

## PRINCIPLE-BASED SYSTEMS FOR TELECOMMUNICATIONS REGULATION: A NEW MODEL THAT MOVES BEYOND THE *EX ANTE* VERSUS *EX POST* DEBATE

By: *Kenneth Jull and Stephen Schmidt*

Most North American regulatory systems, in areas ranging from the environment to securities law utilize a basic “*ex post*” model: the regulation or statute sets a standard and a legal remedy can be imposed, after the fact, upon proof of a breach of the standard. By contrast, an *ex ante* regulatory system requires prior permission and imposes legal remedies prospectively.<sup>1</sup> Regulatory systems in the telecommunications industry have traditionally been *ex ante* systems. Traditional telecommunications regulatory systems have imposed prospective legal remedies in the form of price controls, forced sharing of assets through unbundling, mandatory interconnection requirements, etc.

We wish to advance a two-part thesis: (1) that in a post-modern society, the regulatory state should offer multiple regulatory models that reflect the different needs and interests at stake and (2) that a hierarchy of human need priorities should guide the legal system in assessing which level of intrusiveness is appropriate. We wish to emphasize that the traditional *ex ante* versus *ex post* debate is deficient in at least two obvious regards. First, the debate obscures, more than it reveals, about the rationale for and benefits of both *ex ante* and *ex post* regulatory paradigms. As traditionally framed and pursued, the debate is more political than analytical and is largely concerned with the abolition of *ex ante* regulation rather than the pursuit of a sound understanding of when *ex ante* and *ex post* regulation are respectively justified. Second, given that the traditional debate is largely focused on the overthrow of *ex ante* regulation in favour of *ex post* regulation, it does not confront the possibility, the necessity, or the benefits of having multiple-regulatory models within both the *ex ante* and *ex post* regulatory paradigms. Indeed, there is growing recognition in legal circles that any sophisticated system ought to offer a full range of models based on the seriousness and economics of the case.<sup>2</sup>

---

<sup>1</sup> Damien Gerardin and J.Gregory Sidak, “European and American Approaches to Antitrust Remedies and the Institutional Design of Regulation in Telecommunications” in Handbook of Telecommunications Economics, Vol.2., London: Elsevier, 2005. Sumit K. Majumdar, Ingo Vogelsang and Martin E. Cave, Eds.

<sup>2</sup> David Mullan, “Tribunals Imitating Courts—Foolish Flattery or Sound Policy?” (2005) 28 *Dalhousie Law Journal* 1.

For example, within the *ex post* paradigm, there is a new principle-based model emerging, led by developments in the securities field. Christie Ford describes this development in her article, "New Governance, Compliance, and Principles-Based Securities Regulation".<sup>3</sup> Ford identifies the principles-based and outcome-oriented regulation that has been advocated by the British Columbia Securities Commission as an example of the new governance. She describes the basic difference in the two systems as follows:

The classic example of the difference between rules and principles or "standards" (to use another term) involves speed limits: a rule will say, "Do not drive faster than 55 mph", whereas a principle will say, "Do not drive faster than is reasonable and prudent in all the circumstances." Put another way, a rule generally entails an advance determination of what conduct is permissible, leaving only factual issues to be determined by the frontline regulator or decision-maker. A principle may entail leaving both specification of what conduct is permissible and factual issues for the frontline regulator.<sup>4</sup>

Our paper looks at the telecommunications industry with three goals in mind. First, to develop an analytical framework to justify choices between *ex ante* and *ex post* approaches. Second, to provide a framework for justifying varying approaches within a particular regulatory paradigm (whether *ex post* or *ex ante*). Third, to apply these insights to the telecommunications industry in order to make concrete suggestions relative to economic, technical, and social regulation.

---

<sup>3</sup> Christie L. Ford, "New Governance, Compliance, and Principles-Based Securities Regulation" <http://ssrn.com/abstract=970130> (2008) 45:1 American Bus. L. J. (forthcoming)

<sup>4</sup> Ford at page 8, see footnote 24.