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**NOW THAT WE HAVE COMPETITION, WHERE DO WE GO FROM
HERE? A ROAD MAP FOR DEREGULATION**

Jennifer A. Manner*

I. INTRODUCTION

Since the 1980s, a substantial number of telecommunications markets around the world, especially in developed countries, have opened their telecommunications markets to competition. Some markets, including New Zealand, Brazil and the United Kingdom, have embraced competition in all service areas.²⁴ Conversely, nations such as South Africa and Senegal²⁵ have allowed only partial liberalization, while other nations, including Cambodia and Saudi Arabia, remain largely closed to competition.²⁶ In markets where full competition has been sanctioned and actively encouraged by the governments, consumers have recognized substantial benefits including increased teledensity, the availability of innovative telecommunications services, improved quality of service, and lower prices.²⁷

Where telecommunications markets have embraced competition, there is a critical juncture in regulation of telecommunications services. In many of these markets, the incumbent service providers have lost substantial market share, and hence their market power has declined. As market share declines, the ability of the incumbent service provider to engage in anti-competitive conduct also has decreased. Similarly, in markets where the government may have been hesitant to open without substantial market controls, early fears have proven unfounded and today there are outdated regulations in place governing competitive market sectors.

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²⁴ See e.g., New Zealand Telecommunications 1987-2000, (Ministry of Commerce, Feb. 2000) *available at* www.med.govt.nz/pbt/telecom/tip7/tip7.pdf; (NZ Telecom); www.anatel.gov.br; www.ofcom.org.uk.

²⁵ See e.g., Jean Paul Azam, et. Al. Telecommunications Sector Reforms in Senegal, (World Bank Policy Research Working Paper 2894, Sept. 2002) *available at* www.econ.worldbank.org/files/18861_wps2894.pdf; www.icasa.org.za.

²⁶ See Aileen A. Pisciotta, Global Trends in Privitisation and Liberalisation, *available at* <http://www.lirne.net/resources/tr/chapter23.pdf>, in William Melody, TELECOM REFORM (1997).

²⁷ Jennifer A. Manner, GLOBAL TELECOMMUNICATIONS MARKET ACCESS 1-20 (Artech House 2002)

Accordingly, in sectors of the telecommunications market with effective competition, governments should begin to analyze which regulations must be retained and which should be repealed or modified. Specifically, these governments must take the next step and begin to deregulate their telecommunications markets. This can be accomplished by eliminating outdated and unnecessary regulation to ensure that the competitive market can continue to develop without artificial boundaries to entry and market distorting controls on day to day operations of telecommunications providers. This should be achieved through an on-going, systematic review of existing regulations and their continued necessity. Such a review should begin immediately and, if possible, should encourage the elimination of unnecessary regulations and the revision of any regulations that are deemed necessary but in need of change to reflect changed market conditions or public policy goals.

As this article recognizes, deregulating is not easy; the job of regulators is often thought to be regulation.²⁸ To the extent this goal is consistent with the regulator's governing statute, regulators should allow for market control in the absence of market failures and public policy goals. Failure to remove unnecessary regulation likely will result in a market that does not allow service providers to adapt adequately to the market in terms of the services offered, the technology utilized and the availability of services in the market. Over the long term, this will result in harm to consumers by stifling innovation and competition on market sensitive inputs, such as price and service quality.

Of course, deregulation does not mean a lack of safeguards or an inability to protect social or public policy obligations. Regulators should not feel pressure to eliminate regulations where markets are not fully competitive, where there is sufficient risk of anti-competitive conduct, or where technical regulations are still necessary – such as to prevent harmful interference between radio services. In addition, where warranted, such as to ensure public safety or other public interest goals, it may be appropriate for regulators to impose certain obligations on licensees. For example, the United States imposed requirements on mobile telephony providers to provide geographic location service for emergency communications (E911).²⁹ To the extent regulations are determined necessary, the government must be willing to

²⁸ FCC Commissioner Kathleen Q. Abernathy; Speech at the Telecommunications Conference: Advancing Egypt's Legal and Regulatory Framework (Oct. 8, 2003), *available at* <http://www.fcc.gov/commissioners/abernathy/speeches2003.html>.

²⁹ In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102 (adopted June 12, 1996) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-96-264A1.pdf.

enforce these remaining regulations. This is especially important in a market where the government has reviewed its regulatory regime and has retained only the regulations that it believes are necessary and appropriate.

Finally, where deregulation is appropriate, the regulator also must ensure that it has an effective consumer education policy in place. For consumers to be able to take full advantage of a deregulated competitive marketplace, they must understand the choices that are available and the regulator must be committed to pursuing this goal. This effort also should be conducted by industry and trade associations in conjunction with the regulator. By empowering and educating the consumer, the regulator will further enable the proper functioning of competitive markets.

II. THE ROAD TO COMPETITION

Over the past couple of decades, the global telecommunications market has evolved dramatically from a market characterized by a monopoly service provider to one where many countries now permit full competition between service providers. This trend has been most dramatic in developed countries, such as the United States, Ireland, Japan and the United Kingdom. A significant number of developing countries, such as Brazil and India also have been moving in this direction, most notably since the early 1990s.³⁰

Markets that have allowed competition generally followed the basic regulatory formula of:

$$\text{Privatization} + \text{Liberalization} + \text{Effective Regulation} = \text{Competition}^{31}$$

Specifically, by utilizing this formula, governments have been able to turn telecommunications markets formerly characterized by a single government-owned monopoly bureaucracy providing telecommunications service, often inefficiently, into markets characterized by multiple service providers competing on price and service quality, among other attributes. This has resulted in many consumer benefits, including an increase in the number of services offered, the introduction of new technologies, reduced prices, and more innovative services and service offerings available in the market.

There are many examples of where the basic regulatory formula has resulted in the creation of a highly competitive telecommunications market.

³⁰ See generally, Manner *supra* note 5, at 1-20.

³¹ Manner, *supra* note 5, at 23.

One of the first countries to open its telecommunications market to competition successfully was the United Kingdom.³² In the 1980s, the British government privatized the incumbent telecommunications service provider, British Telecom, and liberalized the telecommunications market, allowing competition in the marketplace for all telecommunications services.³³ The benefits of competition were recognized early on by an increased teledensity, substantial reductions of prices, and an increase in the availability of innovative telecommunications services.³⁴ In addition, even British Telecom benefited from competition by increasing its revenues from the provision of telecommunications services. This revenue increase has been attributed to several factors, including the need for British Telecom to adapt and streamline its operations to thrive in a competitive environment.

Other countries followed suit. For example, Brazil, which as recently as 1995 was characterized by a monopoly service provider with an extremely low teledensity, now has a fully competitive telecommunications market.³⁵ Today in Brazil there is a teledensity of over 26%, and there are multiple telecommunications service providers in all sectors of the telecommunications marketplace.³⁶ In addition, consumers are able to obtain more reliable and cost effective telecommunications services compared to telecommunications markets dominated by a single monopoly service provider. It will be interesting to watch the Brazilian market evolve further, since the entire long distance and local telephony markets recently opened to competition.

Other success stories include Ireland. In 1996, Ireland had a distressed economy. Telecommunications was seen as a potential method of attracting investment, and hence, creating jobs. Specifically, Ireland believed that if a competitive telecommunications market was created, prices would drop and quality and coverage would increase, attracting companies to Ireland to take advantage of the educated, English-speaking Irish workforce. Accordingly, in the late 1990s, Ireland, despite a derogation from the European Union requirements on market access, opened its market to competition earlier than planned in an effort to attract more businesses to Ireland because of its lower rates for telecommunications services in conjunction with its educated, English speaking workforce and stable political regime.³⁷ The Irish strategy worked. Today, Ireland has created and sustained a sizable number of call

³² www.ionet.net/~mguard/.

³³ *Id.*

³⁴ *Id.*

³⁵ See <http://rlandell.tripod.com/histbracom.htm>.

³⁶ See <http://www.worldmarketsanalysis.com/InFocus2002/articles/telecoms-Americas.html>.

³⁷ See <http://abrannen.home.mindspring.com/mba/ireland/irishtel.htm>.

centers that support many industries, resulting in improvements in the Irish economy. In addition, Irish citizens benefit from the wide availability of telecommunications services, increased quality of service, and lower prices.

It is also interesting to note how much mobile telephony has influenced the competitive landscape of the telecommunications industry. In many countries, especially in the developed world, the most competitive markets for telecommunications are in mobile telephony. In addition, some countries are seeing greater penetration in the mobile telephony industry than in the fixed wireline model.

As these markets implemented the basic regulatory formula, however, they rarely revisited their telecommunications regime. This failure has often resulted in outdated regulations staying on the books in many countries around the world. This is because these markets initially were concerned about how to develop their telecommunications market into a competitive model while guarding against service degradation and the potential for anti-competitive conduct by the incumbent service provider. While these regulators were willing and able to impose new regulations or make determinations of appropriate regulations for new services, they were rarely called on to look at which regulations were no longer necessary. Accordingly, many countries have rules that may be outdated, unnecessary or unresponsive to market conditions.

III. WHEN TO DEREGULATE?

Deregulation should only occur when an individual sector of the telecommunications market is fully competitive and the opportunity for competitive abuses is minimal. This condition is in place when no single provider of a telecommunications service in that sector has legacy control of essential facilities or significant market share, such as the case with a former incumbent monopoly service provider. For example, in Germany, Deutsche Telekom (DT) still retains a significant percentage of the basic telecommunications market.³⁸ In addition, the basic telecommunications network is still largely owned and operated by DT. Accordingly, for new entrants to compete effectively they must obtain access to the DT network. However, DT has substantial incentives and the ability to act anti-competitively because of its dominant position in the market. In this situation, deregulation of dominant carrier safeguards against DT would be

³⁸ Deutsche Bank Research, *Digital Economy and Structural Change* (Apr. 25, 2003) (Digital Economies) available at http://www.dbresearch.com/PROD/DBR_INTERNET_EN-PROD/PROD000000000054591.pdf

inappropriate since the market would not be able to function without the anti-competitive distortions that exist because of DT's dominant position.

The German market for mobile services, however, is an example of where deregulation would be appropriate. The German mobile services market is characterized by competition. Although DT had an early start in the market, because of the nature of the mobile telephony market, competition was able to take hold and DT does not have a significant market share.³⁹ The German regulators thus have not had to impose the same type of regulations as in the fixed telephony market to guard against anti-competitive conduct by DT. To the extent such regulations exist, they should be eliminated or phased out over time. In addition, service quality and pricing regulations should be eliminated. This is because the existence of a competitive market should address adequately concerns about poor service or high prices. To be an effective competitor, companies must compete on price and service quality, among other attributes. However, to the extent rules governing technical operations are necessary to avoid things such as harmful interference, or to achieve public interest goals, such as to ensure access to emergency services, those rules would be appropriate to keep in place.

As the German example demonstrates, it is important for a regulator to determine which markets need stringent regulation. Once deregulation occurs, there is no longer a quick and effective method for a regulator to curtail anti-competitive abuses or to ensure that a level playing field is in place for service providers. Accordingly, governments should not consider moving forward too early in the process, and when they do move forward they still should ensure that they have residual legal authority to act if an unanticipated anti-competitive action does occur.

An example of a government moving too quickly in the direction of deregulation is New Zealand. New Zealand moved quickly to adopt a deregulatory approach when it first privatized and liberalized its telecommunications market.⁴⁰ In doing so, New Zealand did not establish a regulator or an accompanying regulatory framework focused on the telecommunications industry. Instead, New Zealand determined that it would regulate only through its antitrust regulator. This led to market failure, however, since the former incumbent monopoly was able to abuse its market position without any regulatory safeguards. Ultimately, many new service providers pulled out of the market because they found they could not effectively compete on a level playing field with the incumbent without

³⁹ *Id.*

⁴⁰ See <http://www.telecom.co.nz/content/0,2502,200633-1548,00.html>.

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corresponding regulatory safeguards. This failure resulted in consumers losing the benefits of competition. Over time, the New Zealand government recognized the problems associated with this approach and chose to create an independent regulator.⁴¹

Therefore, it is important for the regulator to pay attention to the phase of the liberalization process before deregulating. Specifically, each government should utilize certain factors in determining when to begin the deregulation process. The major factors include:

1. The former monopoly service provider no longer retains significant market share.
2. Essential facilities are widely available to service providers from sources other than the former monopoly service provider.
3. There are multiple providers of the specific service in the marketplace.
4. Continued regulation is not necessary in order to advance and meet public policy goals.

If each criterion is met, the regulator should consider moving forward with evaluating existing regulations to see if any should be repealed or modified. To be legitimate, however, this process must be done in a manner that allows public participation, is fully transparent, and does not provide market advantages to any individual or class of service provider. It is important to understand whether there are market failures that may be appropriate to address through regulation. If so, regulations in these areas should be retained or modified to address accurately the harm being remedied. In addition, it is important to examine whether there are public policy rationales for retaining certain regulations, such as providing emergency access to telecommunications services by public safety officials. To the extent such rationales exist, regulations should be retained or modified, but drawn in a manner that is narrowly tailored to appropriately address the goal that regulation is fulfilling.

⁴¹ Paul Brislen, Telecommunications Commissioner Appointed, (Unlimited, Dec. 13, 2001), available at <http://idg.net.nz/unlimited.nsf/UNID/9B9368C7E8C4B4BACC256B200070B10B?OpenDocument&Highlight=2,telecommunications>.

IV. WHY DEREGULATE?

The main aim of any deregulation program is to allow consumers to capture the benefits of a competitive marketplace. Experience demonstrates the benefits of a competitive telecommunications marketplace, including the multiple public interest benefits that flow.⁴² These benefits can include reducing time and cost of entry, providing a greater number of service providers, greater flexibility in the provision of service, encouraging the introduction of new services and technologies, and reducing rates that reflect the lower costs of doing business under a market-based telecommunications regime.⁴³

Since it is often difficult for governments, much less regulators, to move forward with deregulation, it is important to understand the rationale for a deregulatory approach when competition is present in a market. In order to understand this theory, it is helpful to examine case studies.

An excellent example of a vibrant competitive telecommunications market is the United States cellular telephony market. When the United States first established the regulatory regime to govern cellular telephony, it had to choose between utilizing the traditional common carrier scheme or adopting a different model that recognized the absence of any incumbent service providers with market share. The FCC wisely chose not to impose a legacy regulatory structure on this new industry. Instead, the FCC crafted a regulatory regime that allowed for a light touch, by focusing on technical and licensing rules as opposed to imposing service and quality standards mandated in the basic telephony field. By avoiding unnecessary regulation, today the United States mobile telephony market is fully competitive. Presently, the United States has five nationwide competitors for mobile telephony. Companies compete on both price and service. For example, Verizon Wireless' advertising scheme revolves around an employee traveling the country and asking "can you hear me now?" to demonstrate that the Verizon network works everywhere. Similarly, Americans are able to take advantage of reasonable pricing plans for nationwide calling.

Another example involves the provision of data services in the Nordic countries. Many of the Nordic countries have the highest penetration and usage rates for telecommunications services. Finland is a good example of this success, primarily because of its early efforts to liberalize its market.

⁴² Abernathy speech *supra* note 6.

⁴³ See e.g., Verilde Jenaro, Telecommunications and Competition in the European Union, available at www.ecsanet.org/conferences.

First, it is important to note that unlike many countries, Finland's telecommunications market always has permitted a certain amount of private ownership. Therefore, when liberalization of the telecommunications market began in 1994, there were fewer problems than in other markets, because of a change in philosophy with regard to private ownership of telecommunications facilities. Liberalization of the Finnish telecommunications market has resulted in many benefits for Finns, including reduced prices and increased service offerings.⁴⁴ This has led to Finland's having some of the highest Internet and mobile phone usage in the world, attributed at least partially to the low rates available in the marketplace because of competition.⁴⁵

Accordingly, by moving towards the creation of a deregulatory framework where competition is in place, consumers will be able to reap the benefits of new services and technologies at lower prices. It is well-established that governments are not well-suited to choose winners or losers with regard to technology or services. These decisions are best left for the market. Therefore, wherever possible, regulators should endeavor to remove regulations as they become unnecessary or outdated, or to modify them to reflect current market conditions.

V. HOW TO ENSURE DEREGULATION IS SUCCESSFUL

As regulators deregulate their competitive markets, they must still ensure that consumers are able to take advantage of the market to its fullest capacity. Accordingly, regulators must focus on three key areas: 1) imposing public service requirements only in situations where required and where the competitive market will not naturally lead to the desired result; 2) enforcing the regulations that are in place; and 3) engaging in consumer education to ensure that consumers can take advantage of the competitive choices available to them in the market.

First, the regulator must determine whether certain requirements are still required to achieve public policy goals that would not be satisfied in a

⁴⁴ Mikel Akermosa, *Telecommunications in Finland*, (ITU Doc WTIM 99/02) available at www.itu.int/ITU-D/wtim99/presentations/akermarak-e.pdf.

⁴⁵ See, e.g., *Local Access Pricing and E-Commerce*, Organisation for Economic Co-operation and Development (OECD), Committee for Information, Computer and Communications Policy (2000), available at

http://www.oecd.org/longabstract/0,2546,en_2649_201185_27129235_1_1_1_1,00.html;
Cellular Mobile Pricing Structures and Trends, Organization for Economic Co-Operation and Development (OECD), Committed for Information, Computer and Communications Policy (2000), available at

http://www.oecd.org/longAbstract/0,2546,en_2649_201185_2538094_1_1_1_1,00.html.

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competitive market. For instance, in the United States, although the mobile telephony industry is still fairly unregulated, the FCC has implemented requirements ensuring that consumers are able to access emergency communications and that mobile phone services are accessible to the hearing impaired. Other countries have imposed similar types of regulations to achieve their public interest goals. For example, in order to reduce the amount of spam that is sent to mobile telephony users, governments such as Japan have imposed regulation. However, when a government does impose such requirements, it is very important that they are narrowly tailored to address the specific interest advanced and that they are imposed in a fair and equitable manner. Failure to tailor the regulations appropriately may have negative effects on the market and may, in the long run, result in greater public harm than good.

Second, to the extent that certain regulations are deemed necessary, the regulator must have the political will to enforce these regulations. Accordingly, it is unwise to create a regime without any regulation or role for the regulator. This would lead to the very failures that were faced in the market in New Zealand. Instead, the regulator must ensure that the rules deemed necessary for a properly functioning market are effective. For example, to the extent that rules remain in place to guard against harmful interference between wireless services, the regulator must stop the harm and impose appropriate penalties when these rules are violated.

A good example of this was the recent action of the FCC to impose forfeitures against mobile telephony providers in the United States which failed to meet E911 requirements for deploying emergency communications networks. In this case, the FCC had imposed certain requirements on mobile telephony service providers to ensure that emergency communications services were available to mobile phone users on an established schedule. As part of this process, the FCC adopted deadlines for service providers to comply with the Commission's rules. Several carriers, including T-Mobile and AT&T Wireless, failed to satisfy the rules. This led the FCC to issue forfeitures and to order the carriers into compliance.⁴⁶ If the FCC had not acted, it is likely that these companies and other companies also subject to the requirement may not have realized the necessity of meeting their legal obligations.

⁴⁶ See, In the Matter of AT&T Wireless Services, Inc., EB-02-TS-018 (FCC May 9, 2002), available at, <http://www.fcc.gov/eb/Orders/2002/FCC-02-142A1.html>; In the matter of T-Mobile USA, Inc., EB-02-TS-624 (FCC March 4, 2003), available at, <http://www.fcc.gov/eb/Orders/2003/FCC-03-43A1.html>.

Finally, in order for deregulation to be successful, the regulator must ensure that its policies are disseminated to consumers. Consumers must understand their rights and the obligations of service providers. For example, in the United States, the FCC has established the Consumer and Governmental Affairs Bureau in large part to educate consumers about their telecommunications choices and the rights that are provided to them. Other countries, such as the United Kingdom, also have engaged in consumer education efforts.⁴⁷

Regulators, however, should not act alone. It is important that service providers, trade associations and consumer groups, among others, also engage in consumer education. A competitive telecommunications market works best for all parties when available choices are made known to consumers. Therefore, regulators should actively encourage industry to engage in consumer education efforts.

VI. THE HIDDEN DANGER: IMPOSING UNNECESSARY REGULATION

Once a market is deregulated, regulators must ensure that they do not reimpose or impose unnecessary regulation on existing services which would have a negative impact on the market. A good example of such unnecessary regulation is the attempt by some states in the United States to impose service quality standards on cellular telephony providers.⁴⁸ As discussed, it is clear that the U.S. mobile telephony industry is competitive and has incentives to improve service quality as the market demands. Nonetheless, many states, such as California, have proposed imposing service quality standards. Because cellular telephony is a competitive market, it seems unwise to resort to market distorting rules, as opposed to relying on competition to remedy such issues. To impose unnecessary regulations likely will forestall the benefits of competition, such as innovation and reduced prices.

Regulators must also resist imposing unnecessary or inappropriate legacy regulations on new services and technologies. For example, wi-fi devices are being deployed in many countries. Wi-fi is a technology that allows wireless broadband access at a range from several hundred feet to

⁴⁷ Ofcom, a regulator of communications industries in the United Kingdom, offers consumer guides for radio, television, telecommunications and wireless services; *see* www.ofcom.org.uk.

⁴⁸ Other countries also have been accused of imposing unnecessary regulation. *See e.g.*, Vodafone Press Release, Nov. 28, 2001 *available at* http://www.vodafone.co.nz/aboutus/media_releases/12.4_20011128.jsp.

slightly over a mile. As this new technology enters the marketplace, it is important that regulators not impose unnecessary regulation. This technology is being widely deployed in coffee shops and cafes, hotels and office buildings, among other locations. Because of the low power at which wi-fi operates, many nations, including the United States, have imposed very little technical regulation on the service. In addition, in an effort to allow development, and because of the lack of an incumbent with market power, many governments also are refraining from traditional telecommunications regulation of these operations. This type of light-handed approach will provide these nascent services with an opportunity to develop in accordance with market demand as opposed to being stifled by the arbitrary requirements of a regulator. In the long run, consumers should benefit, much as they did through the unregulated environment in which the Internet was developed and in which it continues to grow.

Instead of over-regulating new technologies, regulators should work to ensure that their regimes permit the development of new technologies and services. For example, as with wi-fi necessary regulations, rules concerning interference with other radio devices should be the focus. Care should be taken to avoid imposing legacy telecommunications regulations merely for the sake of regulating. This does not mean, however, that regulators should shirk from their obligations as required by statute or law. For example, Voice Over Internet Protocol (VOIP) is an exciting new application. Many countries, including the United States and the European Union, are examining how this technology fits into existing regulatory regimes. This is particularly tricky, since although VOIP looks similar to basic telephony, it is carried over the Internet, which has historically been largely unregulated. Many countries have stated that they are looking to impose a light regulatory touch in order to allow the market to dictate how this service develops. It will be interesting to watch how governments address this issue over the next year.

VII. CONCLUSION

The telecommunications marketplace has changed significantly over the past few decades. As it moves from a market characterized by a single government-owned provider of basic telecommunications service to a competitive marketplace with innovative services available on an affordable basis, regulators must adapt their regulatory philosophy. No longer should regulators focus on retaining outdated regulation; they must act affirmatively to remove unnecessary barriers to market forces. As regulators move in this direction, however, they should ensure that they continue to adopt safeguards where appropriate, actively enforce their rules, and disseminate consumer

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information to ensure that consumers have the information they need in order to make educated choices in a market.