

## **Three Principles to Guide New Telecommunications Legislation**

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The so-called “convergence” of information and communications technologies and the resulting difficulties of fitting services into predefined sectors such as wireline, wireless, media, and so on, are helping to drive a push towards major revisions of the Telecommunications Act of 1996. The same motivation was partly responsible for the 1996 Act, as well. As Eli Noam (2000) noted, “the Telecommunications Act of 1996 was supposed to accelerate convergence by allowing previously separated industries to compete with each other.”<sup>1</sup> Similarly, Joseph Gattuso of the NTIA explained that the 1996 Act “reflects a new thinking that service providers should not be limited by artificial and now antique regulatory categories, but should be permitted to compete with each other in a robust marketplace that contains many diverse participants.”<sup>2</sup>

Promoting competition, entry, and experimentation with innovative business models should remain the goal of new legislation. Thomas Krattenmaker’s comment about the 1996 Act serves as useful guidance for today’s reforms: “...to the extent that the new Act destroys entry barriers, I would judge it a success while, to the extent that it creates or strengthens them, I would judge it a failure.”<sup>3</sup>

This goal is most likely to be accomplished by adopting a three-pronged framework. First, the Federal Communications Commission should be required to adopt a well-defined consumer welfare standard instead of the current, vague, public interest standard and to use competition analysis to make decisions. Second, the agency should apply cost-effectiveness analysis to rules that are not inherently economic in nature, such as social goals like connecting schools and libraries to some minimum broadband standard. Third, new legislation should continue aggressively encouraging spectrum markets both by moving spectrum to market and by making its use as flexible as possible. Reform legislation should also ensure the agency has sufficient accountability and the technical expertise to apply the framework described above.

### Consumer Welfare and Competition Analysis

The FCC’s current “public interest” standard is too vague for coherent and consistent policy decisions.<sup>4</sup> Instead, analysis using a consumer welfare standard would be better-defined and

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<sup>1</sup> Eli Noam, “Four Convergences and a Trade Funeral,” in *Convergence in Communications and Beyond*, ed. Erik Bohlin, A. Lundgren, and B. Thorngren, 2000, 405–410, <http://www.citi.columbia.edu/elinoam/articles/4CONV1.htm>.

<sup>2</sup> Joseph L. Gattuso, “The United States Telecommunications Act of 1996,” *Global Communications Interactive* (1998), <http://www.ntia.doc.gov/legacy/opadhome/overview.htm>.

<sup>3</sup> Thomas Krattenmaker, “The Telecommunications Act of 1996,” *Federal Communications Law Journal* 49 (November 1, 1996): 49.

<sup>4</sup> As early as 1950 Nobel Laureate Kenneth Arrow explained that there is no single, best method of aggregating and ordering society’s preferences. Arrow’s so-called impossibility theorem implies that the public interest cannot be

could take advantage of the voluminous academic literature and real-world experience of agencies like the Department of Justice and Federal Trade Commission in applying this approach to policy.

At least one advantage of adopting a consumer welfare standard is that it enables the FCC to undertake more serious competition analysis. Such analyses should generally be in the domain of the Department of Justice and the Federal Trade Commission, who are largely responsible for antitrust policy across the rest of the economy. But to the extent that such analysis requires expertise available only in a sector-specific regulator, the FCC decisions should be guided by competition analysis.

Decisions made by competition analysis have at least two advantages. First, it becomes possible to construct a framework that allows the Commission to make coherent and consistent decisions. Such a framework might be modeled after the DOJ/FTC Merger Guidelines.<sup>5</sup> Just as with the DOJ and FTC, the framework itself can be updated as our understanding of competition develops. Second, such analysis explicitly makes it possible to think about and quantify how different technologies, products, and services compete with each other, reducing the “silo” problem.

### Cost-Effectiveness Analysis for Rules Aimed at Social Objectives

Some social objectives may not pass strict cost-benefit tests if the benefits are not easily quantifiable. Society may decide, for example, to subsidize broadband access for the poor, provide every hospital with some minimum level of connectivity, or ensure that every road is covered by at least 3G wireless technologies even if the quantifiable benefits do not justify the costs. Requiring cost effectiveness analysis would yield at least two important benefits. First, it makes the costs explicit, allowing policymakers to decide if the social objective truly is worth the cost or if those resources might be better spent elsewhere. Second, it can be used to compare different, less costly, methods of achieving the same goals so as to achieve any given benefit at minimum cost.

### Flexible Use Spectrum

The FCC deserves praise for its pioneering use of auctions, which has clearly helped enable the valuable use of wireless products and services.<sup>6</sup> The FCC should continue working to make as much spectrum as possible available, and Congress could aid the process by continuing to work on schemes that incentivize federal agencies into relinquishing their spectrum for higher-value uses.

Auctions, however, are only part of the story. They create a market mechanism for finding an efficient initial allocation, but do little to ensure that spectrum remains at its highest-value use.

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defined definitively. Kenneth J. Arrow, “A Difficulty in the Concept of Social Welfare,” *Journal of Political Economy* 58, no. 4 (August 1950): 328–346.

<sup>5</sup> I first heard this idea from John Mayo of Georgetown University.

<sup>6</sup> It’s just a shame it took almost 40 years from when Ronald Coase first proposed the idea for it to actually happen. R. H. Coase, “The Federal Communications Commission,” *Journal of Law and Economics* 2 (October 1959): 1–40.

Legislation should ensure that new spectrum licenses can be used and traded flexibly, subject to interference concerns. An active secondary market in licenses already exists,<sup>7</sup> and the more spectrum there is that can be traded this way the better these markets will function.

### Enable the FCC but Make it More Accountable

New legislation should also reconsider some aspects of the FCC's composition and authority to enable the above framework. It is generally believed that to be effective a regulator must meet several criteria. In particular, it must be independent from short-term political pressures, accountable, capable of doing its job, transparent, and limited in its authority.<sup>8</sup> The FCC falls short in some of these categories, especially if shaped along the lines described above.

Perhaps the most important shortcoming is that the FCC has little accountability. In principle, it is accountable to Congress and to the courts. Currently, however, Congress, has limited oversight powers short of passing new legislation. And while the FCC does often find itself in court, any entity with repeated interactions with the regulator will hesitate before challenging a rule for fear of reprisal. Also, while the General Accountability Office and Congressional Research Service both evaluate FCC rules, those reports seem to have little influence.<sup>9</sup>

Additionally, while the FCC has a dedicated and talented staff, its current mix of talents may not be best suited for an agency whose primary responsibilities should include competition analysis of highly technical industries. Marcus and Schneir (2010) conducted a survey of regulatory agencies, which illustrated the mix of professions among several regulators.<sup>10</sup> The survey revealed that the FCC has far more lawyers as a share of its workforce than any of the other regulators surveyed (Figure 1). The FCC's senior managers were almost entirely lawyers (Figure 2). Nobody knows what the right mix of skills is, of course, but these numbers suggest that technical and economic analysis are not currently among the FCC's highest priorities.

### Conclusion

In sum, a new telecommunications act should focus on encouraging entry, competition, and market experimentation. A three-part framework would help further these goals. First, the FCC should adopt a consumer welfare standard and use competition analysis to make decisions. Second, it should apply cost-effectiveness analysis to rules that are not inherently economic in

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<sup>7</sup> John Mayo and Scott Wallsten, "Enabling Wireless Communications," *Information Economics and Policy* 22, no. 1 (March 2010): 61–72; John W. Mayo and Scott Wallsten, "Secondary Spectrum Markets as Complements to Incentive Auctions," Georgetown Center for Business and Public Policy Economic Policy Vignette, June 2011.

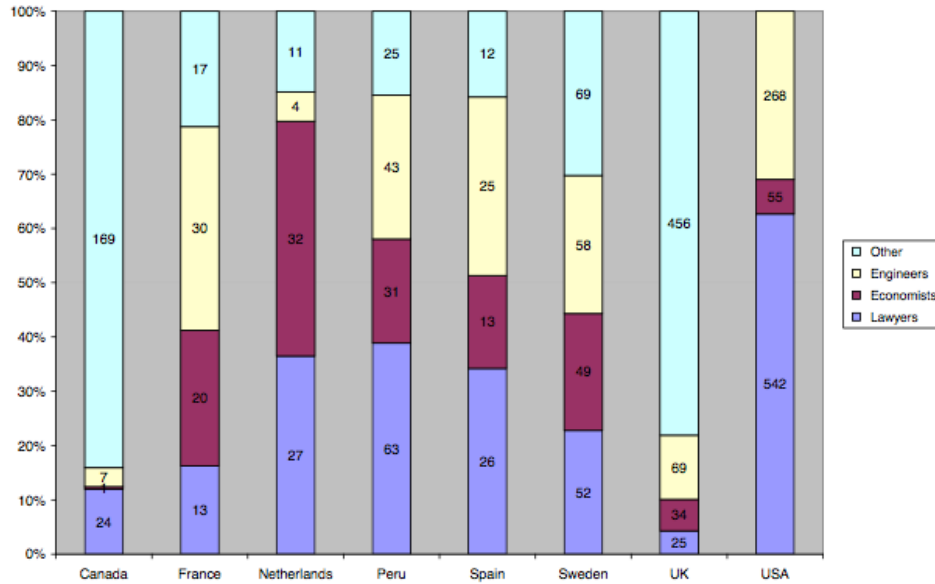
<sup>8</sup> See, for example, Scott Wallsten et al., "New Tools for Studying Network Industry Reforms in Developing Countries: The Telecommunications and Electricity Regulation Database," *Review of Network Economics* 3, no. 3 (2004): 248–282.

<sup>9</sup> See, for example, Government Accountability Office, *Digital Television Transition: Increased Federal Planning and Risk Management Could Further Facilitate the DTV Transition* (Washington, DC, 2007); Government Accountability Office, *FCC Needs to Improve Performance Management and Strengthen Oversight of the High-Cost Program*, June 2008, <http://www.gao.gov/new.items/d08633.pdf>; Government Accountability Office, *Telecommunications: FCC Has Reformed the High-Cost Program, but Oversight and Management Could Be Improved* (Washington, DC, July 2012).

<sup>10</sup> Scott J. Marcus and Juan Rendon Schneir, *Drivers and Effects of the Size and Composition of Telecom Regulatory Agencies* (WIK-Consult GmbH, September 2010), <http://ssrn.com/abstract=1675705>.

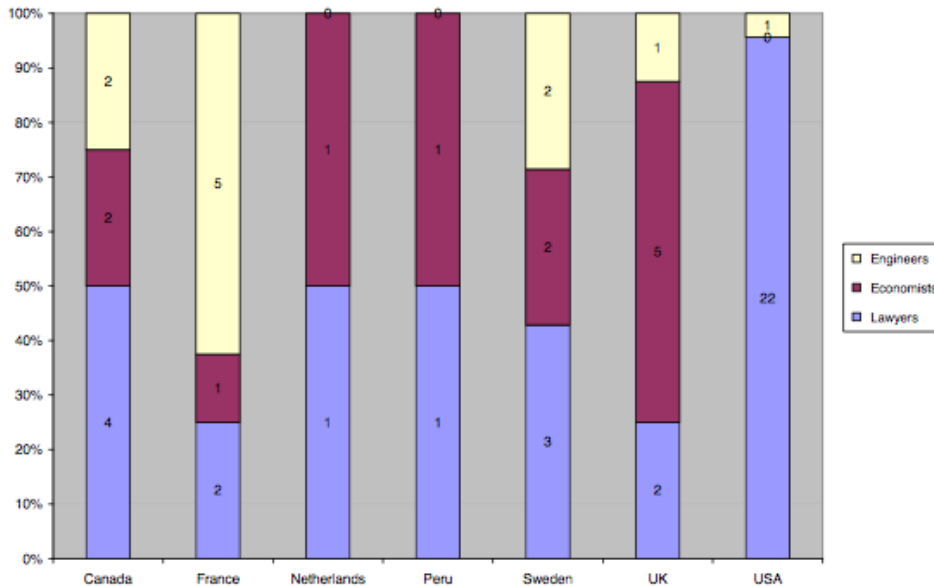
nature. Third, new legislation should continue to encourage spectrum markets by moving spectrum to market and by making its use as flexible as possible.

**Figure 1: Distribution of Professions Among Professional Staff**



Source: Marcus and Schneir (2010), Figure 4.<sup>11</sup>

**Figure 2: Distribution of Professions Among Senior Managers**



Source: Marcus and Schneir (2010), Figure 6.<sup>12</sup>

Note: Excludes “other” category.

<sup>11</sup> Marcus and Schneir, *Drivers and Effects of the Size and Composition of Telecoms Regulatory Agencies*.

<sup>12</sup> Ibid.