

# Brooklyn Journal of International Law

---

Volume 27

Issue 3

SYMPOSIUM:

International Telecommunications Law in the Post-  
Deregulatory Landscape

---

Article 15

2002

## Panel 1: Discussion Transcript

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

---

### Recommended Citation

*Panel 1: Discussion Transcript*, 27 Brook. J. Int'l L. (2002).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol27/iss3/15>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

## PANEL I: DISCUSSION TRANSCRIPT

NATHANIEL BERMAN: Well, I think both papers went from the detail of the regulatory changes in Europe to address some of the larger concerns. Professor Burkert brought us to the democracy problem in Europe and Professors Mayer-Schönberger and Lazer addressed the distribution of power among regulatory instances in Europe and the United States. And I look forward to Professor Verhulst's commentary on all this.

STEFAN VERHULST: Thanks for the presentation of two wonderful papers. As a commentator, it is always difficult to comment. I had a brief conversation with Professor Frankel, which clearly indicated that you can never trash them, but you can also never improve them, and that is the difficulty of a commentator.

And so I am going to try to make some — on the one hand — comparison lessons, because we are talking about European developments in a U.S. setting. So, we have the automatic tendency to compare. What I would like to do is try to create some comparative frameworks and touch upon differences or at least some comparative terms, and then I would also like to come back to the interdependencies of governance and look at what they are, or at least, the problems that a global EU and U.S. encounter. I probably only have five minutes, but it is important in addressing the comparative questions to indicate certain safety warnings when you develop a comparative framework, and also reflect the safety warnings that are applicable when you start actually exchanging information based upon the interdependencies of information, as expressed earlier. This is due to the difficulty in drawing lessons from different legal cultures and making comparisons.

The first difficulty of the first complexity that you should be aware of is the use of different terminology. For instance, the use of telecommunications law might already reflect certain differences between the U.S. and Europe — quite often in the U.S., under the umbrella of telecommunications policy and law, you find broadcasting, which is something you will never find within an EU setting. So, the terminology of the sectors and

systems are often really different. Of course, you have to be aware of fundamental legal differences between legal cultures. You also have to be aware of the tendency of the comparatists to rely on one's own legal concept. As the focus of this panel is the European experience, my comparison will also emphasize differences in the European context.

There is a tendency to see common patterns, a typical element in making comparisons. There is also a tendency to ignore the larger picture, which quite often explains the differences between the various legal cultures, and you have to be aware of the speed of change of those legal cultures, which was indicated by both papers already. If we have those safety warnings, then I can start developing a comparative framework. You should be aware of the safety warnings, whatever conclusions you make within that comparative framework.

The first element that is important to emphasize is that both the U.S. and the European Union use a different vision towards actually regulating the communication space. And sometimes they actually fail to emphasize, but at least they both use different metaphors within that whole spectrum of regulating communications and developing communication policies.

If you look at the relevant directorate that is in charge of telecommunications law, you see the metaphor that is used within Europe to regulate communications in the information society, which is fundamentally different than any metaphor used within the U.S. to actually regulate or develop telecommunications policies.

There is metaphor these days. There was one a few years ago when you had the whole fuss about the super-highways. But clearly those metaphors and models have somehow disappeared within the debate in the U.S. about telecommunications regulation, which is not the case when you look at European Union developments that clearly have an information society model in mind, and also have a certain tendency to implement those metaphors.

The second element, the element of focus — something that has substantially changed within the European Union as a result of the new framework, and the focus tends to be more technologically neutral — was emphasized by Professor Burkert's paper, especially where touches upon the notions of inter-

connection and access, which is quite an important difference that indeed there is a technologically neutral approach within the European Union these days. When you look at notions of interconnection and access, which is still different in the U.S., where you have some kind of a classification of dichotomies . . . telecom cable . . . which is again a difference from the European Union which leads to a whole array. This is, of course, a law school, a whole array of litigations, based upon those classifications — and you can have a look at the broadband debate — which ultimately delayed the implementation of specific laws and have a major impact on the debate. That element of fundamental litigation based upon those dichotomies is not present, or less present, within the European Union debate and is an important distinction to be made.

Another element of comparison is the legal scope and . . . what I mean here is the balance between competition law and sector specific law. That balance has changed again within the European Union, as a result of this new communications framework in which — and again, Professor Burkert has emphasized — you have more implementation or more emphasis on the competition law, general competition law element, and you see integration within telecommunications law of general competition law principles such as definition of the significant market power. This balance was already different within the U.S. There was traditionally more emphasis on competition law . . . anti-trust law elements when it came to certain elements of telecommunications regulation, which is, again, important from a comparative perspective.

Another element is the scope, besides the legal scope, but also the general scope and focus and the level of intervention. The European Union tends, as you can see within the very complex communications framework, to be very comprehensive when it does things. This is quite often in conflict with the whole notion of solidarity and proportionality within the European Union, but the EU tends to be rather comprehensive and tries to indicate or include every single element that it sees to be important, which is perhaps different again within the U.S. setting, where it is more an ad hoc intervention on a regular basis. This is also, of course, related with some notions of the light-touch type of regulations.

Then, again, it is important to emphasize that this communications framework is also an attempt to make a distinction in a converged environment between content and conveyance. This is also taking place within a U.S. setting, but is still merged within the FCC, which is a different approach than what the European Union is doing, whether it is really a distinction between content and conveyance also institutionally. And that's also an important comparative conclusion perhaps.

Then another element and a last element, which I want to touch upon here, which is interesting from a comparative perspective, is indeed the whole notion of the public interest — how it is defined and expanded within the European Union framework. This refers to notions of universal service, users rights and consumer protection . . . and especially also . . . consumer protection and users rights, which as you can see is very elaborate in the current communications/telecommunications framework and which is to a certain extent absent — not completely absent — but there is anyway some kind of taboo within the telecommunications debate from at least the FCC perspective to touch upon those issues these days. Anyway, you have, of course, FCC Commissioner Michael Powell, who has those famous speeches about whether there is actually a public interest and so on, which is unthinkable within a European Union setting, and an important comparative perspective.

And then just one element on what Professor Burkert said at the end with regard to localizing universal service. I can't agree more to have universal service as a moving target, and depending upon the target, you should have some kind of a different policy with regard to universal service. This target may change, of course, according to the region . . . or could change according to the region and the local environments.

Some general lessons from both the U.S. and the European Union is that deregulation, the title of this panel, ultimately leads to, not less, but definitely equal, or even *more* rules and frameworks. The whole complex setting of deregulation is already an indication of the end result.

Another important lesson is that liberalization both within the U.S. and within the European Union setting has quite often led to some kind of regulatory opportunism, which then leads to the pollution that Professor Burkert has indicated, and quite often also leads to actual real market distortions following lib-

eralization. These are important lessons to be learned. Everyone knows that, and that is of course, the problem of the informational interdependency — there is a difference between knowing something and acting upon it.

The other comment I would like to add to the interdependency debate and the question of centralized/decentralized governance is: Should it be global versus local, and in the European Union debate should it be European versus Member State based? Perhaps it is also important to look at what problems they have tried to solve.

Depending upon the problems you try to solve, you can make a distinction between the need for a global governance structure and the need for more locally based governance structures; basically if you look at the global governance structures, then there is the tendency for the governance structures to be created as a result of three types of problems that they want to solve.

The first type of problem they want to solve, and hence has led to the creation of those cross-border governance structures, is coordination. If there is a fundamental need for coordination in specific fields because of the need for compatibility — for instance, in the standards fields — then you will have a tendency and . . . a governance solution to its more global type of coordination and institutional framework.

The second type of problem that leads to some kind of need for global governance is what you can title the so-called “commons problems,” which then refers to trying to manage or govern common resources, which don’t stop at the borders and which are generally conceived as public goods. Here again, you can have a whole day debate on what are public goods, and are public goods also moving targets depending upon certain developments. The whole debate is whether you can have, for instance, the same perspective that you have as a spectrum, which is sometimes perceived as a common resource, and you have the same debate within an Internet setting. That is transferred anyway, then you have the automatic tendency to think in global governance terms.

The third type of problem, interdependency, is actually more value based. Quite often you see the creation of global governance structures because there is a tendency to protect call values across borders. And then, look at the UN and so on — basi-

cally wide spaced global governance solutions. The question is: What types of rights and core values do we have within the whole communications debate? You can automatically think of some, and the question is: Are these to be protected at a global level? Then you can add the digital divide to that, and see whether that ultimately may change the whole telecom debate.

Anyway, all those global problems which lead to the need for some kind of global governance structures may ultimately lead to some kind of international institutions, and the ultimate question is whether there needs to be some experimentation here in order to address those global problems that ultimately blend. Then come back to Professor Burkert, and the blend, a certain notion of effectiveness of policy making with democratic accountability, which then also may be the basis for the next panel around ICANN, which is the fundamental question.

NATHANIEL BERMAN: Thank you very much for those comments. . . . I think there are two very broad things that the papers have brought out: Both the distribution of power between various regulatory authorities, and the problems of democracy that were highlighted by Professor Burkert and Professors Schönberger and Lazer, as well as the question of comparative conceptualization of the very issues that the regulatory authorities have to deal with, value choices as well as an understanding of the very conceptual distinctions that are at stake here. . . . So, I want to thank our panelists for both a very informative, and also very provocative set of remarks.