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European Telecommunications Law: Unaffected by Globalisation?

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I. Introduction

Good politicians are experts in the art of insulting. A decade ago, American politicians demonstrated their expertise by coining the term 'Fortress Europe'[1]. It took quite some time, and a good many concessions during the Uruguay Round negotiations over the WTO, before the pejorative label fell into oblivion. The bottom line of this paper is: perhaps too early. Communications is a global phenomenon these days, one should think. The conduits of communications, the telecommunications networks, are connected worldwide. Yet the pertinent legal rules of the European Community take surprisingly little notice of globalisation. They read as if telecommunications were an exercise in organising life within the fortress only, with just a few well-guarded drawbridges crossing the dangerous moats that surround it.

This paper is organised as follows: It starts by presenting the different meanings of the term globalisation (sec. II). For a theoretical foundation, it relies on work by political scientists on governance across multiple arenas. From this work the paper derives a series of hypotheses concerning how a European regulative policy, like telecommunications policy, might be expected to react to globalisation (sec. III). It contrasts these exiting theoretical hypotheses with the sobering reality of current European telecommunications legislation (sec. IV). The paper tries to explain this reality (sec. V). It concludes with a normative outlook (sec. VI).

A caveat is warranted here. Although this paper relies on work of political scientists, it is the work of a lawyer. This feature plays itself out in two respects. The evidence is strictly limited to the law in force, legislative drafts or policy documents officially introduced into the legislative process. More specifically, the paper exclusively uses the current revision of the telecommunications framework as evidence[2]. Political scientists would certainly double check this material with other empirical methods, and interviews with relevant actors in particular[3]. Since the evidence is restricted, the paper cannot make causal claims. It is confined to functionality: If A is the goal, then B helps further it. Or vice versa: If B is the action, the actual goal cannot be A. At one point in our argument, this limitation will become relevant. In legislative practice we will find a good number of actions that are functional for both globalisation and Europeanisation. Due to the methodological restriction, we will not be able to actually prove that they are indeed the result of the latter. We will only be able to demonstrate the (high) plausibility of this thesis.

1 See e.g. HUFBAUER und SCHMITZ in Oppermann und Molsberger 1991.

2 All documents are made available at http://europa.eu.int/information_society/topics/telecoms/index_en.htm (visited on August 21, 2001). By now, the convenient separate web site for the telecommunications framework has disappeared. The documents can be accessed via http://europa.eu.int/pol/infso/index_en.htm (visited on January 16, 2002). For details see below IV.

3 On their methodology see KING, KEOHANE und VERBA Designing social inquiry 1994.

II. Dimensions of Globalisation

There is much controversy about globalisation. Obviously there are those who think it is bad[4], and others who think it is good[5]. But an equally lively controversy concerns the question about what globalisation actually means. It is partially also a controversy over the appropriate conceptual tools for understanding the phenomenon. A first distinction concerns the object of globalisation. In this context, the globalisation of markets is not itself of interest[6]. When applied to government, globalisation characterises a – partial or even total – loss of autonomy of the nation-state. Those who use the term in this way disagree, however, about the dimension of the loss.

The most basic dividing line is between rational choice and constructivist approaches[7]. The former look at individual actors maximising some utility, the latter at the social context in which individual action is embedded. Another way of putting the dividing line is that the former look at interests, the latter at ideas[8].

On the interest side, those are most prominent who equate globalisation and regulatory competition[9]. In the terminology of economic competition theory, the nation-states no longer have a governance monopoly. They have shifted into a situation of monopolistic competition[10]. Other nation-states offer different bundles of public goods. Regulatees are able to move to these substitutes[11]. A related concept might be more appropriate for understanding the effect. It replaces the metaphor of competition on a market with the metaphor of members controlling the management of an organisation. There are two conceivable mechanisms for doing that: voice and exit[12]. Within a traditional nation-state, regulatees can only make use of the former mechanism. Globalisation adds the second. Exit becomes so easy that it is turned into a practical option, at least for some actors. If an actor can credibly threaten government with exit, his voice also becomes much louder. Market entry by outside suppliers can be a functional equivalent to the exit of formerly captive regulatees. This is so if the new entrants into the national market can at least partly operate under the less stringent rules in force at their place of origin. Acountry importing foreign products may be able to impose its product regulations on them. But it will normally not have an opportunity to control production, organisation or funding.

4 Characteristic MARTIN und SCHUMANN Globalisierungsfalle 1996.
5 Characteristic VON WEIZSÄCKER Globalisierung 1999.
6 See below on the possible repercussions of global markets on regulatory autonomy.
7 Comprehensive on this, and stimulating BÖRZEL und RISSE Internationale Institutionen 2001.
8 On this distinction VANBERG und BUCHANAN Journal of Theoretical Politics 1989; YEE International Organization 1996.
9 On regulatory competition see only GERKEN Competition Among Institutions 1995; MONOPOLKOMMISSION Systemwettbewerb 1998; MÜLLER Systemwettbewerb 2000 and critical TJIONG Regulatory Competition 2000. For the equation see only SCHARPF Globalisierung 1997b.
10 Fundamental on this concept CHAMBERLIN Monopolistic Competition 1933; for modern views see TIROLE Industrial Organisation 1988, chapter 7.
11 Clear on this SCHÄFER in Berg 1999, 10 and passim.
12 Basic HIRSCHMAN Exit voice 1970.

In this perspective, a link to the globalisation of markets becomes visible. Globalisation affects what antitrust lawyers call the geographically relevant market[13]. Globalisation can also change what is known as the relevant product market[14], e.g. if consumers only ask for a telecommunications service that offers global coverage. The greater such effects of globalisation, the less relevant the physical location of the headquaters of a firm becomes, and the easier exit becomes. However, this is often not a strong effect. Usually, the switching cost is still considerable. To conduct local business, local premises normally have to remain, and they are regulatory targets.

Another link between the globalisation of markets and the autonomy of national governments is even more important. It is difficult for a single nation-state to regulate a truly global market. But the nation-state is not entirely devoid of means: It can apply its own rules extraterritorially[15]. It can engage in international cooperation. Or it can implement governed self-governance[16], to cite only the most important options[17]. But each of these options comes at a cost, or a risk, or both.

It is no coincidence that political scientists interested in European governance have coined a term analogous to globalisation, namely, Europeanisation[18]. Their prime topic, however, is not pressure on member states' autonomy, originating from fundamental freedoms, as guaranteed by the EC-Treaty. That would be the strict parallel to globalisation as discussed so far. They look at how national politics change once Europe is introduced as an additional arena for policy-making. Obviously there is no strict parallel to this on the world level. There is no sign of supranational governance at the global level. But here we are interested in limitations to the national regulatory autonomy. And such limitations do not solely stem from the regulatees' exit options or from regulatory issues transgressing national borders. They are also grounded in – limited – international regulatory powers that partly, or even fully, escape national control.

One may discuss whether ordinary international treaties already fall into this category; for treaties must be ratified by each and every nation-state before it becomes bound by the treaty rules. But globalisation is clearly evident when a framework treaty endows an international organisation with some uncontrolled regulatory powers[19]. In our context, the International Telecommunications Union[20] and the World Trade Organisation Agreement on Basic Telecommunications Services are the most prominent instances[21]. One can even close the conceptual circle and couch regulatory competition in these terms. It means that functionally some regulatory power shifts to foreign nation-states. This interpretation makes it possible to properly classify what one might in economic terms dub regulatory yardstick competition. The term yardstick competition has been

13 More in our context from EC Commission Working Document On Proposed New Regulatory Framework for Electronic Communications Networks and Services Draft Guidelines on market analysis and the calculation of significant market power under Article 14 of the proposed Directive on a common regulatory framework for electronic communications networks and services of March 28, 2001, COM (2001) 175, par. 46-52.

14 More ibid. (note 13) par. 56 and 58.

15 Basic SCHNYDER Wirtschaftskollisionsrecht 1990; MENG Extraterritoriale Jurisdiktion 1994.

16 More at ENGEL European Business Organisation Review 2001c.

17 For an overview see ENGEL in Engel und Keller 2000a, 245-258.

18 See only HÉRITIER in Héritier 2001, 3-9.

19 More on this difference from ENGEL Völkerrecht als Tatbestandsmerkmal 1989, 258-328.

20 Comprehensive, though somewhat dated, TEGGE ITU 1994.

21 For the moment see only BLOUIN Telecommunications Policy 2000.

developed for understanding how managers are controlled by the product markets, even if they earn a fixed salary. If their firm performs significantly worse than its competitors, shareholders receive a relatively reliable signal for poor managerial quality. The manager must justify himself, if he is not simply fired[22]. The intensity of yardstick competition depends on transparency. Not only must data on foreign performance must be available; the foreign and the domestic case must also be sufficiently similar. On both grounds, globalisation can have a similar effect on national regulation[23]. It makes access to information about foreign regulatory practice much easier than before. If globalisation extends product markets across national borders, it also partly standardises the regulatory issue[24].

All these have been rational choice arguments. An analogy to research on risk helps us understand how the constructivist understanding of globalisation differs. In a rational choice perspective, classifying risks seems relatively easy: multiply the conceivable damage by its probability. If you do not know any of these elements precisely, build rational expectations on the basis of what information you have. If you find more information, update your expectations[25]. This leads into a quest for measurable indices, like dollars per lives saved[26]. Many have objected that people perceive risks differently[27]. They have consequently called for making 'perceived risk' the appropriate regulatory standard[28]. By the same token, one might distinguish globalisation from 'perceived globalisation'. The decisive fact is whether policy-makers *think* that the regulatory environment has changed and that they have lost some of their autonomy[29]. Taken to the extreme, even the regulatory discourse could no longer be national or European; it has become global[30]. And in the constructivist perspective, too, there is a link between the globalisation of markets and of politics. For constructivists, an industry has an identity, created by communication among its members[31]. If this identity is no longer national, but global, the regulatory problem changes. For in the constructivist perspective, successful regulation is tantamount to altering the internal communication of the addressees as a group. If they now think global, they are likely to ignore purely national governance attempts, viewing them as mere irrelevant noise. Governments will only be successful if they adapt their intervention to the new internal logic of industry[32].

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22 TIROLE Industrial Organisation 1988, 41-48.
23 Cf. WEBER Globalization 2001, 13: globalisation yields information about "best regulatory practices".
24 Cf. CRANDALL und WAVERMAN Universal Service 2000.
25 More from EICHENBERGER in Engel, Halfmann und Schulte 2001.
26 As in the famous MORRALL table, MORRALL Regulation 1986, 30 table 4; critical HEINZERLING Yale Law Journal 1998.
27 See only PILDES und SUNSTEIN University of Chicago Law Review 1995; MCGARITY Administrative Law Review 1998; see also SYMPOSIUM Journal of Legal Studies 2000.
28 See in greater detail SUNSTEIN Stanford Law Review 1996, 264/267/293, but VISCUSI Risk Equity 2000, 32.
29 Cf. WEBER Globalization 2001, 274: "Ultimately, institutional change happens only when political actors understand a challenge in a particular way and fashion a response".
30 Sceptical on empirical grounds SCHMIDT Daedalus 1997.
31 Basic WHITE Identity and control 1992.
32 These are insights from systems theory, one strand of constructivist thinking. The details are heavily disputed among systems theorists. The interpretation offered here is close to TEUBNER Recht als autopoietisches System 1989, 83/95 et passim; more discussion in ENGEL Assessing Outcomes 2001a, 15-19.

III. Exiting Hypotheses: A System of Multilevel Governance In the Face of Globalisation

The European Union is a functioning system of multilevel governance. There is Europe, the Member States, in federal States like Germany also the members of this national federation, the municipalities, often also autonomous regional bodies. There are many functional governmental regulatory bodies at all these levels, like the independent *Regulierungsbehörde Telekommunikation und Post*. Finally, there are a multitude of private or hybrid regulatory institutions, like the European Telecommunications Standardisation Institute (ETSI). As shall be discussed below, globalisation potentially affects their policies (section 1), but it also affects the institutional framework for policy-making (section 2). In theory, the individual elements, and the system as a whole, have three options for reacting to the challenge: mitigation (section 3), adaptation (section 4) and preference change (section 5). Here the focus is on the options of European actors, exercising their powers for autonomous reaction.

1. Effects of Globalisation on Policies

The effect of globalisation on policies is obvious[33]. It directly follows from the definition of globalisation. We have defined globalisation as a (partial) loss of regulatory autonomy. In a rational choice perspective, European regulators must submit to competitive pressure from abroad, or to the regulatory activities of foreign regulatory bodies.

In a constructivist perspective, the limitation results from the outside influence on the canvas of ideas. Europe looses some autonomy in choosing political preferences[34]. There are many ways of explaining how this might result from globalisation. Discourse theory points to a potential change of prevailing belief systems[35]. Others would investigate whether the dominant problem-solving approach[36], or even identity, changes[37]. Historical institutionalists would look out for new 'rules of appropriateness'[38]. Organisation ecologists would investigate how 'coercion, mimetism and normative pressure' play themselves out under the new circumstances[39].

33 One might further distinguish the effect on policy patterns from the one on policy outcomes, HÉRITIER in Héritier 2001, 3.
34 Cf. for Europeanisation RADAELLI Corporate Taxation 1997; GREEN COWLES, CAPORASO und RISSE-KAPPEN Transforming Europe 2001.
35 SCHMIDT Daedalus 1997.
36 SABATIER in Héritier 1993.
37 GREEN COWLES, CAPORASO und RISSE-KAPPEN Transforming Europe 2001.
38 MARCH und OLSEN Rediscovering Institutions 1989; OLSEN in Gustavsson und Lewin 1996.
39 DIMAGGIO und POWELL in diMaggio und Powell 1991; RADAELLI Corporate Taxation 1997.

2. Effects of Globalisation on Political Institutions

Less obvious, but no less important, are the potential impacts of globalisation on formal and informal political institutions[40]. Again, a rational choice perspective and a constructivist perspective can be distinguished.

In a rational choice view, changes in the political opportunity structure are decisive. How are the games changed that political actors play with each other[41]? Just introducing Europe makes the analysis complicated[42]. In game-theoretic terms, political actors are now playing a two-level game[43]. What they do at the national level has repercussions on their policy options at the European level, and vice versa[44]. Their policy options explode once a more realistic picture of governance across multiple arenas is introduced. Globalisation is one more element of this picture. Due to the enormous complexity of the ensuing nested game[45] it becomes almost impossible to predict strategic moves. Is Europe an independent, additional driving force for change, along with globalisation? Is it, instead, the strategic environment where political actors try to moderate and control how they are affected by globalisation? Or is the European Union no more than a pipeline, a conduit, transmitting global causes to Member States and firms[46]?

Only case studies of specific political conflicts might define opportunity structures, and in all likelihood their results would be confined to narrow issues at one point of history. They would often even differ from Member State to Member State[47]. No more than some possibilities can be listed here, as an illustration of the potential impacts of globalisation on the European multilevel game. If firms can muster up a realistic threat of exit, this gives them a stronger veto point in negotiations over future regulation[48]. If they stand to become superfluous after the globalisation of a market, administrative agencies are likely to combat globalisation fiercely[49]. Any new arena for policy-making tends to give informal political actors a greater potential, because they gain additional 'access points'[50]. The more important it becomes for Europe to externally speak with one voice, the more unitary European organs, and the Commission, in particular, are likely to gain ground.

40 In the language of HÉRITIER in Héritier 2001, 3: Europeanisation, and hence also globalisation, can have an impact on administrative structures, but also on patterns of interest intermediation.
41 Basic SCHARPF Games 1997a.
42 HÉRITIER in Héritier 2001, 9: "the complex dynamics of political processes induced by European policy outcomes" in the Member States.
43 Basic PUTNAM International Organization 1988.
44 HÉRITIER in Héritier 2001, 10: "European and national policy-making as two separate, but parallel, policy streams which intermittently interlink"; HÉRITIER in Héritier 2001, 2: "Member state actors exert influence in the shaping of policies at the European level by which they themselves are subsequently transformed".
45 On this game-theoretic category more from BAIRD, GERTNER und PICKER Game theory 1994, 188-218.
46 WEBER Globalization 2001, 289 offers all three hypotheses and claims that each has some truth in it.
47 Cf. HERITIER in Héritier 2001, 9 s.
48 On the concept of veto points basic IMMERGUT Health Politics 1992.
49 Cf. HERITIER in Héritier 2001, 15.
50 Ibid.in, 11.

From a functionalist perspective, one might expect globalisation to increase the urge for a unitary 'European regulatory culture'[51]. Practice seems different, however, and not only in the case of telecommunications. The political systems of Members States seem to be much more likely to react to the increased (feeling of) uncertainty by renationalising political discourse[52]. This is in line with the observation that there is still no such thing as a true European *demos*. Solidarity is still very much perceived as a national endeavour, as is (political, national) identity[53].

3. Mitigation

Theoretically, the European political system, or any of its components, can parry the challenge of globalisation in three distinct ways: by mitigation, adaptation, or preference change[54]. Mitigation is a defence strategy. Feasible defences mirror the reasons for globalisation.

If globalisation comes in the form of regulatory competition, the previously autonomous regulatory body must strive to make exit more difficult[55]. There are many ways of doing this. An outright prohibition is only the most obvious approach. But throughout history many states have made emigration impossible or at least dependent on an explicit permission[56]. The most popular strategy is making exit more costly. This can be done via asymmetric taxation. This is what the famous conflict over removing headquarters from one Member State of the EC to another is about. After *Centros*, going abroad became much more of a practical option than before[57]. When we characterised regulatory competition as an instance of monopolistic competition we also implicitly expressed the idea that there are considerable exit costs. Normally, firms do not have the option of customized exit from those provisions of national law that they dislike. They have to swap whole regulatory packages, taking the British instead of the German package, for instance. There is a constructivist option, too. Nation-states, or the European Union, could try to discourage private actors from exit by shaming them if they go. The famous 'buy British' campaign is an instance. It shamed customers who bought foreign products, and thereby circumvented any national regulation not directly affecting product quality.

In principle, the same options also exist if a loss of regulatory autonomy originates in the globalisation of regulated markets. But they are more difficult to apply. For then it is not sufficient to specifically target those national actors who might be tempted to exit. Instead, the whole market must be (re-)nationalised.

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51 This is indeed what the Commission calls for in the Explanatory Memorandum, B 2, to the Amended proposal for a Directive on a common regulatory framework for electronic communications networks and services of July 4, 2001, COM (2001) 380 final.

52 SCHMIDT in Weber 2001.

53 For a legal voice see LÜBBE-WOLFF Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 2001; for a voice from political sciences see SCHARPF Governing in Europe 1999, sec. 1.2.

54 It is no coincidence that these same options do also exist if a constitution considers how best to react to private or hybrid governance, see ENGEL European Business Organisation Review 2001c, sec V.

55 More at ENGEL in Gerken 1995.

56 For the evidence see FINER Social Science Information 1974.

57 ECJ 9.3.1999, C-212/97, Reports 1999 I 1459.

Legally, it is easy to prevent regulatory authority from being siphoned away by international regulators. Their jurisdiction depends on the ratification of a treaty by the national parliament. Yet politically, it is not always easy not to confer, or to pull back jurisdiction. Private regulatory bodies do not need an explicit transfer of authority from the national sovereigns at all. In principle, the nations, and Europe, might apply the same techniques of mitigation as they do in regulatory competition. They might, by autonomous rules, prohibit their subjects from applying these foreign rules; they might make this prohibitively costly; or they might shame those who rely on these foreign rules. But these individuals are themselves the addressees of these foreign rules. They will therefore object that, in contrast to the case of regulatory competition, the loss of national regulatory autonomy is not their fault. Maybe the foreign and the competing national rules are even contradictory. In that case, addressees would rightly ask to be protected from tragic choices. For all these reasons, the practical options will therefore usually boil down to an open political fight between the national regulator and its foreign adversary. If the foreign rules can only be implemented by the nation-state, another option is simply for the state not to implement them.

Remains perceived globalisation. If the national, or European, regulator itself does not think that autonomous action any longer makes sense, enlightenment by outside observers might help. If this regulator is itself the observer of prevailing social construction, strategic action is conceivable, but difficult to perform. The regulator would have to mould public perception differently. Or maybe it is enough to offer the public other salient issues. It then might be content to simply maintain the previous national regulation, once the globalisation issue is no longer centre stage.

4. Adaptation

The terms mitigation and adaptation are culled from the discussion of climate change[58]. Countries that did not want to take on rigorous mitigation obligations made a strategic move to introduce adaptation into this discussion. They objected that adapting to a different climate would be much cheaper for many regions of the world. Likewise, regulators exposed to globalisation are not faced with a choice between mitigation or withdrawal. Not so rarely, they can adapt to the changed environment. This can be (politically) cheaper, or even more effective.

If globalisation affects a particular policy, adaptation calls for altering this policy so that globalisation no longer affects, or damages, it. For this to be an instance of adaptation, the underlying policy preferences should not change. But regulators might find less vulnerable ways of reaching their constant goals. A very popular reaction is to shift from pure public to hybrid regulation. This is characteristic of many Internet related issues, like data protection, consumer protection or speech control[59].

58 See only KANE und YOHE Climate change 2000.
59 For details see ENGEL und KELLER Global Networks 2002, chap.8.

Likewise, if globalisation affects political institutions, the underlying constitutional goals should not be adapted. But a polity might find ways to reach these same goals by different, less vulnerable means. Another way of putting the task is: make the institutional framework more robust against outside influences. In the parallel context of Europeanisation, it has been observed that nations possessing a greater 'reform capacity' do adapt much better[60]. Europeanisation, or globalisation for that matter, can therefore become a stimulus for constitutional reform. Likely targets of such reform are historically emergent, but no longer functional veto positions[61].

There is a less benevolent view of adaptation, however. It inevitably opens up internal political debate anew. Previous compromises can crack. Interested actors can seize the opportunity to gain on other grounds. The general insight into regulative policy holds: there is almost always more than one option for addressing a true social problem. And these solutions almost always differ on distributional grounds. Effectively imposing one solution, and not any other, is therefore the safest way of securing distributional gains. For after the fact, all actors would lose by abolishing that solution, even those who lose on the distribution side. In game-theoretic terms, the distributional gain is a Nash equilibrium[62]. One application of this general idea is particularly likely: the Commission of the EU could maintain that it is necessary to extend its powers in order to adapt to globalisation, and this would be to the detriment of Member States or other European political organs[63].

5. Preference Change

If you can't beat them, join them. If globalisation affects specific policies, regulators have the same option[64]. They can make their cause what was originally only the political will of a foreign or superior regulator. They also can interpret regulatory competition as a healthy stimulus to internal betterment. For individuals, the parallel process is well studied by psychologists. A change of attitude is a mechanism to preserve self-esteem. Psychologists call it a reduction of cognitive dissonance[65]. But there is the opposite reaction too. Psychologists call it reactance[66]. In line with this, a loss of utility still seems better than subduement to unjust pressure. Which reaction is more likely depends on the character and representation of the outside pressure[67]. None of these mechanisms directly carries over to group behaviour[68]. It is even less possible to mechanically apply them to the institutionally embedded political process. But we need not understand the

60 HÉRITIER in Héritier 2001, 9 s., and 19 comparing the Member States of the European Union in this respect.
61 This is the central claim of SCHARPF Politikverflechtung : Theorie u. Empririe d. kooperativen Föderalismus in d. Bundesrepublik 1976.
62 This is the central idea of KNIGHT Institutions and social conflict 1992.
63 Cf. HÉRITIER in Héritier 2001, 7 on a similar strategy of the Commission in other areas. It repeatedly has promoted the representation of associations at the national or local level, in the interest of weakening Member States, and of using the associations as their watchdogs.
64 Cf. Ibid.in, 1: Europeanisation can add new policy goals to the political agenda.
65 Comprehensive FREY und GASKA in Frey und Irle 1993.
66 Comprehensive DICKENBERGER, GNIECH und GRABITZ in Frey und Irle 1993.
67 A graphic example of both options is to be found in FREY und OBERHOLZER-GEE in Frey 1999.
68 For an overview see SEDIKIDES, SCHOPLER und INSKO Intergroup cognition 1998.

mechanism here. It suffices to point to a change in political preferences as a third option for a previously autonomous regulatory body.

IV. Sobering Reality: European Telecommunications Law Has Hardly Been Affected by Globalisation

Against this rich theoretical backdrop, the reality of European Telecommunications Law that is being developed is quite sobering. European Telecommunications Law is currently undergoing a major overhaul, called the new telecommunications framework[69]. In what follows, these documents shall be used as (sole) evidence. There are, it is true, a number of explicit references to international issues to be found in these documents (section 1). But most of them read as if globalisation just did not take place. The small exceptions concern rather marginal issues. There is hardly a sign of mitigation (section 2). Adaptation is the only debatable issue (section 3). But it is at least highly plausible that the apparent signs of adaptation are mere instances of Europeanisation. Are we thus faced with a neglect of globalisation by the European Community, and by the Commission in particularsection 4.)?

1. Explicit References to International Issues

In all the many documents on the new regulatory framework for telecommunications, the term 'globalisation' is merely mentioned once, and in a totally marginal reference:

> Numbering requirements in Europe, the need for the provision of pan-European and new services and the *globalisation* and synergy of the electronic communications market require the Community to harmonise national positions in accordance with the Treaty in international organisations and fora where numbering decisions are taken[70].

Apart from that, there are a good number of references to the international dimension of telecommunications. But most of them concern issues that were no different ten years ago, when nobody spoke about globalisation[71]. These issues shall be discussed below. Respect is, of course, paid to the international legal obligations of the Community and its Member States (section a). The Community organs and the Member States must specify who speaks for them externally (section b). In antitrust law, markets sometimes must be defined in a way that transgresses

69 All documents can be accessed at http://europa.eu.int/information_society/topics/telecoms/index_en.htm (visited on August 21, 2001).

70 Draft Framework Directive (supra note 51) preamble (17), emphasis added.
See also Regulation of the European Parliament and of the Council on unbundled access to the local loop of Dec. 5, 2000, 2000/0185 (COD): "In accordance with the principle of subsidiarity as set out in Article 5 of the Treaty, the objective of achieving a harmonised framework for unbundled access to the local loop in order to enable the competitive provision of an inexpensive, *world-class communications infrastructure* and a wide range of services for all businesses and citizens in the Community cannot be achieved by the Member States in a secure, harmonised and timely manner and can therefore be better achieved by the Community" – emphasis added.

71 For the older law, see in detail ENGEL in Friedmann und Mestmäcker 1990, 130-134 in particular.

Community borders (section c). Finally, there is the Internet, by definition a global enterprise (section d).

a) Respect for International Legal Obligations

At several instances, the new telecommunications framework points to the commitments of the Community and the Member States under the WTO Agreement on Basic Telecommunications Services[72]. There are also references to the international obligations relating to the use of radio frequencies and orbital positions, as enshrined in the law of the International Telecommunications Union (ITU), and in the rules of the *Conference Européenne des Administration des postes et des télécommunications* (CEPT) at the European level[73]. Further references are made to international technical standards that are part of ITU law or part of the secondary legislation of other international standardisation bodies[74]; but the Community stresses that it prefers its independent European standards[75]. The new rules also make occasional caveats for international commitments for conditional access systems of digital television services[76], for reporting obligations under international treaties[77], and for ex ante regulatory obligations in general[78].

b) External Relations

The many references to international issues in the Draft Radio Spectrum Directive boil down to a conflict between the EU and its Member States over external powers. Thus far the Community has not had much say about radio spectrum management[79]. The Community pushes Member States on two grounds. It wants management issues to be decided upon within the Community framework, rather than by international organisations like the ITU or CEPT[80]. At least the Community should speak with one voice in these bodies[81]. To this effect, a joint negotiation position should be agreed upon beforehand[82], and the Community should get involved in the implementa-

72 Draft Framework Directive (supra note 51) preamble (22); Amended proposal for a Directive on access to, and interconnection of, electronic communications networks and associated facilities of July 4, 2001, COM (2001) 369 final, preamble (8); Proposal for a Directive on universal service and users' rights relating to electronic communications networks and services of July 12, 2000, COM (2000) 392, preamble (3); par. 102 Draft Market Analysis Guidelines (supra note 13); see also Sixth Report on the Implementation of the Telecommunications Regulatory Package of Dec. 7, 2000, COM (2000) 814, at 5.

73 Amended proposal for a Directive on the authorisation of electronic communications networks and services of July 4, 2001, COM (2001) 372 final, Art. 7 IV (2); Proposal for a Decision on a regulatory framework for radio spectrum policy in the European Community of July 21, 2000, COM (2000) 407, Explanatory Memorandum, at 1.

74 Draft Framework Directive (supra note 51) Art. 15 II (3)-(4); Draft Access Directive (supra note 72) preamble (3).

75 Draft Framework Directive (supra note 51) Art. 15 II (1)-(2).

76 Draft Access Directive (supra note 72) preamble (9).

77 Draft Authorisation Directive (supra note 73) preamble (14).

78 Draft Framework Directive (supra note 51) preamble (20).

79 Explicitly Draft Decision Radio Spectrum (supra note 73) Explanatory Memorandum at 3; see also Green Paper on radio spectrum policy in the context of European Community policies such as telecommunications, broadcasting, transport, and R&D, COM (98) 596 final.

80 Ibid, at 3; preamble (2).

81 Ibid, preamble (8); preamble (14); Art. 1 (4); Explanatory Memorandum at 3.

82 Ibid, Art. 10 III 2.

tion of international agreements vis-à-vis Community actors[83]. The Commission even asks for the power to give standardisation mandates to CEPT in the area of radio spectrum[84].

c) Market Definition in Antitrust Affairs

The Draft Guidelines on Market Analysis explicitly envisage the possibility of geographically relevant markets that transgress Community borders[85], including potential competitive pressure from abroad[86]. But the Guidelines point to the impact of network coverage and regulatory instruments on market definition[87]. A legal definition contained in the Draft Framework Directive also highlights that global markets are not what the Commission is interested in. 'Transnational markets' are defined such that their "geographical dimension comprises the whole of the Community or a substantial part thereof"[88], not any area beyond that.

The Guidelines occasionally also use an international element for the definition of the relevant product market. They point to 'international voice and data communications services'[89], to the 'resale of international transmission capacity'[90] and to 'enhanced global telecommunications services'[91]. Further market definitions are also inherently international, like the ones for 'satellite services' or 'seamless pan-European mobile telecommunications services to internationally mobile consumers'[92].

d) Internet

The most outspoken acknowledgement of the global character of telecommunications is to be found in the Draft Data Protection Directive for Telecommunications Services. It reads:

> The Internet is overturning traditional market structures by providing a common, global infrastructure for the delivery of a wide range of electronic communications services. Publicly available electronic communications services over the Internet open new possibilities for users but also new risks for their personal data and privacy[93].

But compared to political reality, even this almost sounds like camouflage. For data protection is the one success story of EU Internet policy. The US would have preferred a pure self-regulatory regime. EU pressure has forced a compromise upon the US. They have accepted the supervisory

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83 Ibid, Art. 6 III, see also Explanatory Memorandum at 3.
84 Ibid, Art. 6 II.
85 Draft Guidelines on Market Analysis (supra note 13) par. 51.
86 Ibid, par. 49.
87 Ibid, par. 50.
88 Draft Framework Directive (supra note 51) Art. 2 (m).
89 Draft Guidelines on Market Analysis (supra note 13) par. 56, see also par. 58 and note 38.
90 Ibid, par. 58.
91 Ibid.
92 Ibid.
93 Proposal for a Directive concerning the processing of personal data and the protection of privacy in the electronic communications sector of July 12, 2000, COM (2000) 385, preamble (5).

role of the Federal Trade Commission, thus transforming the regime into one of international hybrid regulation[94].

The idea of the Internet becoming an infrastructure is also behind the only act of the regulatory package already in force. The Community gives the following reason for the regulation on unbundled access to the local loop:

> The conclusions of the European Council of Lisbon of 23 and 24 March 2000 note that, for Europe to fully seize the growth and job potential of the digital, knowledge-based economy, businesses and citizens must have access to an inexpensive, world-class communications infrastructure and a wide range of services. The Member States, together with the Commission, are called upon to work towards introducing greater competition in local access networks before the end of 2000 and unbundling the local loop, in order to help bring about a substantial reduction in the costs of using the Internet. The Feira European Council of 20 June 2000 endorsed the proposed eEurope Action Plan which identifies unbundled access to the local loop as a short-term priority[95].

But apart from that, the EU is still hesitant to develop its own Internet policy[96].

2. Mitigation

If one looks at telecommunications legislation, European actors do not seem to be concerned by globalisation. There is hardly a trace of attempts to mitigate its impact. The only explicit reference to market access by foreign firms is to be found in the Draft Decision on the Radio Spectrum. The Commission considers the conclusion of international treaties on access with third countries on a reciprocal basis[97].

There are considerable efforts to draw a strict line between telecommunications regulation and the regulation of communication contents[98]. Theoretically, one might interpret this as an attempt to fence off a protected core area from a set of rules that otherwise takes into account the global character of telecommunications[99]. But this is not a plausible interpretation. As we have seen, these texts hardly even show a sign of an awareness of globalisation. It seems much more likely

94 FARRELL in Héritier 2001.
95 Local Loop Regulation (supra note 70) preamble (1).
96 Characteristic the results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework of April 26, 2000, COM (2000) 239 final, at 6: "This Communication does not set out a specific regulatory framework for the Internet. But it does aim to facilitate vigorous competition and innovation in the networks and services which make up the Internet, and over which the new knowledge economy is going to be delivered." More from WERLE European Integration online Papers 2001, 9-14.
97 Draft Radio Spectrum Decision (supra note 73) preamble (13).
98 Draft Framework Directive (supra note 51) preamble (7), see also Explanatory Memorandum, at 2; Draft Authorisation Directive (supra note 73) Explanatory Memorandum, at 2.
99 For the idea of areas of the economy protected against globalisation see SCHARPF Governing in Europe 1999, sec. 4.1.2.

that the mentioned rules respond to Member States', and in particular French, concerns with a loss of cultural autonomy.

3. Adaptation

In the same vein, it is quite dubitable whether legislative measures can be interpreted as signs of adaptation to a globalised regulatory environment. There are two sets of rules that do indeed have an adaptation effect. But the regulatory context does not make it plausible that they are meant for that.

The first set of rules makes Europe stronger vis-à-vis the Member States. This could in principle be interpreted as an exercise in making Europe, as a whole, more robust to global challenges. To use the language of political scientists, these changes increase the reform capacity of Europe[100]. But again, there is hardly a sign of legislative awareness of globalisation. It seems much more likely that these measures are just attempts of the Commission to push Europeanisation forward[101].

Let us have a look at the details. According to the will of the Commission, in the future the regulatory authorities of Member States shall no longer be allowed to define relevant telecommunications service markets. Instead, they will have to rely on the Commission's authoritative definitions[102], as laid down in its (draft) Guidelines[103]. If they think a case is exceptional, they are obliged to reach prior agreement with the Commission before defining a market differently[104]. Under normal circumstances, Member States will only be allowed to define the geographically relevant market[105].

A host of other substantive issues are also to be harmonised under the new regulatory package: authorisation, i.e. legal impediments to market access[106]; access to, and interconnection with, the networks of other operators[107], in particular to the local loop[108]; the management of the radio spectrum[109]; technical standardisation[110]; numbering, naming and addressing[111]; rights of way[112]; co-location and facility sharing[113]; accounting separation and financial reporting for un-

100 HERITIER in Héritier 2001, 9 s.
101 For an overview of the rich literature on Europeanisation see Ibid.in, 3-9. A further hint is Draft Framework Directive (supra note 51) Explanatory Memorandum, at 2, where the Commission rejects all amendments suggested by the European Parliament "which jeopardise harmonisation".
102 Draft Framework Definition (supra note 51) Art. 14 I; see also The results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework of April 26, 2000, COM (2000) 239 final, at 18.
103 Supra note 13.
104 Draft Framework Directive (supra note 51) Art. 14 I (3).
105 Draft Guidelines on Market Analysis (supra note 13) par. 27.
106 Draft Authorisation Directive (supra note 73), in particular preamble (1).
107 Draft Access Directive (supra note 72).
108 Local Loop Regulation (supra note 70).
109 Draft Framework Directive (supra note 51) Art. 8; Draft Radio Spectrum Decision (supra 73).
110 Draft Framework Directive (supra note 51) Art. 15.
111 Draft Framework Directive (supra note 51) Art. 9.
112 Ibid. Art. 10.

dertakings possessing significant market power[114]; universal service[115]; data protection[116]. The Commission even wants to avail itself of the following general clause:

1. The Commission may, where appropriate, [...] issue Recommendations to Member States. Member States shall ensure that national regulatory authorities take the utmost account of those Recommendations in carrying out their tasks. Where a national regulatory authority chooses not to follow a Recommendation, it shall publish its reasoning.

2. Where the Commission finds, inter alia, that divergence in regulation at national level creates a barrier to the single market, or where the High-Level Communications Group advises that a binding harmonisation measure is necessary, the Commission may, [...] take the appropriate technical implementing adopt binding harmonisation measures. The Commission may consult the Advisory Communications Group about its views in this matter[117].

The Commission also defines regulatory goals strategically so that the need for harmonisation increases. For that purpose it tries to establish the principle of 'technologically neutral regulation'. Due to pervasive convergence between communications technologies[118], this principle almost gives the Commission a *carte blanche* for regulatory intervention[119].

A second line of Community action targets regulatory institutions. The Draft Framework Directive obliges Member States to set up independent regulatory authorities[120] and to make them strong actors[121]. These authorities shall have the right to exchange information without informing their governments[122]. Their representatives shall form an independent European Communications Group, to advance regulatory learning[123], and to become the Commission's watchdog at the national level[124]. The activities of the National Regulatory Authorities will themselves be under strict Commission supervision. In many instances, they have to notify the Commission of draft

113 Ibid. Art. 11.
114 Ibid. Art. 12.
115 Draft Universal Service Directive (supra note 72).
116 Proposal for a Directive concerning the processing of personal data and the protection of privacy in the electronic communications sector of July 12, 2000, COM (2000) 385.
117 Draft Framework Directive (supra note 51) Art. 16.
118 See only Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation. Towards an Information Society Approach of December 1997, COM (97) 623; CLEMENTS Telecommunications Policy 1998.
119 Cf. the criticism reported in 1999 Communications Review (supra note 102) at 7.
120 Draft Framework Directive (supra note 51) Art 3, see also preamble (11).
121 See in particular ibid. Art. 3 II: "Member States shall guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services. Member States that retain ownership or control of undertakings providing electronic communications networks and/or services shall ensure full and effective structural separation of the regulatory function from activities associated with ownership or control. Member States shall ensure that national regulatory authorities are able to act freely, without further authorisation or control from any other agency or body, subject only to the provisions of Articles 4 and 6 of this directive." See also ibid. Explanatory Memorandum, at B 4: "The success of the new framework will depend on the provisions being implemented in a consistent manner by strong and independent NRAs".
122 Ibid. Art. 3 II, see also preamble (27).
123 More from http://irgis.icp.pt/site/ (visited on January 16, 2002), I owe this reference to Dominik Böllhoff.
124 Ibid. Art. 21; the original plans of the Commission went even further, see 1999 Review (supra note 102) at 19.

decisions; their measures only take effect if the Commission does not declare otherwise within a month[125]. Under the Draft Access Directive, National Regulatory Authorities must also notify the Commission both of the names of operators deemed to have significant market power, and of the obligations imposed on them[126].

Finally, private actors are given the opportunity to by-pass national governments. They can bring claims to the Group of National Regulatory Authorities[127]. If National Regulatory Authorities fail to resolve a cross-border dispute between private actors, they can submit it to the Commission. "In so doing, the parties renounce any further action under national law"[128].

Similar observations can be made with respect to a second set of rules that has an adaptation effect. In several instances, the new regulatory framework calls for hybrid forms of governance, combining public and private inputs[129]: in the areas of technical standardisation[130], spectrum management[131] and data protection[132]. These frameworks could be a means of getting hold on governance activities that would otherwise, due to their global character, escape Community influence. In accord with a 'better less than nothing' attitude, Europe would be changing its own, internal governance structure. But the pertinent provisions speak the language of Europeanisation, not of globalisation. The Community can bring a halt to national standardisation activities by transferring the issue to a hybrid European body[133]. The Commission grudgingly accepts CEPT activities in the domain of spectrum management, although these activities escape its control. But if the Commission is not pleased with the outcomes, it can step in with autonomous regulatory activities[134]. This gives the Commission considerable power of threat for informal negotiations with CEPT.

4. Neglect

In the theoretical part of this paper, we have presented a third option. Regulators can react to globalisation by changing their own preferences. Since we find neither mitigation nor adaptation, this would thus be the theoretical prediction. But there is not the remotest sign of preference change in the documents of the new regulatory package. What one finds, however, is pervasive Eurocentricity. The new rules aim at the creation of a true *internal* market for telecommunications services[135]. 'Trans-national' markets are defined as markets that transgress Member States,

125 Draft Framework Directive (supra note 51) Art. 6 II 1 and 6 IV, see also preamble (14).
126 Draft Access Directive (supra note 72) Art. 16 II, see also preamble (16).
127 Draft Framework Directive (supra note 51) Art. 21 VII.
128 Ibid., Art. 18 III.
129 For the general attitude of the Commission see 1999 Review (supra note 102) at 7; more on hybrid governance in ENGEL Die Verwaltung 2001d; ENGEL European Business Organisation Review 2001c.
130 Draft Framework Directive (supra note 51) Art. 15, see also Explanatory Memorandum, at B 5.
131 Draft Radio Spectrum Decision (supra note 73) Art. 6 II-IV
132 Draft Data Protection Directive (supra note 116) preamble (8), see also Explanatory Memorandum, at 4.
133 Draft Framework Directive (supra note 51) Art. 15 I 2.
134 Draft Radio Spectrum Decision (supra note 73) Art. 6 IV.
135 Draft Framework Directive (supra note 51) Art. 7 III; Draft Guidelines on Market Analysis (supra note 13), par.10; Draft Authorisation Directive (supra note 73) preamble (3).

not Community borders[136]. Internet policy is discussed as if the Community had autonomy to decide[137]. The evidence thus indicates that the new regulatory package simply neglects globalisation.

V. Explanations

How come? There are two possible lines of explanation, which will be discussed below. Thus far, we have only presupposed, not actually shown, that telecommunications are affected by globalisation. Maybe regulatory practice knows better. Maybe at closer sight telecommunications will turn out to be one of the happy protected sectors of the economy[138] (section 1). If not, we are faced with an interpretative choice between involuntarily 'unperceived globalisation' and strategic neglect (section 2). Given the limited evidence on which this paper is based, we cannot fully decide. But it at least seems much more plausible that strategic neglect is behind the regulatory practice.

1. Telecommunications as a Protected Sector of the Economy?

We have offered four complementary definitions of globalisation. The first definition points to regulatory competition. Competitive pressure rests on credible threats of exit. At first sight, telecommunications operators do not seem to possess threat power; for telecommunications is in essence the transportation of signals. This makes it inexorably a local business. The local character is obvious for the physical grid dug into the national territory, or hanging on poles erected along national streets. It also holds for cellular communications. They presuppose a dense network of senders and receivers within the territory.

Moreover[139], national telecommunications companies are relatively well protected against market entry by foreign competitors. Consequently, they normally cannot credibly argue that they have to compete with suppliers working under less stringent rules. There are, in other words, important barriers to entry[140] in this industry. There are substantial sunk costs for rolling out a new telecommunications network[141]. Network externalities make a piecemeal approach to market entry difficult[142]. Newcomers must make a substantial investment upfront. Due to their previous monopoly, the market position of incumbents is strong. End-users have no interest in single components of communications services. Guaranteeing the compatibility of components is

136 Draft Framework Directive (supra note 51) Art. 2 (m) and Art. 14 I (2).
137 1999 Review (supra note 102) at 9.
138 On the general idea of protected sectors see again SCHARPF Governing in Europe 1999, sec. 4.1.2.
139 International rules notwithstanding, see below 2.
140 Basic VON WEIZSÄCKER Barriers to entry 1980.
141 This is the basic concern of the Local Loop Regulation (supra note 70) and of the Draft Access Directive (supra note 72).
142 See on network externalities only the classical texts of KATZ und SHAPIRO American Economic Review 1985; FARRELL und SHAPIRO Rand Journal of Economics 1988.

therefore paramount. Newcomers accordingly depend on the existing compatibility standards[143]. These standards tend to be tuned to the network of the incumbents.

Newcomers will hardly ever be able to offer all these complementary components on their own. And if they cannot gain such access themselves, market access depends on contracting with the incumbent, either freely or through a forced contract, backed by the regulatory authority. In the former case, the incumbent can easily protect himself[144]. In the latter case, the regulatory authority can see to it that conditions for market entry are unattractive for foreign suppliers. If they want to build independent networks, newcomers must get rights of way. This also normally means that they need help from a regulatory authority[145]. They must also dispose of numbering resources, provided by a regulated numbering plan[146]. In other words, they are operating on a market organised by way of regulation[147]. Government can use its power of organisation to make market access for foreign providers cumbersome. Finally, as long as taking up business in the telecommunications industry presupposes public authorisation, government can use the authorisation procedure, and its terms and conditions, to make market access difficult[148].

At closer sight, however, national telecommunications operators are much less dependent on their government. Technically, satellite communications provide a way out. If an economically important nation-state exercises pressure on national telecommunications companies, the general high speed of innovation in this field[149] is likely to generate further loopholes quickly. Pervasive convergence[150] would make it easy to shift traffic away to less controllable substitutes. The nation-states, and Europe for that matter, can, at most, credibly threaten the local loop. All other telecommunications services can fairly easily be substituted by less vulnerable alternatives. Practically the most important way of doing this is by packet switching, as is done on the Internet. Communication is portioned into small data packages, each finding its way through the world communications networks separately. Packet switching was originally invented to secure communication even in the event of nuclear war[151]. The Commission itself demonstrates by the Regulation on unbundled access to the local loop[152] that this monopolistic bottleneck can to a

143 Cf. Draft Framework Directive (supra note 51) preamble (23).

144 Cf. Draft Guidelines Market Analysis (supra note 13) par. 51 note 26: "Physical interconnection agreements may also be taken into consideration for defining the geographical scope of the market, Case No IV/M.570 – TBT/BT/TeleDanmark/Telenor, par. 35"; see also ibid. par. 58 note 38: "Case No IV/M.856 - BT/MCI (II), OJ L 8.12.1997. These services are provided on the basis of existing international transmission facilities existing between the countries concerned or through the use of international private leased circuits hired from facilities based operators".

145 Cf. ibid. preamble (18).

146 Cf. Draft Framework Directive (supra note 51) preamble (17).

147 On organised markets see ENGEL und SCHWEIZER Journal of Institutional and Theoretical Economics 2002.

148 Cf. Draft Guidelines Market Analysis (supra note 13) par. 50 note 24: "In practice, this area will correspond to the limits of the area in which an operator is authorised to operate. In Case No COMP/M.1650 – ACEA/Telefonica, the Commission pointed out that since the notified joint venture would have a licence limited to the area of Rome, the geographical market could be defined as local; at par.16".

149 This is acknowledged by the Commission itself: Draft Framework Directive (supra note 51) preamble (21); Draft Guidelines Market Analysis (supra note 13) par. 24.

150 It also is acknowledged by the Commission, Draft Framework Directive (supra note 51) preamble (7); Draft Guidelines Market Analysis (supra note 13) par. 38; Green Paper on Convergence (supra note 118).

151 More on the history of the Internet by ENGEL und KELLER Global Networks 2002, chap.2.

152 Regulation Local Loop (supra note 70).

large extent be separated from the remaining telecommunications services. Finally, and most importantly, for economic reasons, neither nation-states nor Europe are likely to take the owners of the local loop as hostages for their regulatory autonomy. The opportunity cost would be prohibitive: for state of the art, internationally connected communications networks are an infrastructure for almost any other business[153]. No industrially developed country would conceive of cutting itself off from these networks, or making them considerably less effective.

A second dimension of globalisation under discussion here relies on the market definition. In accord with this perspective, globalisation is characterised by a definition of the geographically relevant market that transcends territorial boundaries. In accord with this alternative, the relevant product market can have an international element implicit in its definition. Obviously, not all telecommunications markets are global in one of these senses. But if one takes complementarity into account, the picture changes. Most telephony customers will rarely make transatlantic calls. But they are not likely to make a contract with a telephone company that is not technically capable of providing for international calls, even if their services are cheaper. They accordingly attribute 'option value' to the possibility of making or receiving international calls. While these considerations may seem a little speculative for ordinary telephony, they are obvious for customers buying Internet access. They want worldwide access. Their Internet service provider can only guarantee this, if he has concluded transmission contracts with backbone providers. Otherwise, the routers will not allow this traffic to pass[154]. If nation-states do not want to put this complementarity at risk, they lose at least some of their regulatory authority over telecommunications.

A third dimension of globalisation originates in an independent, superior regulatory authority. This time, the relationship between appearances and underlying forces is just the opposite of the relationship just described. Appearances clearly point in the direction of globalisation. All Members States of the Community, and the Community itself, have made commitments under the WTO Agreement on Basic Telecommunications Services. These commitments cover all segments of the telecommunications services sector[155]. The following quote from a report of the United States International Trade Commission highlights why this is an important factor of globalisation:

> EU members were under no obligation to extend market access privileges to non-EU members, nor were they subject to any penalty should they treat non-EU carriers in a discriminatory manner. Through the 1997 WTO commitments, the EU made a binding commitment to extend its current internal level of market access to non-EU service providers[156].

153 The Commission acknowledges this fact in Framework Directive (supra note 51) preamble (6).

154 For the details see EU Commission: Internet Network Issues, CEPT, ETNO & EICTA WTSA-2k doc. (00)122 Rev. 002 of September 11, 2000.

155 BLOUIN Telecommunications Policy 2000, 137.

156 United States International Trade Commission (USITC): Recent Trends in US Services Trade: 1998 Annual Report, Investigation No. 332-345, pp.4-42, cited after Ibid., 139.

There is controversy, however, regarding how far the liberalising effect of these commitments actually reaches; for lifting legal barriers to entry is not enough in telecommunications markets. All the other barriers to entry listed above may still prevent foreign suppliers from entering European markets. The WTO has not been blind to this challenge. It has supplemented the Agreement with a 'Reference paper', addressing the anticompetitive behaviour of incumbents, interconnection, rules on universal service, licensing procedure and the obligation to set up an independent and impartial regulatory authority[157]. All EC Member States have signed the Reference Paper[158]. Observers are divided, however, over the efficacy of these rules[159].

2. Unperceived Globalisation, or Strategic Neglect?

Remaining is the last dimension of globalisation under discussion here – i.e. the constructivist one. If there is such a thing as perceived globalisation, the opposite must also exist. The indicators of globalisation analysed with tools from rational choice theory could be masked in the collective perception. Globalisation could go 'unperceived'. Is this what explains the conspicuous lack of concern for globalisation in the documents of the new regulatory package?

There is one element in this package that might support the hypothesis. The Commission is strongly preoccupied with the transitional dimension of telecommunications policy. The Commission stresses the difficulties inherent in getting from national monopolies to true competition[160]. For the time being, it has opted for asymmetric regulation. Incumbents are forced to grant newcomers access to the local loop[161] and to other elements of their networks, if appropriate[162]. Accounting separation and reporting obligations shall make it easier to supervise them[163]. In order not to implicitly discriminate against smaller newcomers, administrative charges may not be flat[164]. But asymmetric regulation is to be phased out once the newcomers are strong enough. Should new bottlenecks become visible, however, ex ante rules must be put in place early enough[165].

Has this concern with transition been so dominant that the Commission, and the other actors involved in the political process preceding the adoption of the regulatory package, have simply overlooked the challenge of globalisation? While this is possible, it is not likely. In other, related areas the Commission has been quite concerned with globalisation: electronic commerce[166],

157 Ibid., 137 s.
158 Ibid.
159 Among the sceptics are BRONKERS und LAROUCHE Journal of World Trade 1997; FREDEBEUL-KREIN und FREYTAG Telecommunications Policy 1997; see also NOAM in Hubauer und Wada 1997; BLOUIN Telecommunications Policy 2000 is considerably more optimistic.
160 Draft Framework Directive (supra note 51) preamble (1).
161 Regulation Local Loop (supra note 70), and preamble (3) in particular.
162 Draft Access Directive (supra note 72).
163 Draft Framework Directive (supra note 51) Art. 12.
164 Draft Authorisation Directive (supra note 73) Explanatory Memorandum, at 2.
165 Draft Access Directive (supra note 72) preamble (8).
166 Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) of June 8, 2000, OJ 2000 L 178/1, preamble (58-62).

youth protection[167], data protection[168] and the discussions of the White paper on governance stand out as examples[169].

We do already possess the key to an alternative, more plausible interpretation. We have demonstrated how much ground the Commission stands to gain by this new regulatory package, to the detriment of Member States[170]. It has not won the battle yet. But chances are, it will. Introducing globalisation into this discourse would open up an entirely new political flank. Had this been the battleground right from the beginning, the Commission might have argued that making Europe stronger helps parry the global challenge. But for the Commission, introducing this line of argument now is dangerous. Adversaries in the Member States' governments might argue that Europe is not the right arena for solving global problems, and consequently try to bring the issue into the arenas of the WTO, the OECD or other international bodies. Since none of these organisations can muster up the political power of the EU, they might hope to preserve their autonomy this way. They might have already won, once they succeed in seriously protracting negotiations over the regulatory package. The 'window of opportunity' for the Commission might be lost. As repeatedly stressed, our evidence is insufficient to actually prove this. But considering all we have, strategic neglect seems by far the most likely interpretation.

VI. Normative Outlook

These are interesting findings for a social scientist. But what is in it for a lawyer? Not much, to be honest. Had our theoretical hypotheses turned out true, a host of normative questions would have ensued: Is globalisation a justification for interferences with fundamental freedoms, or human rights? Does the European legislator, under fundamental freedoms or human rights, possess a larger margin of appreciation when he reacts to globalisation[171]? Do the three options of mitigation, adaptation and preference change rank differently under these constitutional rules? How is the principle of subsidiarity affected by globalisation? Does the European Community gain more room for action vis-à-vis the Member States when it acts in a globalised environment?

But we have not found a proactive Community policy addressing globalisation. The Community organs might just have overlooked the globalisation of telecommunications. However, it is more likely that they are aware of globalisation, but deliberately ignore it. One might think that the just mentioned normative questions would simply be mirrored. Member States might blame the European Community for unduly interfering with their legislative autonomy. Some individuals and firms surely stand to loose if the Community strategically neglects the global character of telecommunications. But it is difficult to transpose this normative issue into legal dogmatics. The

167 Illegal and Harmful Content on the Internet, COM (1996) 487.
168 See again FARRELL in Héritier 2001.
169 Characteristic: White Paper on Governance Working Group No. 5: An EU Contribution to Better Governance beyond Our Borders, Report: Strengthening Europe's Contribution to World Governance, of May 2001, http://europa.eu.int/comm/governance/areas/group11/report_en.pdf (visited on August 24, 2001).
170 See above IV 3.
171 More from ENGEL European Business Organisation Review 2001c, 8-11.

logical tool would consist in a duty to protect. Constitutionalists have indeed ere long discussed whether government is constitutionally obliged to grant its nationals diplomatic protection. Public international law characterises the term 'diplomatic protection' as the intervention by one sovereign state in another on behalf of the nationals of the former state. But constitutionalists agree that there cannot be a strict obligation to grant diplomatic protection, given the imponderables of foreign policy. Government is only obliged to properly exercise its discretion[172].

More importantly, our question is not identical to the one constitutionalists were concerned with. If our interpretation of the findings is correct, the Commission does not shy away from international conflict; it does not want to treat telecommunications as an issue of gloabalisation in its internal policy-making. The normative question is thus one political scientists would address in terms of policy cycle analysis. Roughly speaking, the policy cycle consists of the following elements: agenda setting, problem definition, policy formulation, implementation, assessing outcomes[173]. Our question is one of problem definition. Given the strong indications of globalisation, the Commission defines the problem of telecommunications policy inappropriately.

Proper problem definition is certainly a normative issue. But courts seem rightly reluctant to impose a more appropriate problem definition on political organs. The danger of a *gouvernement des juges* looms large[174]. This is so for two combined reasons. The first is conceptual, the second factual. Problem definition is a normative endeavour. To criticise one problem definition, one thus needs a normative starting point. Unfortunately, there is not just one such starting point; instead, there are a good number of competing ones, like efficiency, liberty, fairness, or equality. These starting points cannot be translated into one another. There is no single normative currency, so to speak. Decisions must be taken that cannot be fully justified. In a democracy, this is what Parliaments exist for[175]. The factual reason is uncertainty. The legislator hardly ever has all the facts one might theoretically wish to know before deciding. Again, decision is the only way out[176].

The most one can envisage are thus procedural rules. But European Community law is advanced in this respect anyhow. Article 253 ECT obliges the Community to give reasons for its legislative acts. In practice, a long preamble precedes the operative part of regulations, directives and decisions. Actually, it is mostly due to these preambles that we have been able to trace the neglect of globalisation in the new regulatory package on telecommunications. This is what the law can do. It is up to the political actors involved in European legislation to prevent the Commission from strategically defining the policy problem inappropriately. Occasionally, science can help by pointing out such neglect to policy-makers. This is what this article has intended to do.

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172 Under German law, the leading case is BVerfGE 55, 349 – Hess; comprehensive KLEIN in Ress und Stein 1996.

173 Basic on the policy cycle WINDHOFF-HÉRITIER Policy-Analyse 1987, 65-114; DELEON in Sabatier 1999.

174 More from ENGEL Journal of Institutional and Theoretical Economics 2001b; ENGEL Assessing Outcomes 2001a.

175 More from ENGEL Gemeinwohl 2000b.

176 More from SPIECKER GEN. DÖHMANN in Lege 2001.

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