

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234 Reference Paper, at Section 2.2(b).
235 See note 219 above.
236 See note 48 above.
telecommunications, which authorizes further distinction between local/long distance/international, wire or radio-based, public or non-public, resale or facility-based services\textsuperscript{237} and second, because some countries have introduced additional technological distinctions (e.g., satellite/non-satellite, mobile/fixed). Moreover, some of the definitions used have relied upon as yet unadopted internal legislation or non-explicit (or non-existent) internal definitions. In view of the above, a striking characteristic of the separation between basic and value-added telecommunications services is the lack of a clear criterion and coherent application of this distinction.\textsuperscript{238}

With hindsight, one could qualify the basic value-added delineation as a temporary solution. It was a helpful shortcut for facilitating negotiations, which allowed for gradual liberalization of the telecommunications sector. In the aftermath, however, the distinction between basic and value-added telecommunications services has not proved auspicious and justifies the assessment of Bronckers and Larouche as having been rather “unfortunately introduced in the GATS framework”.\textsuperscript{239} Today, the basic/value-added separation has lost its relevance since the majority of the basic telecommunications markets have already been liberalized. It is in fact more confusing than helpful\textsuperscript{240} and limits the application of the Reference Paper, which addresses only basic telecommunications services. It is discordant with the absence of such classification under the EC communications framework and contrary to the pressing need for convergence-conform and technologically neutral solutions.

(b) \textit{Telecommunications versus audiovisual services}

Another distinction with unfortunate regulatory repercussions in the face of rapidly developing communications markets and multiple overlaps between content and infrastructure is that between telecommunications and audiovisual services. Although this vertical sectoral separation made perfect sense when it was adopted at the outset of the services negotiations,\textsuperscript{241} it has become rather awkward in an environment of progressive convergence.\textsuperscript{242} The existing rigid W/120 delimitation for

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{237} Communication from the European Communities and their Member States, GATS 2000: Telecommunications, as note 193 above, at para. 6.
\item\textsuperscript{238} Luff, as note 33 above, at p. 38. For a comprehensive analysis of the definition and scheduling methods and the lack of consistency, see Communication from the European Communities and its Member States, Classification in the Telecom Sector under the WTO-GATS Framework, TN/S/W/27, S/CSC/W/44, 10 February 2005, at paras 3–13.
\item\textsuperscript{239} Bronckers and Larouche, as note 10 above, at p. 16 (emphasis added). The authors point out further in an updated contribution that, “[t]his distinction . . may cause complications, and may have outlived its usefulness given that no substantive consequences are attached to the distinction. It could be eliminated from the GATS framework”. See Bronckers and Larouche, as note 33 above, at p. 526.
\item\textsuperscript{240} See Communication from the European Communities and its Member States, Classification in the Telecom Sector under the WTO-GATS Framework, as note 238 above, at paras 9–13.
\item\textsuperscript{241} The category “Communications Services”, one of the 12 categories in the Services Sectoral Classification List (as note 48 above), is subdivided into five categories: postal services, courier services, telecommunications services, audiovisual services and other.
\item\textsuperscript{242} This has been largely acknowledged in the current negotiations. See, e.g.,\textit{ Communication from Switzerland, GATS 2000: Audio-Visual Services}, S/CSS/W/74, 4 May 2001, at para. 2.
\end{itemize}
\end{footnotesize}
“telecommunications services”\textsuperscript{243} and “audiovisual services”\textsuperscript{244} lacks a clear criterion. Furthermore, the sub-headings of audiovisual services are too broad,\textsuperscript{245} lumping together services related to sound/music and visual content (no distinction is made, for instance, between music and multimedia applications).\textsuperscript{246} It is thus difficult to classify some new services (e.g., video-on-demand) under either category.\textsuperscript{247} On the other hand, certain Internet services could fit under both and be categorized as either audiovisual, telephony, packet-switched or circuit-switched data transmission services, depending on the particular case. There are also a number of information technology services prone to convergences that complicate the picture.\textsuperscript{248} Online games, for instance, could be fitted into computer and related services, value-added telecommunications services, entertainment or audiovisual services.\textsuperscript{249}

As a result of these definitional shortcomings, some services might not be able to profit from the commitments made in the telecommunications sector because they would be classified (inadequately) as broadcasting.\textsuperscript{250} While it is debatable whether the Reference Paper applies to basic telecommunications only or to value-added services as well,\textsuperscript{251} it definitely does not cover audiovisual services. Neither does the Annex on Telecommunications. Such limitations diminish the effectiveness of the telecommunications instruments in a convergence environment and leave some content-related but genuinely transport communications services outside the scope of their provisions.

Within the EC communications framework, the implementation of regulatory distinction between content and networks was found to be the appropriate response to convergence.\textsuperscript{252} The current EC regime regulates only the latter, while the former

\textsuperscript{243} See section II.A. above.
\textsuperscript{244} There is no general definition of audiovisual services but there is an enumeration of services in the W/120 classification list. Therein audiovisual services are classified in six sub-sectors as: motion picture and video tape production and distribution; motion picture projection services; radio and television services; radio and television transmission services; sound recording; and other services, such as dubbing services (translation of the soundtrack of motion pictures and videotapes from one language to another). See Messerlin, Sweeney and Coqc, as note 191 above, at pp. 2–3, and in particular Table 1 therein “Audiovisual Services and Their Subcategories in the GATS”.
\textsuperscript{245} Nihoul, note 51 above.
\textsuperscript{247} See David Luff, \textit{International Trade Law and Broadband Regulation: Towards Convergence?}, 3 Journal of Network Industries (2002), 244–245 and 259; Luff, as note 22 above, at pp. 1078 et seq. See also Graber, as note 28 above.
\textsuperscript{248} On the difficulties of classifying digitally-delivered content products under the GATS, see Wunsch-Vincent, as note 246 above, at pp. 70 et seq.
\textsuperscript{249} Ibid., at p. 71.
\textsuperscript{250} See, e.g., the case of satellites, as discussed by Paul Nihoul. Nihoul, as note 51 above, at p. 375.
\textsuperscript{251} Bronckers and Larouche, as note 33 above, at pp. 534–535. Some of the new negotiation proposals do suggest that the Reference Paper should apply to all telecommunications services. See, e.g., \textit{Communication from Colombia, Telecommunications Services}, S/CSS/W/119, 27 November 2001.
content-related activities fall within the scope of the “Television without Frontiers” Directive. The content/networks separation, which clarifies the policy choices regarding these two spheres of activity, is likely to remain unchanged and even to be reinforced by the new EC Audiovisual Media Services Directive.

Various aspects of this separation between content and networks/distribution within the EC regulatory space conflict with the existing traditional telecommunications/audiovisual division at the international level. It would be interesting to see whether (and how) measures to address the convergence processes will be taken up in the WTO framework. The discussion on these issues is intensified from the EC perspective because the Community is particularly sensitive with regard to content. It has consequently made no commitments in the audiovisual sector has scheduled a number of MFN exemptions therein and has declared no intention to give these up, with the purpose of safeguarding certain cultural policies.

(c) Technological neutrality

Another issue of increasing significance rooted in the convergence phenomenon is that of technological neutrality. The national and, consequently, the international...
regulatory frameworks for telecommunications before liberalization (and particularly in the “pre-convergence” era) were extensively based upon technological concepts, such as fixed or mobile, cable or satellite communications. These concepts identified different regimes and triggered different treatment of the related services. With the rapid development of telecommunications technologies, however, and especially in the face of convergence, these regulatory technological concepts have become outdated. What is more, the idea of regulation based on strict technological concepts has been strongly challenged. A response to this development has been the introduction in domestic communications regimes of the principle of technological neutrality. This principle prescribes “non-discrimination” of the underlying technologies when regulatory decisions are taken\textsuperscript{259} and is considered to enable the ultimate selection of the most efficient technology by the market.

The adoption of the principle of technological neutrality is a key one in the reform of the EC communications regulation. The networks/content delineation, as mentioned above, is one expression of it. In addition, as described earlier, the European sector specific regulation has been aligned with competition law and has thus moved away from the communications “technicalities” towards concepts of generic economic regulation. This alignment with antitrust methodologies provides for detachment from technical definitions and flexibility in reacting to new developments within the electronic communications environment. Such alignment could thus also be interpreted as a movement towards technological neutrality.

In contrast to these developments, the WTO law does not yet include any technologically neutral tenets,\textsuperscript{260} although there has been a growing appreciation of this need.\textsuperscript{261} An important step in this direction has been made through the US—Gambling Report.\textsuperscript{262} It established, among other things, that the WTO and GATS rules are applicable to electronically supplied services. It concluded notably, that

\begin{quote}
“mode 1 \text{[cross-border supply]} \text{under the GATS encompasses all possible means of supplying services from the territory of one WTO Member into the territory of another WTO Member. Therefore, a market access commitment for mode 1 implies the right for other Members’ suppliers to supply a service through all means of delivery, whether by mail, telephone, Internet etc., unless otherwise specified in a Member’s Schedule. We note that this is in line with the principle of ‘technological neutrality’, which seems to be largely shared among WTO Members. Accordingly, where a full market access commitment has been made for mode 1, a prohibition...}"
\end{quote}

\textsuperscript{259} According to the 1999 Communications Review (as note 211 above), “[t]echnological neutrality means that legislation should define the objectives to be achieved, and should neither impose, nor discriminate in favour of, the use of a particular type of technology to achieve those objectives”. See also the Framework Directive, at Article 8(1).

\textsuperscript{260} On technological neutrality and the WTO, see Larouche, as note 252 above, at pp. 411–415.


on one, several or all means of delivery included in this mode 1 would be a limitation on market access for the mode”.263

Despite the above evolutionary interpretation of what the Panel defined as a “means of delivery”,264 the incoherent system of technical definitions, both within the GATS telecommunications instruments and especially, within the Members’ schedules has not really been overcome. Indeed, the very case of US—Gambling stressed the crucial importance of the commitments listed in the Members’ schedules and the existence of a presumption that the structure and language of a schedule follow the W/120 and CPC nomenclature.265

(d) Solutions?

The revised conditional offer of the European Communities and its Member States266 for the Doha Round has boldly attempted to resolve the “basic versus value-added” telecommunications dichotomy and to address (at least partly) the three points of divergence outlined above. It has abandoned this delineation in its entirety and bases its commitments upon the “more comprehensive classification of telecom services as found in the Annex on Telecommunications Services to the GATS”.267 The definition of telecommunications services is hence to be “the transmission and reception of signals by any electromagnetic means”.268 The EC believes that:

“[s]uch a definition based on the functions performed would cover unmistakably all telecom services. By putting such a definition in the first column of the schedule to identify the scope of services that are considered to fall within the sector in a functional manner, WTO Members would create greater legal certainty, and fall in line with the international consensus that regulators should not discriminate between different technologies in providing services, between different content being transmitted or between different business models”.269

In line with the above, the EC has completely changed its own schedule of commitments and now includes in the first column simply “Telecommunications Services” with no further categorization. These services are then defined as “[a]ll services consisting of the transmission and reception of signals by any electromagnetic

264 “The expression ‘means of delivery’ will be used in this Report to refer to the various technological means (mail, telephone, Internet, etc.) by which a service can be supplied cross-border or remotely. Unless otherwise indicated, ‘cross-border’ and ‘remote’ supply cover all the various technological means of supplying services”. See Panel Report, US—Gambling, ibid., at para. 6.33.
266 See note 197 above.
267 Communication from the European Communities and its Member States, Classification in the Telecom Sector under the WTO-GATS Framework, as note 238 above, at para. 1.
268 Section 3(a) of the Annex on Telecommunications.
269 Communication from the European Communities and its Member States, Classification in the Telecom Sector under the WTO-GATS Framework, as note 238 above, at para. 16 (emphasis in original). For a more detailed argumentation, see ibid., at paras 17–26.
means, excluding broadcasting". The additional definition of broadcasting that follows is preserved while a new clarification in the sense that, "[t]elecommunications services do not cover the economic activity consisting of the provision of content services which require telecommunications services for their transport" has been added. This solution proposed by the EC is undoubtedly a step towards abolishing confusing definitions, and while maintaining the present level of commitments, it allows for technological neutrality and flexibility.

The EC approach, although evolutionary and positively accounting for the contemporary state of telecommunications, is however unlikely to succeed in the rather conservative environment of trade negotiations. The opposition of the United States is the epitome of the more pragmatic attitude towards the trade discussions and scheduling. The United States, while appreciating the efforts of the EC to clarify telecommunications commitments, seems "concerned about the EC's proposal because of its potential to limit the scope of the telecommunications sector", and more specifically that it "may add greater uncertainty into the sector with respect to value-added services". The United States argues that "value-added" services are an essential component of the telecommunications services sector and that a classification scheme that does not explicitly cover them may result in diminution of existing commitments. The United States proposed an alternative to the EC definition, which ensures the inclusion of value-added telecom services but stressed that, "if efforts to address the problems with the EC approach highlighted here fail, it would be preferable for all Members to continue to use the existing W/120 framework to schedule commitments, rather than schedule under a new classification system".

In view of this, the three lines of discord between the EC communications framework and the WTO telecommunications rules, as illustrated above, are likely to persist. Indeed, if no changes in the realm of the WTO are made, the advance of convergence and technological developments may exacerbate the discord. Subscribing
to a newer nomenclature, such as the updated UN Central Product Classification (CPC 1.1)\textsuperscript{280} for the Doha Round commitments may have solved certain problems and offered more convergence accommodating, technologically neutral solutions.\textsuperscript{281} But this would probably be just another piecemeal approach\textsuperscript{282} and would not necessarily reflect the decisions taken at the EC level. The content related issues are, in any case, likely to remain highly sensitive and the dichotomy of commitments in audiovisual versus telecommunications services preserved.

\textbf{(c) Lack of global competition rules}

While the above definitional collisions could be related to the nature and structure of the WTO Agreements and have implications not only for the EC, there is another point of discord between the EC and the WTO regimes for telecommunications, which is EC-specific and perhaps also the most vital for the development of EC communications regulation. This last point of potential discord is two-pronged. It relates firstly, to the lack of general competition rules on the international level and secondly, to the lack of projected alignment of telecommunications regulation with antitrust rules.

To recap, the EC regime envisages a phasing-out of the telecommunications specific regulation. In essence, this means that if (and when) the necessary level of effective competition in the EC electronic communications markets is achieved and the sectoral regulation is withdrawn, this “might prove incompatible with the EC’s WTO commitments since the regulatory principles contained in the Reference Paper are not and cannot be aligned with an international competition law framework that presently does not exist”.\textsuperscript{283} Upon the withdrawal of the sectoral telecom rules, the Community will either need to preserve a provision similar to the “safety-net” of the Access Directive,\textsuperscript{284} or rely on consistent interpretation in order to ensure conformity. The questions of whether this would be sufficient, on the one hand, and a positive development for the EC communications law, on the other, remain open.

\textsuperscript{280} The UN Central Product Classification (see note 49 above) has in fact been amended twice since the end of the Uruguay Round. See CPC 1.0 (Central Product Classification – Version 1.0, UN Statistical Papers, Series M, No 77, 1998, Ver.1.1, E.98.XVII.5) and CPC 1.1 (Central Product Classification – Version 1.1, UN Statistical Papers, Series M, No 77, Ver.1.1, 2002, ESA/STAT/SER.M/77/Ver.1.1).


\textsuperscript{282} One may even argue that such a provision ensuring conformity with the WTO law and referring explicitly to the EC commitments under the WTO framework will have direct effect, pursuant to the \textit{Nakajima} doctrine (as note 182 above).
Although the complementarity between trade policy, domestic deregulation and competition policy has been widely acknowledged, the developments on competition policy within the WTO, which commenced at the Singapore Ministerial Conference in 1996 as part of the so-called “Singapore issues” have led to few tangible results. Competition policy was part of the Doha Development Agenda but was subsequently dropped due to lack of consensus. It is beyond the scope of the present paper to examine the advances of the Working Group on the Interaction between Trade and Competition Policy, the submitted proposals and their possible impact or to engage in a more sophisticated debate of whether the WTO is the appropriate forum for developing competition rules and whether such rules can function at all. It is however important to stress in the present context that firstly, the next steps in committing to competition rules in the realm of the WTO are likely to be “fairly modest” and that secondly, if such rules on competition policy are drawn up, it is unlikely that they would ever be comprehensive enough to be capable of addressing the complex communications-specific antitrust cases. In the context of our analysis of the Telmex Panel decision, we could further question the process of “creation” of these rules and ultimately, whether they are the right ones.

IV. CONCLUSION

The above discussion has shown that the WTO provides a comprehensive framework of telecommunications rules that is essential to the development of the communications industry, which by its very nature is transnational. We have also seen

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286 WTO, Singapore Ministerial Declaration, Conf. Doc. WT/MIN(96)/DEC/W, 13 December 1996. The Singapore Declaration (at para. 20) mandated the establishment of “a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework”. On the development since Singapore, see Marsden, as note 88 above, at pp. 59 et seq.

287 The Singapore Ministerial identified four rules that might be well suited for the development of new multilateral disciplines. These were investment policies, competition polices, transparency in government procurement and trade facilitation. See ibid. at paras 20–23.

288 Doha Ministerial Declaration, as note 192 above, at paras 23–25.


290 For an excellent critical analysis, see Marsden, as note 88 above, at pp. 161 et seq.

291 See Marsden, ibid., at pp. 192 et seq.


294 Marsden, as note 88 above, at p. 253.
that the EC communications regulation, as it stands, conforms to the law of the WTO and the commitments of the EC and its Member States made in the frame of the WTO Agreements.

The EC regulatory framework has however evolved in the last decade: building upon the successful transition from monopoly to competition in the telecommunications sector, it has adapted to meet the new challenges posed by the rapid development of communications technologies and markets and the correlated process of convergence. In response to these novel developments, the 2002 framework for electronic communications formulated, among other things, three new fundamental principles embodied in the (i) separation of content and networks regulation; (ii) alignment of sector specific rules with antitrust methodology, including a mechanism for withdrawal of sectoral rules and (iii) introduction of technological neutrality. As evident from the overview of the WTO telecommunications rules, these principles cannot (yet) be appropriately reflected at the international level. If the EC framework follows its path of evolution, the gap between EC communications law and the WTO rules is likely to increase, especially with regard to the obligations of the Community under the Reference Paper for "major suppliers".

To conclude in the context of the more general discussion of governance of international telecommunications, convergence as a phenomenon and an ongoing process and the ubiquitous digitization make it impossible to maintain the traditional criteria, and calls for adjustments in communications regulation. In the WTO context, however, the very structure of GATS may constrain the available choices because of the bottom-up approach of the Agreement, under which the substance of the commitments is contained in the individual schedules of the Members and the GATS applies only to those sectors tabled therein. The unreliable classification list, the multiple sub-headings and their different interpretation in different Members' schedules of commitments provide rather unsuitable bases for adjustment to convergence and the introduction of technological neutrality.

Clearer definitions and appropriate distinctions between networks, services and content, coherence in the interpretation and the application of the Reference Paper, and most importantly, a greater willingness to commit to a definite adaptation are needed. This is not to say that the WTO should necessarily regulate competition and harmonize all rules within the communications markets of its Members since its role as an international trade forum is different. It should, above all, try to observe and reflect the contemporary developments occurring in the markets for electronic communications.

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296 Jackson, as note 16 above, at p. 308.
communications. Although it has been wisely said that, “[i]t cannot be helped, it is as it should be, that the law is behind the times”, the law should at least try to keep up.


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