The Persistence of the *Dirigiste* Model: Wireless Spectrum Allocation in Europe, *à la Francaise*.

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I. INTRODUCTION

The process of allocating radio spectrum for Third Generation ("3G") wireless communications[1] in the European Union ("EU" or "the Union") illustrates the convergence of serious economic and political challenges facing the Union and its member states in the near term. The European Commission's ("EC") telecommunications policy focuses in part on quickly establishing the groundwork for a 3G wireless market throughout the EU.[2] The EC's objective is, in essence, to create the structure of the 3G market before the demand for one actually exists.[3] In so doing, the EC hopes to create a large 3G market in Europe where European firms will have a very high market penetration. It is hoped that the European 3G market will, when fully developed, provide revenues and economies of scale that will allow European firms to compete effectively for 3G markets in Eastern Europe, Russia, Africa, Asia, and elsewhere.[4] The EC is wagering that 3G will be the network by which the world will maintain person-to-person voice contact and interface with the Internet. It is also wagering that the telecommunications sector, via 3G, will create a multiplier effect throughout the European economy, thereby rescuing Europe from the structural economic crisis that has plagued it for decades.[5]

This is a colossal wager. If the EC is right, then Europe may well be

1. Third Generation wireless communications is seen as a major leap over current digital cellular telephone technology. Third Generation technology's high transmission rates will allow mobile access to the Internet via cellular telephones or other devices. *See* Sean Buckley, *3G Wireless: Mobility Scales New Heights*, TELECOMM. ONLINE (Oct. 2000), *at* http://www.telecoms-mag.com/issues/200010/tcs/3g_wireless.html.

2. *See* note 7, *infra*, and accompanying text.

3. *See* Interview with Ignacio Garcia Alves, Associate, Arthur D. Little & Bruno Duarte, Senior Manager, Arthur D. Little, LES ECHOS, Nov. 17, 1999, at 60, *available at* LEXIS News Library, http://www.lexis.com [hereinafter Garcia & Duarte Interview].

4. *See* Wolf Sauter, *The Compatibility of Industrial and Competition Policy: The Case of Telecommunications*, *in* EUROPEAN TRADE AND INDUSTRY IN THE 21ST CENTURY: FUTURE DIRECTIONS IN EC LAW AND POLICY 53, 54 (Kees Jan Kuilwijk & Robert Wright eds., 1996).

5. *See id.* at 60. Sauter concludes: "Due to its convergence with the high technology sectors of electronics, components, and information technology, the European position in telecommunications has been construed as a 'last chance' to expand its lead in this sector into other areas, and remedy earlier failures." *Id*. The EC itself has made similar statements in a series of policy papers. *See* Green Paper on Radio Spectrum Policy in the Context of European Community Policies such as Telecommunications, Broadcasting, Transport, R&D, COM(98)596 final, at i-iii; Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation, COM(97)623 final, at ii-iii. *See also* The Information Society Promotion Office of the EC, *at* http://europa.eu.int/information society/topics/telecoms/radiospec/mobile/ index en.htm. (last visited Aug. 30, 2001) (listing the goals and current status of mobile communications in the EC).

poised to make its broader Trans-European Networks[6] ("TEN") policy a reality. A successful TEN based on 3G would allow the EU to enter the twenty-first century with real economic growth and a European currency, the Euro,[7] that performs well against the dollar. If the EC has bet incorrectly, however, the prestige of the EU will be seriously damaged. This Note argues that signs exist which suggest that the failure of Europe's 3G policy is likely.[8] In Europe, 3G is much more than an EC economic policy initiative or a drama for telecom firms (and their investors) competing for market share. Third Generation technology is also a political initiative that the EC itself considers crucial in Europe's prosperity and for the survival of European integration, which is the cornerstone of the Maastrict and Amsterdam treaties.[9] The stakes are quite high.

This Note examines spectrum allocation for 3G mobile wireless networks in Europe in light of larger EC telecommunications and competition policies. The European Commission has allowed each member state to allocate spectrum to firms in two ways: (1) by the free market auction; and (2) by the "beauty pageant" method by which firms submit detailed proposals to the government, and government bureaucrats make the final selections.[10] This Note focuses on France as the prime example of the beauty pageant method. This Note argues that, despite the "excesses" of the prices of spectrum on the free market auctions, the beauty pageant method has even more disturbing drawbacks.

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6. TENs are an envisioned result of a general policy initiative that wishes to identify industries and markets where cross-border collaboration and cross-border competition can flourish. The general idea is to facilitate larger, pan-European telecommunications firms and economic sectors that will not be hindered by national boundaries and national regulations.

7. As is widely known, in its efforts to integrate Europe and surmount trade barriers, the EU and member states such as Germany, France, and Italy have adopted a new currency, the Euro. All prices in France, for instance, are currently listed in both French Francs and Euros. Within a few years the French Franc, German Mark, and Italian Lire will disappear, and EU citizens will use the Euro.

8. *See infra* notes 187-189, and accompanying text.

9. *See* Sauter, *supra* note 4, at 79.

10. *See L'Autorite de Regulation des Telecommunications, UMTS: Results of the Allocation Procedure for 3rd Generation Mobile Metropolitan Licences* [sic] *in France*, May 31, 2001, http://www.art-telecom.fr/dossiers/umts/view-umts.htm. The French regulatory agency explained:

> While discussions on the stakes of UMTS technology (Universal Mobile Telecommunications System) had already begun in France in January 1998, at the *Commission consultative des radiocommunications* (CCR), **the process was officially launched at the Community level by the decision dated 14 December 1998** of the European Parliament and Council, regarding the coordinated introduction in the Community of a 3rd generation mobile wireless communication system.

Id. (emphasis in original).

Clearly, each method of spectrum allocation has its dangers and its rewards. This Note posits that the EC committed itself to a schizophrenic policy when it allowed member states to devise their own methods of allocating frequency spectrum. The EC's general policy in the realm of telecommunications has been to liberalize markets.[11] Despite the bureaucratic overtones of the EC's 3G policy, deregulation and free market competition have been vital to the EC's telecommunications policy.[12] Yet, as allocation approaches go, the beauty pageant method of spectrum allocation is inherently very suspicious of the market. Again, this Note argues that France's activities show that national telecommunications authorities are capable of operating on nonmarket assumptions in much of their management of this emerging market. Essentially, French authorities have reverted to *dirigiste* traditions in the near term. Such a reversion, at a time when the EC is reassessing its role in European affairs, does not bode well for the EU.

II. THE FRENCH PARADOX

A. The Dirigiste *Tradition in France*

The French word "*dirigiste*" is an adjective derived from the noun "*dirigisme*." To any educated French person, and to students of French history, the word is very familiar. In its broadest sense, *dirigisme* comprises the entire centralizing tradition in French historical development, from the long reign of Louis XIV, punctuated by the rule of Napoleon, to the present day. In its narrower sense, used today, *dirigisme*[13] refers to the central government's role in "directing" the French economy.

One must be careful, however, when talking about the *dirigiste* model of governance. It is important to remember that for all of the initiative the central government might make in shaping markets and setting priorities, the French system has never approached the extremes of central planning

11. *See* Sauter, *supra* note 4, at 79-80.

12. *Id.*

13. "*Dirigisme: Système économique dans lequel l'État assume la direction des mécanismes économique d'une manière provisoire et en conservant les cadres de la société capitaliste (à la différence du socialisme*) . . . . [antonym] *Libéralisme*." PAUL ROBERT, *LE NOUVEAU PETIT ROBERT: DICTIONNAIRE ALPHABÉTIQUE ET ANALOGIQUE DE LA LANGUE FRANÇAISE* 652-53. (Josette Rey-Debove & Alain Rey eds., 1994). The translation of the definition is as follows: "*Dirigisme*: An economic system in which the state assumes the provisional management of economic policy while preserving the structure of capitalist society (in contrast to Socialism). Antonym: Liberalism." (author's translation). In the French lexicon, liberalism is equivalent to *laissez-faire*, free market capitalism, where the government plays a small role and private businesses are allowed to compete with minimal restraints. *Id.* at 1090.

that were witnessed in Eastern Europe and Russia under the communist regimes.[14] There was a four-year plan in France after the Second World War, but that was rather extraordinary and was a function of Marshall Plan aid as much as it was the result of the devastation of the war.[15] Of course, French industry during the First World War, like American industry in the Second World War, was subordinated to the war effort, which entailed some central planning. The centralization of industry under the Vichy regime from 1940-1944 is more difficult to account for, however.[16] These unique periods aside, French industry has never been fully "coordinated" from the center and used for the purposes of the government, as was the case in Nazi Germany.[17] That said, in comparison to the English-speaking countries, or as the French would say, the "Anglo-Saxon" countries, the French have throughout their history shown a persistent aversion to "liberalism," by which they mean free markets and limited government.[18]

14. "Central planning" is a term of art common to the fields of history, economics, and political science. It refers to the method by which the entire socialist economy was planned out years in advance by a central agency such as *Gosplan* (an acronym in Russian for "State Planning Agency") in the former Soviet Union. *See generally* DAVID LANE, SOVIET ECONOMY AND SOCIETY (1985); MARTIN MALIA, THE SOVIET TRAGEDY: A HISTORY OF SOCIALISM IN RUSSIA, 1917–1991 (Free Press, 1994).

15. GORDON WRIGHT, FRANCE IN MODERN TIMES: FROM THE ENLIGHTENMENT TO THE PRESENT 409 (4th ed., W.W. Norton 1987). Jean Monnet headed the Economic Planning Commission of General de Gaulle's Fourth Republic. The Planning Commission drew up the "four-year plan of investment in key branches of the economy." *Id.*

16. The Vichy regime is still an open sore in French society. Headed by the hero of the First World War, Marshall Philippe Pétain, it was a quasi-fascist, quasi-nationalist regime that slavishly collaborated with Nazi Germany. *See generally* ROBERT O. PAXTON, VICHY FRANCE: OLD GUARD AND NEW ORDER (1972); JOHN F. SWEETS, CHOICES IN VICHY FRANCE: THE FRENCH UNDER NAZI OCCUPATION (1986).

17. "Coordination" is a term of art in the field of German History. The Nazis used the term *Gleichschaltung* to describe their brand of central planning, where ownership of industry remained in private hands, but the business subordinated itself to Nazi direction. *See generally* KARL DIETRIECH BRACHER, THE GERMAN DICTATORSHIP: THE ORIGINS, STRUCTURE, AND EFFECTS OF GERMAN NATIONAL SOCIALISM (Jean Steinberg, trans., Praeger Publishers 1970); AVRAHAM BARKAI, THE NAZI ECONOMY: IDEOLOGY, THEORY, AND POLICY (Ruth Hadass-Vashitz, trans., Berg Publishers 1990).

18. Scholars disagree whether France is a dysfunctional "stalemate society," or rather a delicate balance committed to gradual change. Both groups of scholars seem to agree, though, that a fear of Anglo-American liberalism and free market competition is at the basis of both French modernization drives through the four year plan and, more recently, French resistance to change. Several scholars support the "stalemate society" view. *See* MICHEL CROZIER, *LA SOCIÉTÉ BLOQUÉE* 130 (1970); DAVID LANDES, *French Business and Businessmen: A Social and Cultural Survey*, *in* MODERN FRANCE: PROBLEMS OF THE THIRD AND FOURTH REPUBLICS 352-53 (Edward Mead Earle ed., Russell & Russell 1964); STANLEY HOFFMAN, ET AL., IN SEARCH OF FRANCE 3-4 (1963). The other camp is represented by the work of Catherine Gremion. *See generally* CATHERINE GREMION, *PROFESSION DÉCIDEURS: POUVOIR DES HAUTS FONCTIONNAIRES ET RÉFORM DE L'ÉTAT* (1979). In THEODORE ZELDIN, THE FRENCH 171-74 (1983), Zeldin, a noted English specialist on France, defends

It is fair to say that the French have maintained, in significant measure, the medieval period's hostility to commerce[19]—all the while excelling at commerce in many regards, especially in the realm of high quality agricultural items.[20] Scholars have noted that even French business people and industry leaders take a "smaller is better" approach and at times consciously avoid expansion and market dominance.[21] They prefer old methods and to maintain family control over businesses, rather than to rush into initial public offerings on the stock exchange or into large financing arrangements with banks in order to expand production or to modernize.[22] In France today, one can easily imagine a communist union leader and a businessperson agreeing that there are evils in free market competition, that globalization is a threat to French identity, and that hefty sales taxes

French "planification" and argues that the slow pace of change in France is due to a system where business, government, and sometimes large labor unions coordinate major business decisions together. Zeldin concludes that the difficult task of pleasing so many different constituencies means that decisions are slow in coming. *Id.* at 174. He cites approvingly the work of Catherine Gremion. *Id.* On French "planification," *see generally* RICHARD F. KUISEL, CAPITALISM AND THE STATE IN MODERN FRANCE (1981).

19. DAVID S. LANDES, THE UNBOUND PROMETHEUS: TECHNOLOGICAL CHANGE AND INDUSTRIAL DEVELOPMENT IN WESTERN EUROPE FROM 1750 TO THE PRESENT 132-33 n.1 (1969). The obsession with thrift is derived from agricultural society's fears of subsistence crises. *Id*. After all, until the nineteenth Century there were no rail systems in Europe, and a large crop failure in one region meant starvation for that region because food could not be shipped efficiently over long distances. The obsession with thrift and the attempt to control unpredictable economic and natural forces were enshrined in the guild system, which controlled licenses for nearly every type of skilled craft in the cities and towns of Europe for many centuries. "The guilds have long since disappeared, but in countries like France and Germany, the reprobation of judgment by the market place continues to this day." *Id.* Landes adds that French society generally views entrepreneurs as socially subversive: "[T]he entrepreneur's preference for the greatest possible profit per unit of sale, as against higher total profit at some larger output, accorded with a general condemnation of competition, particularly price competition, as unfair and even socially subversive." *Id*. at 132. Landes notes that, for the French, economic demand is seen as fixed and price competition is seen as an attempt to undercut one's neighbor's fair share of production and sales. *Id*.

20. *See* Agriculture and Agri-Food Canada, *France Agri-Food Export Market Assessment Report Statistical Update*, Aug. 2001, *at* http://ats.agr.ca/public/htmldocs/e3203.htm. The fact that the French excel in luxury items underscores my point: luxury items are generally small production items of high cost; they require significant skilled labor inputs, a hallmark of medieval production. Of course, this is not to suggest French workers are wearing wooden clogs and still belong to medieval guilds, but, following Landes, this Note suggests a continuity of the mental outlook and expectations of many French producers.

21. *See* Landes, *supra* note 19, at 131.

22. *Id*. Landes adds: "Thus the identification of the producer with his tools and methods and his reluctance to scrap old ways for new was closely related to a worship of thrift . . . ." *Id*. at 131-32.

(up to thirty percent on some items) should *not* be cut.[23] Both may fear the EU.

Of course, city communists and landed aristocrats do not run the French Government. Elected politicians, and more importantly, an educated technocratic elite do—with students from a handful of elite schools staffing practically every important position in the French bureaucracy.[24] The result is naturally that the elite speaks in its own language and shares many common assumptions about what French society and economy should aspire to be.[25] Were this scenario to exist in American society, it would be as though all or most officials in the U.S. government, as well as the people running the major television networks, had all graduated exclusively from the business, law, and graduate schools of Harvard and, say, Stanford.[26] The French elite believes in the French government's competence to shape markets, and to direct both the economy and even society as a whole, in broad terms.[27] The French invention of the Minitel, a computer terminal connected to the telephone that was widely available in French homes in the 1980s, is a prime example of the *dirigiste* tradition at work.

23. The statement is an exaggeration, but not by much. France has been very slow to lower taxes, and none of its five major political parties can be said to have a strong tax-cutting platform, as one finds with Britain's Conservative Party or America's Republican Party. Only recently have the French begun to cut taxes, which still can take over 60% of the gross income of workers in the highest brackets. *See* Jack Ewing et al., *Tax-Cut Fever: The Only Question is How Much to Slash*, BUSINESSWEEK ONLINE, Mar. 6, 2000, *at* http://www.businessweek.com:/2000/00_10/b3671123.htm?scriptFramed. Even after a series of reductions, the rate on corporations was estimated to remain at 40% in 2001. *Id.*

24. WRIGHT, *supra* note 15, at 453. Wright notes that the near-revolution in May, 1968 arose because there were not enough government jobs to go around for university graduates: "The desirable positions were monopolized . . . by the graduates of the *grandes écoles*—those highly selective training schools such as the Polytechnique and the Institut d'Études Politiques that had long dominated access to the upper bureaucracy in government and business." *Id.* Wright notes that reforms did not solve the problem and that "ferociously competitive" state exams ensured quality but also perpetuated the power of the elite: "Indeed, the creation of the new École Nationale d'Administration in 1945 increased the grip of that elite on the levers of power in France; for the so-called 'Enarchs' (graduates of the E.N.A.) have almost monopolized the top positions in government and even in some sectors of business." *Id.*

25. *But see* ZELDIN, *supra* note 18, at 161-62.

26. *See* ZELDIN, *supra* note 18, at 161-63. This chapter, entitled "How to Find the People with Real Power," asserts that the E.N.A. is "where many of the rulers of France have been trained." *Id.* at 161.

27. *Id*. at 169. Zeldin, who is generally sympathetic to the French bureaucratic tradition, comments that the extreme centralization of the Revolutionary and Napoleonic Periods has left a profound mark on France: "The legacy of this history has been the French habit of accepting government interference in almost every aspect of life, and of seeing the solution to problems in the granting of state subsidies and the creation of new state institutions." *Id*. Zeldin notes with evident amazement that over 3,000 laws exist in France to protect the status, job security, and 'turf' of bureaucrats. *Id*.

Installed, the Minitel system was a dry run at an internet before the Internet was invented. When the French government introduced it as part of France Telecom's phone services, the Minitel was revolutionary.[28] With a black and white screen and a primitive terminal attached to phone lines, one could, beginning in 1982, search phone numbers nationwide online in France.[29] Soon after, services expanded to include the ability to book train, plane, and theater tickets; to check the weather; to read the news; and to send and receive text messages.[30] By 1995, the Minitel offered more than 26,000 online services.[31] Despite some technological improvements, however, the Minitel today remains essentially what would be considered as a "text-only" online system.

For many years France was regarded as one of the most technologically advanced countries because of its Minitel system, and as late as 1995 some observers wondered which system—Minitel or the Internet—would prevail over the other.[32] Unlike the Internet, with its decentralized development, the centralized Minitel in France had economic incentives for upgrades only, rather than a wholesale rethinking of the system. This situation was caused at least in part by the enormous resources that France Telecom, the government-owned phone company, had sunk into the Minitel.[33] When first the personal computer revolution and then the Internet came along, France resisted, believing that the Minitel was sufficient. In sum, the French Government clung for far too long to the Minitel. And, as a result, France is woefully behind the United States in computer technology today.[34]

One virtue of the *dirigiste* tradition is that it can deliver, relatively quickly and with a nationwide commitment, innovations like the Minitel or the *Train à Grande Vitesse* ("TGV") bullet train for which France is justly

28. H.K. Univ. of Sci. & Tech., *France – History*, *at* http://www.ust.hk/~webiway/content/France/History.html (last visited Aug. 22, 2001). The first test runs of the Minitel were launched in 1980. By early 1984, France Telecom began distributing free Minitel terminals to all subscribers. *See id.*

29. Jack Kessler, *The French Minitel: Is There Digital Life Outside of the 'US ASCI II' Internet? A Challenge or a Convergence?*, D-LIB MAGAZINE, *at* http://www.dlib.org/dlib/december95/12kessler.html (Dec. 1995).

30. *Id*.

31. *Id*.

32. Kessler, *supra* note 29.

33. *See* Junko Yoshida, *French Minitel Romances the Web*, *at* http://www.eetimes.com/news/97/963news/french.html (last visited Aug. 22, 2001) ("In the emerging world of the Internet, where many companies are still scrambling to implement successful electronic commerce business models, Minitel's profitability justifies France Telecom's determination to hang onto Minitel services.").

34. *See* Amy L. Fletcher, *Videotex, the Internet, and Innovation in France and the United States*, ANTENNA, Apr. 2000, *at* http://www.mercurians.org/4-2000/videotex.html.

famous.[35] Among the tradition's shortcomings is the way in which it encourages stagnation once a new item is introduced.[36]

Examined from a neoclassical economic perspective, the *dirigiste* tradition sinks large sums of money into huge projects that may or may not pay off. For, while the bullet train has been a big success, the Minitel is now fading, and the French Concorde's profitability and future use has fallen into question.[37] In any event, the incentive in the *dirigiste* system is to stick with the investment, despite what consumers may want.

At least one observer has noted the analogy between the Minitel and 3G.[38] He argues that as long as the coming mobile Internet is wedded to the cellular phone, as in Europe's current thinking, it will produce a Minitel-like failure, but this time across all of Europe.[39] His argument boils down to one of ergonomics and practicality: the Blackberry and various personal data assistants have much more surface area available for video and for interfacing than a cell phone does.[40] As this Note argues, the extreme detail of the French telecommunications policy, and the extent to which bureaucrats already exercise control, bodes ill for a flexible response to changes in markets, technology, and consumer preferences.

If the mobile Internet is not ultimately as suited to cellular telephones as it is to technology like a Blackberry, for example, then the *dirigiste* tradition in France, as it is currently expressed in telecommunications policy, indicates that France may find itself wedded to an outmoded system a few years down the road—just as the Minitel has seen its position erode in relation to the Internet in the past few years. The potential for failure in

35. *See* Kessler, *supra* note 29 (describing how France Telecom and Alcatel, France's largest electronic equipment manufacturer, paired together under government direction to create the Minitel: "Minitel has very much been the creation of the French national government."); *see also* Ewan Sutherland, *Minitel—The Resistible Rise of French Videotex*, *at* http://www.sutherla.dircon.co.uk/minitel/developing.htm (1995). Sutherland notes that the original "owner" of France Telecom, the French Post and Telegraph Service ("PTT" or "La Poste") was inspired by huge state-run projects like the TGV and the Concorde supersonic jet:

> Whether as the DGT or as France Télécom, the French PTT was breaking new ground in moving into videotex. The DGT knew little about broadcasting or about collaboration with information providers and almost nothing about consumers. What it did have was the ambition and the desire to emulate other great technological feats, such as *Concorde* and the *Train à Grande Vitesse* (TGV).

Id.

36. *Id*.

37. *See BAC-SUD Concorde*, *at* http://www.aemann.pwp.blueonder.co.uk/aircraft/british/concorde.html (last visited Oct. 21, 2001).

38. *See Mobile Phones: Europe's Next Minitel?*, JAKOB NIELSON'S ALERTBOX, *at* http://www.useit.com/alertbox/20010107.html (Jan. 7, 2001).

39. *See id.*

40. *Id*.

France, combined with more flexible approaches in some other European countries, means that the EU's goal of a Europe-wide mobile Internet may not come to pass. Before developing this argument in more detail, this Note will examine the role of France in the EU and the importance of telecommunications policy for the future viability of the EU.

B. France in the European Order

After the Second World War, the French, led by international banker Jean Monnet, embarked on an ambitious program to modernize the French economy and society. Plans included huge, centrally managed investments in industry and, closely linked with this sort of *dirigisme*, the creation of a European economic community that would more efficiently allocate resources in Western Europe and create a large free-trade zone.[41] In the period between 1944 and the early 1960s, the French population jumped from forty to fifty million; the GNP increased 500% from 1950 to 1980; and automobiles, electricity, appliances, and supermarkets became universal in France by the 1960s, more than a generation after the United States.[42] French scholar Michel Crozier has remarked that change in French politics usually comes as a result of the force of circumstance, rather than through the normal functioning of parliamentary bargaining.[43] The French defeat to Hitler over only six weeks in 1940, together with the devastation of the 1944 bombing and the German economic rape of France from 1940 to 1944, created a systemic crisis that gave Americanized Frenchman Monnet the opening he needed to push systemic reform in France.

41. ÉRIC ROUSSEL, JEAN MONNET 428 (1996). French modernization after World War II was devised in the Monnet Plan. Monnet convinced General de Gaulle that the only way to rebuild France, and French greatness, was through massive economic and financial modernization. *Id.* Monnet, a sort of French Bill Gates, wielded truly astounding political and economic influence on France and the whole of Europe. Long after de Gaulle, Adenauer, and Schuman had left the scene, an aged Monnet was still, in the 1970s, traveling the world on behalf of the European Community, being received by world leaders whenever he chose: "Europe, as everyone knows, was his thing, he carried her to her baptism, he defined her: from the moment he arrived, how could one not listen to him?" *Id.* at 861. On the Monnet Plan, *see id.* chs. 13-22. On Monnet's strong link to the United States and on the role of his many elite American supporters, *see id.* chs. 14, 16. On this latter point, *see also* MONNET AND THE AMERICANS: THE FATHER OF A UNITED EUROPE AND HIS U.S. SUPPORTERS 1-4 (Clifford P. Hackett ed., 1995). The European Coal and Steel Community was founded in April, 1951, and its successor, the European Economic Community, was founded in 1957. Both were officially products of the Schuman Plan, which owed a great deal to Jean Monnet. *See* Pascal Fontaine, *Seven Key Days in the Making of Europe*, *at* http://europa.eu.int/abc/obj/chrono/40years/7days/en.htm (last visited Aug. 26, 2001).

42. WRIGHT, *supra* note 15, at 444, 454.

43. *See* Paul Warwick, *Ideology, Culture, and Gamesmanship in French Politics*, 50 JOURNAL OF MODERN HISTORY 631, 636-37 (1978).

The EU's very genesis began with the plans and activities of Monnet and his incredible influence in Paris, Bonn, and Washington, D.C.[44] Jean Monnet himself designed and proposed the European Economic Community, the direct forerunner of the EU. He also designed and proposed the EurAtom initiative and crafted the European Coal and Steel Community, the direct forerunner of the European Economic Community.[45] Not surprisingly, a quite young and brilliant Monnet, who had been indispensable as early as World War I, when he organized the French war industry and coordinated the war effort between the United States, Britain, and France.[46] U.S. diplomat Robert Murphy declared once that Monnet was "in many respects more remarkable than de Gaulle."[47]

In brief, Monnet's brilliance was his recognition that economic cooperation among Belgium, Luxembourg, the Netherlands, and France was the first step toward the creation of a united Europe.[48] Monnet's inclusion of Germany, with its rich coal fields and industry, was an inspired stroke of genius; Monnet understood that, after two disastrous wars with their neighbors over the Rhine, France could best avoid a future war with Germany by economically and politically integrating with the Germans, rather than competing against them as in the past.[49] For their part, the Americans encouraged European integration because American policymakers saw European economic integration as the crucial element to guarantee the survival of NATO, which was the primary means of responding to Stalin's creation of the East Bloc during the early years of the Cold War. For nearly fifty years, Monnet's vision served as the basis for continued European integration.[50]

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44. *See* Fontaine, *supra* note 41. Professor Fontaine, in this official EU publication, says of Monnet:

> It was Jean Monnet, with his unique wealth of experience as a negotiator and man of peace, who suggested to the French Foreign Minister, Robert Schuman, and the German Chancellor, Konrad Adenauer, that a community of interest be established between their countries, in the shape of a jointly managed market in coal and steel under the control of an independent authority. The proposal was officially tabled by France on 9 May 1950, and was warmly received by Germany, Italy, the Netherlands, Belgium and Luxembourg.

Id.

45. *See* Richard Mague, *Jean Monnet: A Biographical Essay*, *in* MONNET AND THE AMERICANS, *supra* note 41, at 7-24.

46. *See id.* at 9.

47. *Id*. at 8.

48. Fontaine, *supra* note 41.

49. *See id.* ("What could be done to avoid repeating the mistakes of the past and to create the right conditions for a lasting peace between such recent enemies? The nub of the problem was the relationship between France and Germany. A link had to be forged between the two . . . .").

50. *See* JEAN MONNET: THE PATH TO EUROPEAN UNITY 205-208 (Douglas Brinkley &

With the downfall of the U.S.S.R. between 1989 and 1991, however, European integration was no longer needed for defensive purposes. Integration became an end in and of itself. The new strength of the American economy in the 1980s and 1990s, along with the sole superpower status of the United States, provided new reasons for European governments to pursue integration. Further, since the 1970s, Europe has been plagued by structural economic challenges, underscored by chronic unemployment that has been hovering at thirteen percent since the early 1980s in most European countries. Faced with aggressive challenges in many product markets by Japan, Korea, and other Pacific Rim countries, the French feel especially besieged by "globalization," which they understand as global economic competition and the sale of products manufactured in newer factories with cheap foreign labor.[51] The result has been that many in France have viewed the EU as their vehicle to defend French economic interests against American and Asian competition. To some extent, a great deal of hope has been placed in the EU to deliver both (and, some might argue, paradoxically) a better economy and the preservation of the French way of life, which includes, now by law, a thirty-five hour work week.[52] Perhaps inevitably, such excessive faith in the EU has also brought corresponding disillusion. For instance, the prestigious *Le Monde diplomatique*, the French equivalent of a weekly *New York Times* special edition devoted to world affairs, described the recent mass demonstrations against the EU in the French city of Nice on

Clifford Hackett, eds., 1991).

51. *See Rôle de la présidence française*, EUROP MAGAZINE, *at* http://www.monde-diplomatique.fr/cahier/europe/vedrine1 (July 1, 2000) (Interview of Hubert Védrine, France's Minister of Foreign Affairs. He responds to a question about whether the recent fire bombings of McDonald's fast food restaurants in France meant that there was a growing anti-Americanism in France by stating: "The [British and U.S.] newspapers have all chosen an incident to show and to dramatize. A McDonald's was also firebombed in England three weeks ago. On the contrary, there is in reality an anti-hegemonic attitude, anti-globalization in this country but that attitude exists in the United States, too.") (author's translation).

52. *See generally* Mark Hunter, *Les salariés américains aimeraient le temps de vivre*, LE MONDE DIPLOMATIQUE, Nov. 1999, *available at* http://www.monde-diplomatique.fr/1999/11/HUNTER/12646.html. Hunter writes that in contrast to the guaranteed French workweek of thirty-five hours, Americans work much harder and longer. He claims that American capitalism has created armies of overworked people, not armies of the unemployed that Karl Marx predicted. He quotes Juliet Schor as estimating that Americans work 245 hours more, or six weeks longer, than they did in 1973 to maintain their 1973 standard of living. *Id*. He also cites the International Labor Bureau for the following average hours worked per week, per worker in 1980 and in 1997: U.S. in 1980, 1,883 hours; U.S. in 1997, 1,966 hours; France in 1980, 1,809 hours, France in 1997, 1,656 hours; Japan in 1980, 2,121 hours, Japan in 1997, 1,889 hours. *Id.* Hunter's article condemns the American system, which he states damages personal lives and harms families. *Id*. This Note argues that such an article is proof of the deep divide between French and American attitudes toward work and markets.

December 11, 2000 as follows:

> The demonstrations, which amassed close to 100,000 people at the start of the Nice Summit, are far from being isolated. The demonstrations signify the intrusion of the citizens into the history of the construction of Europe, as well as the exasperation of the citizens, not to mention their disillusion, with a process whose results they only see as negative: twenty million unemployed and close to forty million impoverished, inability to cope with the mad cow crisis or with maritime disasters, and [the European Union being] a complete non-entity in world diplomacy . . . . The disillusion is even more profound because the European Union is one of the few international means of resisting Liberalism's [i.e. *laissez faire*] globalization which is the process of rendering the Free Market, blind and destructive, the total master of the planet.[53]

The EU does not agree with the French on everything. To put it mildly, the EU, while itself certainly somewhat *dirigiste*, has in comparison to France been a bastion of free market thinking. The EU has, with its "competition laws," the European equivalent to antitrust in the United States, attempted to force member states to deregulate state-owned industries, stop state subsidies from being given to inefficient government-owned firms, and allow for the freer play of market forces—many times over the resistance of member states.[54] The EU has been at the forefront of eliminating protectionist laws within the Union, often to the outrage of French farmers who, it seems, block the highways of France several times each year in protest.[55]

Currently, many French feel divided about the EU. On the one hand, it is a promising tool to use against the haughty Americans; on the other hand, it interferes with French national policy too much. The EC may have focused much of its energy on telecommunications policy in an effort to

53. Anne-Cécile Robert et al., *Europe, l'enlisement ou le sursaut: Un cahier spécial sur l'Europe*, LE MONDE DIPLOMATIQUE, *available at* http://www.monde-diplomatique.fr/cahier/europe (last visited Aug. 26, 2001).

54. *See SCADPlus: Competition*, *at* http://www.europa.eu.int/scadplus (last visited Aug. 26, 2001) (this statement by the EU on its own competition policy states further that "[c]ompetition policy is essential for the completion of the internal market. The *raison d'être* of the internal market is to allow firms to compete on a level playing field in all the Member States.") [hereinafter *SCADPlus*]. The basis of competition policy is to "encourage economic efficiency by creating a climate favourable to innovation and technical progress." State subsides and certain state regulations are seen as a particular threat: "It must also prevent Member States' governments from distorting the rules by discriminating in favour of public enterprises or by giving aid to private-sector companies (State aid)." *Id*.

55. *See, e.g.*, *Farmers Block Streets to Press for BSE Aid*, *at* http://www.cnn.com/2001/WORLD/europe/france/02/26/madcow.france.protests (Feb. 26, 2001); *Angry French Cauliflower Farmers Block Airport Runway*, NANDO TIMES NEWS, Apr. 16, 1998, *at* http://archive.nandotimes.com/newsroom/ntn/biz/041698/biz15_13936_body.html.

introduce deregulation and free market competition into what it views as the area of the economy with the greatest future growth potential. It is running up against the desires of some of its member states, however, to resist embracing the market. That the French have passed a law mandating a thirty-five hour work week should explain much about French concerns. After all, the French passed not only a reduction in the work week, but also many accompanying laws that try to pay similar wages for lesser hours worked.[56] In sum, the French are trying to preserve their entire social security system and their way of life against the advances of the free market.[57] Now we shall see just how resistant the French are to the spirit of European telecommunications policy.

III. THE ROLE OF THE INFORMATION SOCIETY IN EUROPEAN INTEGRATION

A. Role of the European Commission

The EC is the dominant body of the EU because it is charged with both initiating legislation and implementing policy.[58] While checks and balances limit the scope of its activities, the EC is formidable because it comprises both executive and legislative powers. It is also the largest branch of the EU government, with over 15,000 employees. As part of its executive powers, it may also initiate legal proceedings against member states and businesses before the EU's Court of International Justice.[59]

The EC derives its power from the treaties that formed the EU and the judicial decisions interpreting the articles of the treaty. In setting economic policy, and particularly in reforming entire European business sectors along more competitive lines, the EC draws on the power of Article 90(3) of the

56. *See* Martine Bulard, *Les dix points chauds du projet de loi*, LE MONDE DIPLOMATIQUE, Sept. 1999, at 8, *available at* http://www.monde-diplomatique.fr/1999/09/BULARD/12425.html.

57. *Id. See also* Jean-Loup Motchane, *Alibis ou Solution de Rechange au Liberalisme: Ces territoires méconnus de l'économie sociale et solidaire*, LE MONDE DIPLOMATIQUE, July 2000, at 4, *available at* http://www.monde-diplomatique.fr/2000/07/MOTCHANE/13942.html. Motchane argues that France is in the process of defending a complex "social economy" that has deep roots in the Middle Ages, and was augmented by the collectivism of the French revolution and the socialist movements throughout the nineteenth and twentieth centuries. *Id.* He singles out the EC as the carrier of the Liberal threat against France: "As for European integration, it illustrates one of the aspects of the confrontation between the social economy and the logic of Liberalism that is being pushed by the Commission of Brussels." *Id.* at 5.

58. *See Role of the European Commission*, *at* http://www.europa.eu.int/comm/role_en.htm (last visited Aug. 24, 2001).

59. *Id.*

Founding Treaty, which grants it power to implement the Four Freedoms and the Competition Policy of the Treaty.[60] Called the "Article 90 EC Directives" ("90 EC Directives"), these EC orders touching on economic integration are binding on member states and on businesses in Europe.[61] The 90 EC Directives are especially powerful because they do not require approval by the European Parliament.[62] In terms of economic policy, then, the EC, whose highest officers are twenty commissioners with illustrious political resumes from their respective home countries, is the proverbial 800-pound gorilla that prods member states and the EU itself to actions that benefit the Union and its people as a whole. Concomitantly, the EC dissuades "sectoral" interests (i.e., national or regional interests) from asserting themselves over the interests of the Union as a whole.[63]

B. Development of the European Commission's Telecommunications Policy

One of the EC's primary economic policy goals has been the creation of what it calls Trans-European Networks ("TENs").[64] The TEN policy was conceived as a means of creating larger and more fluid markets for the European version of the "information society."[65] Telecommunication and information technology ("IT") in general have been seen as the most fertile ground for the development of TENs in Europe. Long mired in high unemployment and extremely low job growth, the EU and its largest member states—France, Germany, Italy, Spain, and the United Kingdom—view TENs as the key to bringing the European economy onto a competitive footing with North America and Japan in capturing a global market share in new technologies.[66]

Europe's 3G policy is part of a larger focus on the technological sector as a solution to Europe's economic problems. In 1997, for instance, the EC introduced a broad policy called "The European Initiative in Electronic Commerce."[67] The policy's goal is to "encourage the vigorous growth of electronic commerce in Europe."[68] The EC's focus is on the market-driven expansion of all forms of electronic commerce.[69] The EC

60. *Id.*
61. *Id.*
62. *Id.*
63. *See Role of the European Commission*, *supra* note 58.
64. *See* Sauter, *supra* note 4, at 83.
65. *Id*.
66. *See id.*
67. DENIS KELLEHER & KAREN MURRAY, IT LAW IN THE EUROPEAN UNION 83 (1999).
68. *Id*. (citing EUR. PARL. DOC. (COM 97) 157 (1997)).
69. *Id.* at 83.

believes that there will be a convergence of various strands of electronic commerce.[70] The EC's acknowledged goal is to use some of its advantages in cellular phone technology to move itself into a more competitive position with the United States in electronic commerce generally: "As the Commission itself admits, electronic commerce is dominated by the United States. The main priority for Europe must be to build businesses which can compete with the Americans on the Internet and in electronic commerce."[71]

Policymakers believe that competitiveness in high speed Internet technologies and 3G mobile telecommunications will offset Europe's relatively poor showing in the personal computer and Internet markets of the 1980s and 1990s.[72] The EC's activities throughout the field of telecommunications and IT are impressive in both scope and direction. Since the mid-1980s, the EC has vigorously acted to liberalize the telecommunications market in Europe through myriad policy initiatives,[73] Directives,[74] and sometimes, legal actions against member states and state-subsidized telecommunication monopolies.[75] The EC has also made large investments in research and development, and it has established regimes for cooperation such as joint ventures and mergers, while still aiming at maintaining competitiveness between firms.[76] In the midst of these efforts, 3G wireless technologies have given the EC great hope.

The EC sees 3G wireless technologies as the key to reviving European economic performance.[77] The "wonder technologies" that seem possible with 3G have certainly excited both the EC and investors.[78] The

70. *See id.* at 83-84.

71. *Id.* at 93.

72. *See* Sauter, *supra* note 4, at 83 (discussing The Challenges and Way Forward into the 21st Century: White Paper on Growth, Competitiveness and Employment, COM(93)700 final).

73. Green Papers and White Papers are the primary methods by which the EU initiates policy discussions. Green Papers are rather like a policy proposal, along with detailed discussion and numerous questions posed to the public and governmental bodies. A series of discussions and meetings take place, and the redrafted version of the Green Paper becomes a White Paper. *See SCADPlus: Glossary*, *at* http://europa.eu.int/scadplus/leg/en/cig/g4000g.htm (last visited Oct. 21, 2001).

74. Directives resemble something between an American Executive Order and an Act of Congress. Directives are legally binding and are issued by the European Commission.

75. *See* Sauter, *supra* note 4, at 82-86; *see also* GEORGE A. BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 57-62 (2d ed. 1993).

76. Thomas C. Lawton, *The Course of EC Technology Policy: European Attempts to Enhance Industrial Competitiveness Through Research and Development Collaboration*, *in* EUROPEAN TRADE AND INDUSTRY IN THE 21ST CENTURY: FUTURE DIRECTIONS IN EC LAW AND POLICY 23 (Kees Jan Kuilwijk & Robert Wright eds., 1996).

77. *See supra* note 5 and accompanying text.

78. Third Generation spectrum licenses in Britain and Germany sold for billions of dollars, but Belgian prices declined sharply as the year 2000 wore on. *See* Graeme Wearden,

prospect of being able to combine the Internet and Global Positioning technology with voice service means that the entire way of doing business, not to mention traveling and interacting with people and machines throughout the world, could be changed.[79] The EC hopes that with a rapid construction of 3G networks in Europe, a multiplier effect will take place in the European economy. Firms will rush to fill the infrastructure with products, both hardware and software. If Europe manages to take the lead in this new technology, demand throughout the rest of the world will fuel European exports. The idea is that 3G may well become the next revolutionary product, like the automobile and the personal computer were when they were first introduced. The analogy to the automobile may be more apt than initially realized: with 3G, the EC is making member states build the highways and side streets before the new car has been fully tested.

In its decision to rush 3G into service, the EC had to choose how spectrum would be allocated. Originally, the EC wanted to use American-style auctions, where firms would simply bid against each other for licenses. This desire reflected a faith in the market's ability to sort out the actual worth of the spectrum and for firms to compete for financing. In the end, due to the desires of member states, the EC settled on a compromise: it would allow states to use an American-style auction or a beauty pageant method favored by the French, Italians, and Spanish.[80] As explained below, this compromise has proven a mistake.

C. Challenges to the European Commission

The EU and the EC are currently losing popular support throughout the continent at the very time when their vigorous leadership in competition policy is required. In a speech to the European Parliament in early 2000, EU President Romano Prodi expressed hope for the future based on the single currency and the half century of peace in Europe. At the same time, he was frank about the political dangers the EU faces:

> On the other hand, Europe's citizens are disenchanted and anxious. They have lost faith in the European institutions. They are losing patience with our slow rate of progress in tackling unemployment. The prospect of enlargement [of the Union] divides public opinion between hope and fear—hope for stability and progress, fear of a Europe

EU Telecoms Ministers Meet to Save 3G, ZDNET UK NEWS, Apr. 4, 2001, *available at* http://news.zdnet.co.uk/story/0,,s2085489,00.html. Wearden notes that in the summer of 2000, auctions in Germany and Britain raised £28 billion and £22.5 billion, respectively. The Belgian auction, held in November, 2000, raised less than £300 million. *Id.*

79. *See generally* Buckley, *supra* note 1.

80. *See Reviewing the European Commission White Paper on 3G Services*, EUROPEMEDIA.NET, June 4, 2001, *at* http://www1.europemedia.net/showfeature.asp?ArticleID=2455 (Jose Otero ed.).

without identity or frontiers.[81]

Prodi added that "ordinary Europeans have to be convinced that Europe's policymakers and decision-makers are capable of decisive and effective action[,] Tthat [sic] they can modernize Europe and steer it toward a bright future."[82]

In a list of policy priorities for the EU, Prodi named job creation and economic growth first.[83] His general approach to this challenge is "the right policy mix to ensure stability for the euro and to sustain growth. The basis for this growth has to be a dynamic Single Market, greater competitiveness and real efforts to boost research and innovation . . . ."[84] If Prodi is correct, then the success of the 3G wireless market has arguably become central to the political future of the EC.

Despite the implementation of the Euro and the successes the EC has had in promoting liberalization, Prodi makes clear that the time has come for fundamental change. So, too, must the very structure of relations between the EU and member states be changed, Prodi concludes. Greater integration, Prodi claims, will be made possible only by "radical decentralization."[85] Prodi claims that decentralization is both required and possible. It is required, he says, because the EU is losing political support among average Europeans. It is possible to decentralize without endangering European integration, he claims, because the EU's competition policy (i.e., the favoring of free markets) is now widespread in the political culture of the member states. So, the old methods of moving Europe toward integration and competitiveness through direction from Brussels must be changed, Prodi has concluded.

Indeed, in the wake of Prodi's speech, the EC and a host of committees within it issued a number of policy papers outlining the goals of decentralization. For instance, in June 2001, Working Group 3b of the EC issued its White Paper entitled "Decentralization: Better Involvement of National, Regional and Local Actors."[86] In that White Paper, the Working Group frankly admitted that there was "democratic deficit" in the EU and

81. EC President Romano Prodi, Shaping the New Europe, Address before the European Parliament (Feb. 15, 2000), *at* http://www.europa.eu.int/comm/external_relations/news/02_00/speech_00_41.htm.

82. *Id*.

83. *Id*.

84. *Id*.

85. *Id*.

86. Decentralisation: Better Involvement of National, Regional and Local Actors: White Paper on European Governance from Working Group 3b, 3 (June 2001) [hereinafter EC White Paper].

specifically in the EC.[87] Furthermore, the Working Group added that "a centralised top-down approach, which has basically prevailed over the years," must change.[88] In its review of telecommunications policy, the Working Group concluded:

> Over the last 10 years, the telecommunication sector was increasingly covered by EU regulation. This was done via two spearheads: liberalisation and harmonisation repectively based on competition law and the internal market mechanisms. This *policy centralisation* led to what is generally regarded as a success story of competition in liberalised telecommunications markets being a driving force in the Information Society.[89]

The Working Group essentially admitted that the policy of introducing free market techniques into the telecommunications sector on a Europe wide basis was centrally dictated by the EC. In an attempt to appease the citizenry of Europe, some of which, like the French, are unhappy with the EC's forcing of free markets onto their countries, the EC is now trying to backtrack and decentralize its power. Yet in light of the persistence of the *dirigiste* tradition in France, this Note posits that Prodi and the EC are wrong to decentralize. The EUs future is dependent on economic integration, according to numerous statements by the EU itself.[90] The recent establishment of the Euro and the importance of Brussels as the champion of European growth mean that the EU's prestige and very survival may well be tied to economic performance—at a time when the EU feels constrained to retrench its own ability to carry out policy. The Working Group itself wondered whether, in fact, the error in telecommunications policy had been not to go forward with even more centralization: "At first sight, the experience with the decentralised implementation approach has been positive. One also has to ask the question of the cost of non-centralisation, however, i.e. would the success for this EU policy have been even greater if definition and implementation had been more centralized?"[91]

The answer this Note posits is a resounding "yes."

IV. SPECTRUM ALLOCATION IN FRANCE

A. General Structure

France has created scarcity in the 3G market, much as other nations

87. *Id.* at 8.
88. *Id.* at 28.
89. *Id*. at 18.
90. *See, e.g.*, *SCADPlus*, *supra* note 54.
91. EC White Paper, *supra* note 86, at 18.

have done, by limiting the number of nationwide spectrum licenses it will issue. In light of the prices that winning bidders paid in auctions in the United States, Great Britain, and Germany, the French saw it fit to raise their fees to reflect market realities more accurately.[92] Now, France will demand that each licensee pay approximately 5 billion Euros, or $4.8 billion.[93] After all, it makes little sense for the French to undervalue their spectrum.[94] One might conclude that the result is that spectrum will cost the same across Europe. Indeed, the crux of this Note's argument is that cost is secondary; thus, what matters most is the resulting regime under which these costs are contracted. But as the French example shows, the fixing of prices can have disastrous results.[95]

France's beauty pageant method of spectrum allocation works much as its eponym would indicate. Contestants are invited to submit detailed applications to the *Autorité de régulation des télécommunications* ("ART"), which is the French equivalent of the Federal Communications Commission ("FCC"). The contestants are then graded on a point scale, reflecting how well each contestant satisfies ART's criteria. The four highest scores are awarded the licenses.

ART requires each contestant to commit to a series of obligations.[96] Obligations are to be "clear" and "explicit."[97] To eliminate confusion, they are to be accompanied by the precise formula of: "We undertake to . . . ."[98] ART reserves the right to impose other obligations if forecasts are laid out in sufficient detail. In particular, contestants must agree to specific service launch dates, the extent of coverage at those dates, the type of services

92. ART Chairman Jean-Michel Hubert, Mobility Futures: Competing Visions of a 3G World, Speech Before the Analysys Conference (Nov. 29, 2000), *at* http://www.art-telecom.fr/communiques/discours/analysys-eng.htm. [hereinafter Hubert London Speech].

93. *Id*. Hubert adds that "[h]alf of this amount has to be paid over two years, with the remainder payable over 13 years." *Id.*

94. *See id.* Hubert states that the decision to raise the license price in France:

> [B]elonged to the government, which wanted to take two factors into account: first, the impact of the UK auction on the economic equilibrium of the European market; and second the government's analysis of how much operators are able to contribute, given that further outlays will be needed to build up a network.

Id.

95. Peter Sayer, *3G—France Awards Just Two UMTS Licenses*, IDG.NET, *at* http://www.idg.net/english/crd_france_550610.html (May 31, 2001). The French succeeded in attracting only two applicants for 3G licenses because the government, relying on earlier auctions, fixed the price too high, long after markets re-evaluated the worth of spectrum. *Id*.

96. *Appel à candidatures pour l'introduction des systèmes mobiles de 3 ème génération: informations complémentaires relatives à l'appel à candidatures, from Autorité de régulation des télécommunications*, *at* http://www.art-telecom.fr/dossiers/umts/umts-infos.htm (Dec. 2000) [hereinafter ART Overview].

97. *Id.*

98. *Id.*

available, the extent and the speed of a contestant's 3G network, and the quality of service.[99]

B. Selection Criteria

As mentioned above, the essence of the beauty pageant method is that the firms who submit applications must lay out a detailed business plan. ART then grades the firms according to its own open set of criteria. In a set of three publications, it has laid out the general criteria, as well as some additional information on how those criteria will be evaluated. ART lays out its grading scale as indicated in Table 1. In sum, there are fourteen major criteria, each of which requires discussion.

Table 1.[100]

Selection Criteria	Max. Points
(a) Launch date	15
(b) Services available	50
(c) Relationship with service providers	30
(d) Relationship with subscribers and users of services	15
(e) Tariff rate	15
(f) Size of network	15
(g) Extent of network and speed of network deployment (extent defined in terms of percentage of the population and detailed in step with the type of service and sales)	100
(h) Quality of service	15
(i) Ability of the project to maximize resources and frequency	15
(j) Capacity to provide users with international roaming service	15
(k) Environmental preservation initiatives	15
(l) Employment: quantitative aspects (forecasted job creation) and qualitative aspects (facilities, qualifications, training)	25
(m) Coherence and credibility of the business plan	75
(n) Coherence and credibility of the project	100
TOTAL	500

99. *Id*.

100. Autorité de régulation des télécommunications, Annexe a la decision 00-835. Avis Relatif aux modalités et conditions d'attribution des autorisations pour l'introduction en France métropolitaine des systèmes mobiles de 3ème génération. Document 2 : conditions généralaes de la procédure d'autorisation des exploitants de systèmes mobiles terrestres de 3ème génération (IMT2000), § III-2-3, *available at* http://www.art-telecom.fr/textes/avis/00/appel3g.htm (last visited Aug. 29, 2001) [hereinafter ART Doc. 2].

The level of detail that ART demands for each criterion above, as well as the unequivocal nature of the obligations once made, indicates that government bureaucrats will exercise a great deal of influence in shaping the 3G market in France.

Factors (a) through (e) in Table 1 alone account for 125 of the 500 possible points. These are what we might characterize as "market shaping" factors. Factor (a), the launch date, is weighted only at fifteen points. The offer of services, factor (b), however, is weighted at fifty. As ART explains in regard to this factor, the French Telecommunications Agency will "evaluate the project's contribution to the mobile multimedia market, and, more generally, its contribution to the development of the Information Society in France."[101] There can be little doubt that policy goals have driven the articulation of this important factor.[102] ART adds that its consideration of the service availability values diversification from Second Generation ("2G") services.[103] ART tells contestants it will examine this factor for "the clarity and the relevance of the proposed offers, in light of the targeted clienteles."[104] One might translate ART's bureaucratic language by referring to Hubert's plain English. In regard to factor (b), the offer of services, Hubert stated that he stresses "the obligation to provide a pre-determined set of services, including voice, Internet access, data transmission and user location, together with obligations of availability and service quality."[105] Hubert added that this factor was weighted so heavily for "[o]ne simple reason: we want real 3G services . . . ."[106] This Note argues that the incentive that ART has created for contestants is to commit to advanced (and speculative) 3G service schemes as quickly as possible, before the market, or clientele, for such services has even developed.

Closely related to the "market shaping" factors are factors (c), (d) and (e), which together account for sixty of the 500 possible points. We might label these factors collectively as "market-structural" factors. ART explains that it will look at the structure of proposed agreements between licensees and service providers based on how well they further goals of openness and fairness in business, as well as how likely they are to lead to a diversification of services.[107] Factor (d), the relationship between

101. ART Doc. 2, *supra* note 100, at § III-2-4 (b) (author's translation).

102. *See* Hubert London Speech, *supra* note 92 (stating that the beauty pageant was devised "because it can be used to select candidates according to objective criteria that reflect the principles of public policy").

103. ART Doc. 2, *supra* note 100, at § III-2-4 (b).

104. *Id*. (author's translation).

105. Hubert London Speech, *supra* note 92.

106. *Id*.

107. ART Doc. 2, *supra* note 100, at § III-2-4 (c).

subscribers and users of services, is evaluated down to the detailed level of proposed contracts for 3G services. Such contracts are evaluated for conformity with the legal rights of consumers, as well as the clarity of the tariff plans.[108] Factor (e), the tariff rate, is evaluated according to the rate structure's ability to stimulate further technological development of services. The rate structures are evaluated according to various scenarios associated with reasonable rate plans.[109]

ART requests detailed information on the organizational structure and financial status of each contestant. For instance, a contestant should submit an organizational chart detailing the "direct or indirect" role of each significant corporate partner, parent, or subsidiary with which it is involved in any way.[110] An *extrait Kbis* disclosure form is required from the contestant and from its principal shareholders.[111] Industrial and commercial agreements between the contestant and "all suppliers or subcontractors" must be described. Further, contestants must detail all licenses they hold in foreign countries. The translation of each license into French "could be recommended as long as the contestant thinks it helpful for its file."[112]

The capital reserves of the contestant are also of great concern to ART. Thus, from the date a corporation submits its application to the date of the signing of the license, the corporation must keep ART updated as to its capitalization. A change in capitalization is no excuse to modify the application after it has been submitted.[113] ART is clear that no part of the application can be changed after submission; a change in the application means automatic elimination.[114] Therefore, ART will determine if a change in capitalization is significant enough to be considered to have changed the application itself. If so considered, the contestant is eliminated.[115]

ART's concern with the contestant's capitalization is grounded in more than a general concern for the financial solvency of licensees. The French regulatory body's selection criteria indicate that it will examine the application much as a bank examines a business plan before agreeing to make a loan and take a security interest in the collateral. Indeed, the selection criteria indicate that ART has faith in its ability to evaluate

108. *Id*. § III-2-4 (d).

109. *Id*. § III-2-4 (e).

110. ART Overview, *supra* note 96 (stating: "Comme precisé au paragraphe II-1 du document 2 de l'appel à fournir dans leur dossier un organigramme en cascade des sociétés ayant des participations directes ou indirect dans la société candidate").

111. *Id*.

112. *Id*.

113. *Id*.

114. *Id*.

115. *Id*.

detailed business plans from both financial and technical perspectives. This Note argues that the inescapable conclusion is that ART believes it has the ability to predict, or dictate to a significant degree, what the 3G market will look like in the future.

As indicated in Table 1, ART intends to review the business plan for general coherence, as well as for financial soundness. More importantly, ART's evaluation of the corporate business plan will account for seventy-five of the total 500 points, as indicated in Table 1. Such weight in the overall scale indicates the level of confidence ART places in its own business judgment. Accordingly, ART goes so far as to examine not only the coherence of the business plan, but also its future profitability.[116] Its review of profitability is indexed according to levels of service offered.[117]

The level of detail that ART demands is telling. Each business plan submitted must indicate every financial commitment that the contestant makes, including letters of intent or signed financial commitments from the relevant individual or organization.[118] The business plan and supporting documents must be composed according to French accounting methods or, if translated from another language, they must be easily read and understood in French. Accounting hypotheses and methods of amortization must be defined.[119] All forecasted, network-wide expenses and revenues must be accounted for and supplied in paper form and electronic form (in Microsoft Excel format) to ART.[120] ART reserves the right to require a contestant to answer a confidential follow-up questionnaire.[121]

ART also demands a detailed technical description of each contestant's proposed national 3G network. ART will evaluate the planned network for its ability to meet factors (f) through (j) in Table 1. When it comes to technical detail, ART's policy can be summed up simply as "the more the better."[122] A list of firms supplying equipment in the construction of the network is requested, as well as "a summary of the principal contractual terms binding [the contestant] to each supplier."[123] ART adds that "documentation, furnished by the builders, on the equipment composing the network may also be attached to the [contestant's file]."[124]

116. ART Doc. 2, *supra* note 100, at § III-2-4 (d).

117. *Id*.

118. ART Overview, *supra* note 96.

119. *Id*.

120. ART Doc. 2, *supra* note 100, at § II-6.

121. ART Overview, *supra* note 96.

122. *Id*. ("Therefore, it is desirable that candidates submit the most clear and precise data possible concerning the construction of their networks.") (author's translation).

123. *Id*. (author's translation).

124. *Id*. (author's translation).

As Table 1 indicates, 160 of the 500 possible points are awarded on the basis of ART's evaluation of the technical aspects of the plan. ART makes clear that candidates should guarantee that coverage is effective twenty-four hours a day.[125] ART further specifies that coverage should reach ninety-five percent of the outdoor area of planned network coverage both for voice and for 144 KB data transmission.[126] All of the mathematical calculations used to determine coverage must be explained.[127] ART's detailed explanation of its requirements for review of a contestant's network architecture includes nine subcriteria.[128] The specifics a contestant must provide on long distance service give an indication of how detailed the plan must be:

> c) infrastructure for long distance transmission: nature (owned, leased, technology used (telegraphic, by hertzian bundle)), characteristics and geographic coverage zone; types of equipment used; standards used; schedule of construction and of launch; the candidate will distinguish actual installations already in existence (in the case of candidates already possessing a GSM license) from those to be constructed, for which [the candidate] will provide a forecasted schedule of deployment.[129]

In the case of a tie among contestants, ART will use the grading scale in Table 2 to select its final four winners.

Table 2.[130]

Selection criteria	Max. Points
Services offered	50
Extent of network and speed of network deployment (extent defined in terms of percentage of the population and detailed in step with the type of service and sales)	100
Coherence and credibility of the business plan	75
Coherence and credibility of the project	100
TOTAL	325

As is evident from this list of four factors (which corresponds exactly to the four most heavily weighted factors in Table 1), a premium is placed

125. *Id*.
126. *Id*.
127. *Id*.
128. *See* ART Doc. 2, *supra* note 100, at § II-4.
129. *Id*. § II-4 (c) (author's translation).
130. *Id*. § III-2-9.

on the more general factors. One could argue that these factors are also the most subjective. In any case, the tie-breaking method highlights which criteria ART views as most important.

C. Fear of the Market

In a speech in London in November 2000, Jean-Michel Hubert, the Director of ART, defended the beauty pageant method because it is "pertinent, effective and transparent – qualities that belie the criticism leveled at it in Europe over the past two years."[131] Hubert defined pertinence as its effectiveness in serving public policy goals.[132] He defined effectiveness on the basis that "licences are granted in a manner that is economically viable for operators."[133] Hubert argued that the beauty pageant "is transparent because, in the case of the wireless local loop, we published all the documents involved in the selection process, including the memorandums relative to each criteria for each operator . . . . No disputes have arisen from this [wireless local loop] beauty contest."[134] Hubert's defense of the beauty pageant goes beyond these general points.

Hubert argued that the beauty pageant reflects the desires of all involved, from ART to market participants.[135] He also posited that beauty pageants are more susceptible to the control of participants.[136] This was a apparent critique of the behind-the-scenes financial "wheeling and dealing" that is perceived to accompany auctions. Hubert said as much when he claimed that beauty pageants are "more favourable to market development than auctions, which force candidates to be selected on the basis of financial criteria only, with other important considerations being disregarded."[137] Hubert's faith in the French government's ability to shape and manage the market was evident in public comments at the end of 2000—so were his misgivings about free market allocation.

Hubert identified two main criticisms of ART's beauty pageant. The first dealt with the "limited legitimacy of the regulator's choices, stemming from the view that the market is better placed than technocrats to ascertain what the consumer needs."[138] Hubert responded to this criticism by referring to the "political commitment" that was driving universal 3G

131. Hubert London Speech, *supra* note 92.
132. *Id*.
133. *Id.*
134. *Id*.
135. *Id*.
136. *Id*.
137. Hubert London Speech, *supra* note 92.
138. *Id.*

territorial coverage—"a major concern for Europe."[139] The second area of criticism that Hubert identified was the claim that the beauty pageant lacked transparency.[140] This criticism is also derived from market-oriented preferences, so it is actually a derivative of the first area of criticism. In any event, Hubert explained that the auction process itself had been the subject of much dispute.[141] He added that the "increasingly high drop-out rate" of successful auction bidders "would suggest that beauty contests offer at least the same guarantee of transparency as auctions."[142]

Hubert, in the true French *dirigiste* tradition, openly expressed his reservation about the disorganized and apparently inefficient free market:

> According to economic theory, auctions are an economically efficient procedure because they reflect the price of the licences as assessed by the players themselves, and not by an outsider to the market. However, this view overlooks the fact that, in practice, some players, namely the 2G operators, have to obtain a 3G licence to remain present in the market and that the actual possibility of withdrawing — a pre-condition for auctions — does not exist in this market.[143]

Hubert went on to highlight the nasty realities of the European financial system. The upshot of his comments indicate a suspiciousness of the unscientific, overly-emotional nature of the venture capital market:

> The system of European financing will be put to the test, with the result that some operators, including European majors, have decided not to compete in several countries. This partly explains why the financial markets have been correcting their overly optimistic and sometimes irrational expectations in the past few months. This also shows that appreciations of the market is [sic] made at a specific time, not on [sic] the long term. It is excessive and can be dangerous.[144]

The market had led to overexuberance in the recent past, and now was leading to excessive pessimism, Hubert stated. The French Government, however, has clearly seen the middle course:

> France did not share the euphoria that gripped economic circles, and even the governments, in the spring, when the prices that states could charge operators appeared to have become more important than the success of a new market.
>
> And France does not intend to yield to the concern — or the pessimism

139. *Id*. This response only begs the question, however. The EC, like ART, is just as susceptible to criticism that it is a distant bureaucracy that is shaping trans-European policy from on high; hence, the nervousness with which the EC views its high-stakes gamble on 3G wireless policy.

140. *Id*.

141. *Id*.

142. *Id*.

143. Hubert London Speech, *supra* note 92.

144. *Id.*

> —that is being expressed now, less than six months later, at least in some countries and by some operators.[145]

These comments reveal the French regulator's uneasiness with change in market valuation. Hubert believes that market valuation of a commodity should be based on an objective, timeless estimation of intrinsic value, not on changing supply and demand variables as informed by changing market information. Hubert did, however, make a concession to the wisdom of the market:

> But we should also bear in mind that the market will maintain a degree of freedom regarding the pace of its own development. That is its freedom and its strength, because it's the market that will answer these questions, which are still asked: what services for which consumers and at what price?[146]

The latter point Hubert makes is, of course, difficult to square with the emphasis ART places on having contestants guarantee specific 3G market services.[147]

Public policy will influence not only the extent and type of 3G services that contestants offer, but also basic business decisions about the size, training, and type of workforce required to do the job. Factor (l) in Table 1 is ART's employment criterion, worth twenty-five points of the total. ART indicates that it will review a contestant's general plan for the potential to create jobs, and for how well licensees undertake to provide for job training.[148] In a country with serious structural unemployment problems, the job creation factor cannot be dismissed lightly.[149] Although only accounting for twenty-five points out of 500, it may have more influence than its numerical weight appears to give it. Some "seepage" of this factor into other factors is not impossible to imagine if one remembers that some of the biggest categories are highly subjective.

ART appears ready to enforce the obligations that a successful contestant makes. Licensees will be "obligated to participate in the financing of two yearly investigations (enquêtes) undertaken for review by

145. *Id*.

146. *Id*.

147. *Id.* (stating that contestants have "the obligation to provide a pre-determined set of services, including voice, Internet access, data transmission and user location, together with obligations of availability and service quality.").

148. ART Doc. 2, *supra* note 100, § III-2-4 (c).

149. The French unemployment rate had been at 12.6% until 1997. *See French Unemployment Rises*, BBC NEWS, July 31, 2001, *at* http://news.bbc.co.uk/hi/english/business/newsid_1466000/1466515.stm. The 9% rate that France enjoyed in January 2001 was twice that of the United States and slightly above the EU average of 8.8%. *See French Jobless Hits 10-Year Low*, BBC NEWS, Feb. 28, 2001, *at* http://news.bbc.co.uk/hi/english/business/newsid_1193000/1193984.stm.

the Authority, one concerning the quality of service, the other concerning the coverage of the population by 3G services."[150] ART clearly intends to closely monitor at least these obligations. ART's control will also extend to the quality of voice services that 2G users will receive if the 3G network takes the place of the 2G network.[151] So, what were the results of ART's system of spectrum allocation?

D. Results

On May 31, 2001, ART announced the results of its beauty pageant. There were only two winners: France Télécom's subsidiary, Orange SA, and Vivendi Universal's subsidiary, SFR.[152] The reason why there were only two licensees, rather than the four that ART had originally planned to issue, was that only two firms bothered to apply.[153] Two other leading firms that were considered likely to obtain a license if they only applied—Suez Lyonnaise and Bouygues Telecom—withdrew their applications at the last minute, citing the 32.5 billion francs ($4.8 billion) fixed price tag set by the French government as too high.[154]

Given the recent threat of economic recession and the troubles that have beset the telecom sector, ART may have made an error in setting a fixed price many months ago. In extrapolating from even earlier free market auctions in Germany and Britain, while trying to make complicated adjustments for all sorts of factors, ART may have outsmarted itself instead of the market. Further, while the two firms that pulled out of the French beauty pageant did not mention other possible factors in their decisions to withdraw, one might wonder whether the detailed control that ART regulators would exercise throughout the life of the license was not the sort of arrangement those smaller firms craved, especially considering that such government supervision would cost as much as it did.

Hubert appears chastened but undaunted. While Hubert's bravado that France would not be swayed by momentary over- and under-valuations in the market has apparently mellowed, his general belief that the government can outsmart markets persists. In a session before the French National

150. Autorité de régulation des télécommunications. Annexe a la decision 00-835. Avis Relatif aux modalités et les conditions d'attribution des autorisations pour l'introduction en France métropolitaine des systèmes mobiles de 3ème génération. Document 1 : principales dispositions des autorisations pour des systèmes mobiles de 3ème génération, § 3, *at* http://www.art-telecom.fr/textes/avis/00/appel3g_1.htm (last visited Aug. 29, 2001) [hereinafter ART Doc. 1].

151. *Id.* § 4.

152. Sayer, *supra* note 95.

153. *See id.*

154. *See id.*

Assembly's Finance Committee, Hubert had to explain why only two applicants remained in the running for the French licenses.[155] His explanation politely stated that ART had focused on technical issues, whereas the national government had set the price, and that both factors played a role.[156]

Hubert's appearance before the Finance Committee, however, was evidently not for the purpose of apportioning blame; most of his comments were directed toward a possible solution.[157] Hubert added that a second beauty pageant was required in order to bring France in line with EU policy regarding the required number of 3G licenses.[158] He also voiced concern about a potential "duopoly" between the new licensees, especially if the remaining licenses are not assigned relatively quickly.[159] The new beauty pageant, he stated, would have to ensure that the two firms already chosen were not left behind.[160] Further, Hubert said, in allusion to the price issue, that a central concern was to manage effectively the timing of the beauty pageant.[161] Ironically, especially for a government bureaucrat who is attempting to fix prices and outsmart the market, Hubert's analogy for good timing was the example of successful initial public offerings ("IPOs") on the stock market.[162] He admitted that the original goal of 3G services would not realistically occur until 2004, due to equipment shortages.[163]

Drawing exactly the opposite conclusion from ART's spectacular failure with its vaunted beauty pageant, French legislator Jacques Guyard noted that Hubert's comments showed how difficult it is for "professionals" (apparently meaning telecom industry specialists) "to manage the future."[164] Another legislator faulted the lack of leadership in the EU on telecom policy.[165] Pierre Forgues, another legislator, openly questioned the contradiction between the fluid nature of the predictions of future value of the 3G market and the method by which the price of 32.5

155. *See* Sur l'attribution des licenses de t'eléphonie mobile (UMTS): Assemblée Nationale Commision des Finances, de l'Économie Génénale et du Plan, Compte Rendu No. 48 (2001) (statement of Jean-Michel Hubert), *available at* http://www.assemblee-nat.fr/cr-cfiab/00-01/c0001048.asp [hereinafter Hubert Statement].

156. *Id*.

157. *See id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. Hubert Statement, *supra* note 155.

162. *Id*.

163. *Id*.

164. *Id.*

165. *Id.*

billion francs ($4.8 billion) was reached and fixed.[166] Hubert replied that the national government set the price and that that price seemed "equitable and reasonable" at the time it was set. Hubert also said that in autumn of 2001, ART would set a date for another beauty pageant.[167]

In light of the serious failure of the first beauty pageant, it is hardly pessimistic to wonder how the second one will rescue the prestige of the French in the telecom policy field. At a time when Europe's commitment to 3G is profound yet confused, the failure of the French even to allocate their four licenses must make one now wonder whether the newly anticipated date of 2004 for 3G services across the EU is realistic.

V. GENERAL CONSEQUENCES

Financially, the firms that win the 3G licenses may end up very strapped for cash. The licensing must be financed and the networks must be built. Licensing alone is expected to raise 200 billion Euros for the member states.[168] The firm of Arthur D. Little estimates that in the short term, to deal with licensing and building networks, European financial institutions will be solicited for financing in the amount of 1.5 trillion francs.[169]

In Britain or Germany, a firm that has won a license may proceed to build the sort of network it wants, if it survives the financial obstacles in the short term. The firm's own choices of what infrastructure to build and what services to offer, informed by changing information, will determine costs. Thus, in Britain or Germany, a firm can theoretically choose to cover the entire country but offset the expense by offering fewer services, combining with its rivals to share costs, or staying away from the higher capacity performance levels.[170] In France, however, before even offering 3G to customers, the two (or will it be ultimately be four?) firms will have already committed to a whole range of choices and costs.[171] The coverage, service, and quality commitments will be made years in advance of going to market because ART requires detailed plans in order to issue a license.[172] While the British licensees will likely have more flexibility than their French counterparts, they may effectively face the same challenges to reach profitability because of the huge premiums they paid for their licenses at

166. *Id.*

167. Hubert Statement, *supra* note 155.

168. *Id.*

169. *See* Garcia & Duarte Interview, *supra* note 3.

170. *See* Wearden, *supra* note 78 (firms have several levels to choose from, such as: 144 kb/s, 220 kb/s, or 384 kb/s).

171. *See generally* ART Overview, *supra* note 96.

172. *Id.*

auction. Yet flexibility may do the trick in Britain. After all, compared to France there are relatively few government constraints on how a firm chooses to use its spectrum. Unforeseen new technologies and firms may offer creative uses yet unvisualized. Looking at France, numerous questions arise when contemplating the future in light of ART's many constraints.

Ignacio Garcia Alves and Bruno Duarte, analysts for the firm of Arthur D. Little, criticize the EC for having been captured by the desires and propaganda of the mobile phone equipment manufacturers.[173] They pose a slew of questions that to date are unanswered. Most trenchant is their insight that the so-called 2.5G, based on the GPRS platform, will deliver many aspects of the Internet to customers in the short term on existing 2G wireless infrastructure.[174] The two analysts see 2.5G as a crucial phase that should not be bypassed for the sake of building 3G quickly. GPRS, they point out, will allow consumers to make preferences for which sort of services providers will offer in advance of 3G. GPRS will also allow firms to gauge the true demand for such services Union-wide. Finally, GPRS is much cheaper than 3G, and the latter has not yet seen any agreement on how billing will be figured: Would one bill by the kilobyte, which could lead to quasi-free voice services? Yet, Europe is on the fast lane to build 3G in an effort to compete with the Americans and the Japanese. The issues that arise out of the 3G billing question pale in comparison to the potential dangers facing 3G licensees should they overestimate future demand in vying for licenses today.

Growth in demand for mobile telephones may not mirror the optimistic predictions of industry experts. For instance, shares in telecom giants such as Nokia fell 8.3% in one day in January 2001 on reports of weaker sales than expected.[175] Although Nokia sold 64% more handsets in 2000 than in 1999 (compared to 45% growth worldwide for the entire industry), it fell seven million sales short of industry expectations, selling only 128 million.[176] Mobile phone penetration in Europe already stands at 60%, and the penetration rate in Finland is 80%.[177] Whether Europe will match Finland's rate is in some doubt: "To drive sales, Nokia is banking on a European culture in which owning a mobile phone is as much a necessity as a fashion statement . . . . [But] there are real questions as to whether the

173. *See* Garcia & Duarte Interview, *supra* note 3.

174. *Id.*

175. Suzanne Kapner, *A Nokia Report Rattles Telecommunications Shares*, N.Y. TIMES, Jan. 10, 2001, at W1.

176. *Id*.

177. *Id*.

industry can maintain growth given an unexpected slowdown in Europe . . . ."[178] Nokia's commitment to cellular phones should give some 3G aficionados reason to pause: Nokia was selected by one of France's two 3G licensees to build 3G infrastructure in the areas of mobility core, radio access technology, terminals (i.e., what users will carry to interface with 3G), and services.[179] Thus, in the foreseeable future 3G in France will likely be wedded to the cellular phone, which may make transition to handhelds and other devices difficult.

As the Arthur D. Little analysts point out, the optimistic forecasts for 3G were based on reasoning by extrapolation because the applications of the 3G environment likely do not even exist at present:

> Today, no 'killer application' seems to stand out. Many operators, manufacturers, and observers reason by extrapolating from set applications that they know: mobile internet, mobile office, or e-commerce. However, it is likely in the end that the development of high capacity applications specific to mobility and to ubiquity, such as applications linked to the location of the client, will contribute significantly to the development of the market.[180]

The same considerations prompted Palm Canada's president, Michael Moskowitz, to declare that "3G is a little over-hyped . . . . The reality is that the Internet is not friendly to mobile devices. But over time, the Internet will bend."[181] Slow 3G consumer demand also concerns the fairly optimistic Dan Gardiner of the UK-based Ovum, who sees fast global 3G growth taking off around 2007.[182] With a careful strategy focusing on "a gradual expansion of service from high-revenue, densely populated centers to less profitable outlying regions," firms can expect to see returns on investment only in 2006.[183]

Beauty pageant licensees and auction winners will face similar financial challenges, but each may be constrained in meeting these challenges differently. For the winners in France the goal may be to renegotiate the coverage, performance, and service promises that sounded good in 2001 to more realistic goals. It will certainly be in the interests of ART and the French Government to favor such requests by France Telecom. One can rightly ask, however, whether the other new licensees

178. *Id*.

179. *See Nokia to Build 3G Networks for France Telecom*, WIRELESS NEWSFACTOR, *at* http://www.wirelessnewsfactor.com/perl/story/5318.html (Oct. 27, 2000).

180. *See* Garcia & Duarte Interview, *supra* note 3.

181. *See* Daniel Sieberg, *Palm Canada President: 3G Wireless 'Over-hyped,'* CNN.COM, *at* http://www.cnn.com/2001/TECH/ptech/03/15/palm.keynote (Mar. 15, 2000).

182. Sarah Parkes, *Europe Readies for 3G Licensing*, GLOBAL WIRELESS, Jan. 1, 2000, at 24.

183. *Id*.

will receive similar treatment. Likewise, the risks of special deals between the French government-owned railway, SNCF, and France Telecom, with ART approval, to undercut outside licensees, are not totally unrealistic. For instance, the ART selection criteria include provisions to protect the environment, which means, as ART explains, that new licensees will have to share towers with current 2G licensees in France.[184] The 2G licensees in France will set the terms of the negotiations.[185] Thus, with three out of the four licensees predestined to go to 2G operators, and with ART playing the arbitrator's role in overseeing the manner in which 2G giants allow an upstart 3G licensee to share its sites, one can legitimately wonder about transparency and fairness in the context of actual network construction. In sum, the power that ART holds over its licensees will be considerable if 3G market weakness leads any of them to ask for new terms.

Just how one squares the European policy goal of liberalizing the telecommunications market with the extraordinary (merely ordinary in the French context, however) degree of control ART will exercise over its licensees remains to be seen. European observers are rightly skeptical that the French beauty pageant system with all of its strings attached actually meshes with European policy. The European Commission's Working Group 3b raised this specter in its review of telecommunications policy at the EC level:

> The legislation left a lot of freedom for implementation. This led to a diversity of national conditions which does not necessarily optimise the creation of an internal market in this sector . . . . The result is, that, as widely recognised by national (de)regulators, the EU playing field in the sector is not 'level' and is indeed very distorted.[186]

Faced with the debacle of 3G licensing to date, the European Parliament met in mid-April with the goal of ironing out EU telecom policy and saving 3G.[187] Initially, the parliament agreed to allow the EU to have the final word on proposals made by national regulators, such as ART, but political pressure ruled out a centralization of policy. Instead, the EU allowed itself to have a two-month freeze on any regulations it found contravened EU policy.[188] EU politicians hoped that such an interim solution would encourage coordination among national telecom ministers.[189] In light of reports of discord between national regulators on 3G

184. *See* ART Overview, *supra* note 96.

185. *See id.*

186. EC White Paper, *supra* note 86, at 19.

187. David Neal, *3G Poses Threat to European Union*, ZDNET UK NEWS, *at* http://news.zdnet.co.uk/story/0,,t269-s2085655,00.html (April 16, 2001).

188. *Id*.

189. *Id*.

policy,[190] however, it is difficult to see how 3G will be saved as a coherent EU policy absent a strong assertion of power by the EC itself.

France, it must be remembered, raised the prices of its licensing significantly, after the example of the British and German auctions. This price hike means that not only will firms operating in France face the same financial difficulties that British firms face, but also will face the added, and some might say onerous, regulatory constraints imposed by ART's "beauty pageant" allocation system. The financial challenges can be immense. Nicolas Negroponte, the director of MIT Media Lab, calls the high licensing fees at auction an "economically unsustainable" tax on new technology.[191] Indeed, the high costs of the licenses that firms paid and the upcoming "years of losses because of their 3G investment" have prompted European telecom officials to meet in order to devise methods of saving 3G.[192]

One thing is certain: nothing about 3G appears to be going according to schedule. Belgium, Italy, and Portugal were slow to implement spectrum allocation procedures long before France utterly failed to assign its four licenses. Belgium is running at least six to nine months behind the EC's schedule, which means that the January 2002 starting date of 3G is already unrealistic.[193] The goal of the uniform starting date was to provide a critical mass of consumers to equipment manufacturers.[194] With Belgium being the capital of the EU itself, as well as the crossroads for travelers on the high speed Eurostar, it is unclear what the effect of such a gap in 3G coverage for even six months will be. The failure of a major European country like France to allocate its licenses points to even deeper troubles for 3G and for European telecommunications policy in general.

VI. CONCLUSION

The EC has erred in two crucial aspects. First, in imposing short-term deadlines and pushing for the speedy creation of a 3G market, the EC may have invited telecom firms and financial institutions to overcommit themselves to a market whose actual services, and ultimate consumer demand, are still only speculative. This is *dirigisme* in action. This error is

190. *See* Jane Wakefield, *Ministers and EC Lock Horns Over Telcom Laws*, ZDNET UK NEWS, *at* http://news.zdnet.co.uk/story/0,,t269-s2085528,00.html (April 6, 2001).

191. Sarah Parkes, *Promise of Auction Windfalls Lures European Governments*, GLOBAL WIRELESS, July 1, 2000, at 18.

192. *See* Wearden, *supra* note 78.

193. Jean-Yves Huwart, Licences UMTS: modalities d'attibution connues en juin; Selon toute vraisemblance, les dossiers de candidatures seront deposes en septembre, L'ECHO, March 23, 2000, at 10, *available at* http://www.lexis.com.

194. *Id*.

not as serious as the second error this Note would identify, however.

Once the EC decided to pursue a *dirigiste* path, it should not have flinched. One can, as Alexander Hamilton knew, be *dirigiste* in a number of ways, including mandating free markets and the decentralization that competition brings, via a strong central government along the American federal model.[195] The willingness of the U.S. Supreme Court to interpret our federal constitution's Commerce Clause as requiring a national market, along with federal preemption, has shown that centralized national governmental policy can encourage free markets and the larger decentralization that free markets bring.[196] The EC, however, sought a middle ground. Rather than requiring free market auctions for 3G licenses, it yielded to the demands of countries like France that wanted to maintain substantial control over the selection of the license and near-managerial control over the future market. The problem is that this manner of proceeding undercuts the EC's policy of market liberalization and of greater competition among European firms.

Now that EC President Romano Prodi is pushing for further decentralization of the EU, including the weakening of the EC itself, it is certainly true that the terms of the debate at least favor the member states in any confrontation with the EC. Thus, any member state that wants to revert to *dirigiste* norms may have an easier chance now than at any time in the recent past.

The irony is that if the 3G market is going to be the motor for European growth in the next decade, the EC will have put itself in a position where its major policy initiative, for which it will take credit and blame, is now firmly in the hands of the member states. One can hope that Prodi is correct in his assessment of the triumph of competition policy in Europe and of free market mentalities among the member states. The detailed examination of the French beauty pageant method of spectrum allocation, however, indicates that significant risks to free market competition have been introduced in the 3G market before 3G has even been built. In light of the French reassertion of hostility to free markets and France's clinging to its "social economy," one may wonder whether the failure of 3G policy harmonization in Europe is a harbinger of even greater failures to come in the implementation of a united Europe.

195. THE FEDERALIST NOS. 11, 12, 13, 15 (Alexander Hamilton).

196. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 283 (1997).