

International Telecommunications Mergers: U.S. National Security Threats Inherent in Foreign Government Ownership of Controlling Interests

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I. INTRODUCTION

U.S. regulators and Congress gave an increased level of scrutiny to recently approved international mergers involving a U.S. telecommunications firm merging with a company in which a foreign government owns a controlling interest. A foreign government that is friendly today has the potential to be an enemy of the United States tomorrow. Because of the strong dependence of business and national defense on telecommunications systems, a paramount concern for the United States is to focus attention on the ownership of those systems due to the potential dangers inherent in the owners ability to compromise or shut down our national communications network.¹ The regulators ordinarily give attention to assessing the extent to which a proposed merger may violate antitrust guidelines by substantially lessening competition.² However, the

1. After the terrorist attack in New York City which destroyed the World Trade Center on September 11, 2001, it was reported that Verizon Communications said the next day that twenty percent of the New York Stock Exchange's high-speed data lines were out of action and the rest were operating only sporadically. The area of attack in New York's financial district was described as "probably the most telecom-intensive spot in the world." Emily Thornton et al., *The View from Ground Zero*, BUS. WK., Sept. 24, 2001, at 46; see Thomas S. Mulligan, *NYSE, Nasdaq Stay Closed*, L.A. TIMES, Sept. 14, 2001, at C3.

2. The federal regulator granting licensing approval to telecommunication companies and, in general, regulating interstate and foreign communications is the Federal Communications Commission (FCC). The FCC and Antitrust Division of the Department of Justice (DOJ) share

proposed acquisition of a U.S. telecommunications firm by a foreign company, in which its government has a controlling ownership interest, adds a national security dimension to the usual antitrust situation which may involve the intervention of the Federal Bureau of Investigation (FBI) and other federal bodies during the merger process.³ A serious national security threat can undermine or endanger the infrastructure of the U.S. telecommunications systems if the controlling shares of a pivotal telecommunications company are owned by an uncooperative or hostile foreign government.⁴

Recently there have been two international telecommunication company mergers involving U.S. companies and foreign firms with a government ownership interest in excess of the 25% limit established by statute for mergers with U.S. companies:⁵ (1) Deutsche Telekom (Bonn, Germany),⁶ an ex-state monopoly⁷ with a German government ownership

authority in reviewing telecommunications mergers. The U.S. Department of Treasury has special administrative authority with regard to foreign investments in telecommunication firms as part of its function with the Committee on Foreign Investment in the United States. The Federal Bureau of Investigation (FBI) and the Criminal Division of the DOJ scrutinize and prosecute issues affecting national security. James R. Weiss & Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department over Telecommunications Transactions*, 6 COMM. LAW CONCEPTUS 195 (1998).

3. See Neil King & David S. Cloud, *Global Phone Deals Face Scrutiny from New Source: The FBI*, WALL ST. J., Aug. 24, 2000, at A1.

4. *Foreign Government Ownership of American Telecommunications Companies: Subcommittee on Telecommunications Trade and Consumer Protection*, 106th Congress (Sept. 7, 2000) [hereinafter *Hearings*] (testimony of Larry R. Parkinson, General Counsel, FBI).

5. See 47 U.S.C. § 310(b)(4) (1996).

6. Deutsche Telekom is the largest phone company in Germany. *Deutsche Telekom to Seek More Mobile Licenses*, NAT'L POST, June 5, 2000, at C2. It is engaged in the phone service, Internet, and wireless lines business with 25 million European mobile phone customers. Nicole Harris & Nikhil Deogun, *Deutsche Telekom Lands Its U.S. Beachhead: Buys Voicestream*, FIN. POST (Nat'l Post), July 24, 2000, at C3. It had a stock market value of \$260 billion in March 2000, providing it with the deep pockets to expand its operations. Jack Ewing et al., *Deutsche Telekom Has Designs on the Web, the German Giant Wants to Expand in Europe and the U.S.*, BUS. WK. ONLINE, Mar. 13, 2000 (int'l ed.), at http://www.businessweek.com/2000/00_11/b3672175.htm. More recently, Deutsche Telekom has suffered financial setbacks, but the merger was completed despite the situation. See *Deutsche Telekom Stays Above Water*, INT'L HERALD TRIB., Aug. 1, 2001, at 13.

7. Until the mid-1990s the telecommunications business in many of the European Union (EU) Member States was dominated by government-owned monopolies. The German government began privatizing Deutsche Telekom in 1995. The EU Commissioner for Competition has been campaigning "to stop governments from influencing business decisions of former monopolies with the use of 'golden shares' and special rules governing privatised companies." Bruce Barnard, *Monti Struggles to Stop Governments Meddling in Former Monopolies*, EUROPEAN VOICE, May 25-30, 2000, at 21. The German government only deregulated the telecommunications business in 1998, thus releasing Deutsche Telekom from its former status as a government owned monopoly. Jack Ewing & Stanley Reed, *America or Bust for Deutsche Telekom? The European Giant Needs to Grab a Slice of the U.S. Market—and Now May Be the Time to Strike*, BUS. WK. ONLINE, July 17, 2000, at <http://www.businessweek.com/>

voting interest of nearly 60%,⁸ proposed a \$55.7 billion acquisition⁹ of VoiceStream (Bellevue, WA)¹⁰ including a secondary acquisition of Powertel, Inc. in the summer of 2000;¹¹ and (2) Nippon Telephone and Telegraph (NTT) Communications Corp. (Tokyo, Japan),¹² an ex-state monopoly with a Japanese government ownership interest of 46%¹³ proposed a \$5.5 billion acquisition¹⁴ of Verio, Inc. (Englewood, CO) in the spring of 2000.¹⁵ The NTT Communications Corp.-Verio, Inc. merger received final approval in September 2000¹⁶ and the Deutsche Telekom-VoiceStream merger received final approval in June 2001.¹⁷ In varying degrees, the mergers and accompanying licensing issues have been challenged by the Department of Justice (DOJ), the Federal Communications Commission (FCC), the FBI, members of Congress, and other U.S. government entities.

2000/00_29/b3690105.htm. Because of its history as a government-owned monopoly, approximately one-third of the company workforce is comprised of former civil service employees.

8. See *Eizenstat Urges Congress Not to Bar Deutsche Telekom/VoiceStream Merger*, Agence France-Presse. Dow Jones Interactive Newsstand, Sept. 27, 2000. Even with the VoiceStream merger, the German government interest would only be diluted to a forty-four percent level. Peter S. Goodman, *German Move for VoiceStream Erupts into Battle over Free Trade*, INT'L HERALD TRIB., Sept. 7, 2000, at 11.

9. See Goodman, *supra* note 8.

10. VoiceStream is an independent wireless carrier holding licenses nationwide to operate its cellular service. Harris & Deogun, *supra* note 6.

11. Powertel, Inc. and Deutsche Telekom entered into an Agreement and Plan of Merger in August 2000. Powertel is a West Point, Georgia company licensed to provide wireless service in twelve states in the southeastern U.S. Like VoiceStream, it also uses the Global System for Mobile Communications (GSM) standard, which makes it compatible with Deutsche Telekom. Memorandum Opinion and Order, Federal Communications Commission, *In re Applications of VoiceStream Wireless Corporation, Powertel, Inc., Transferors and Deutsche Telekom AG, Transferee for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, IB Docket No. 00187, Apr. 24, 2001, at <http://www.fcc.gov> [hereinafter Memorandum Opinion].

12. NTT Communications Corp. is a subsidiary of NTT and is the largest telecommunications company in the world. Nippon Telegraph and Telephone Corp., Hoover's Online, at <http://www.hoovers.com/premium/profile/0/0,2147,41780,00.html> (last visited Oct. 3, 2000). NTT's business includes phone, Internet, and cellular services.

13. *Id.*

14. *NTT Comm/Verio-2: Advances into U.S. Internet Market*, DOW JONES INT'L NEWS, Aug. 31, 2000.

15. Verio operates Web sites, i.e., a Web-hosting company, for small and midsize business markets. *NTT Communications Completes Tender Offer for Verio—Combination Creates Global IP Force*, DOW JONES INTERACTIVE NEWSSTAND, Aug. 31, 2000.

16. An announcement was made on September 11, 2000, that the merger had been completed "with Verio surviving as an indirect wholly owned subsidiary of NTT Communications." *NTT Communications and Verio Announce Completion of Merger*, DOW JONES INTERACTIVE NEWSSTAND, Sept. 11, 2000.

17. Sharon Pian Chan, *VoiceStream Wireless Completes Merger Deal with Deutsche Telekom*, SEATTLE TIMES, June 5, 2001.

The authors: (1) explain the special attributes of the general telecommunications business to emphasize its important role in the global community, (2) discuss the national security issues arising when a company with a controlling interest owned by a foreign government is involved in a proposed international merger with a U.S. company, (3) review the deregulation of the telecommunications industry as a precursor to a rise in the number of international mergers, (4) examine the legislative environment in which mergers involving foreign governments occur, and (5) analyze two recent international merger transactions in which foreign governments own a controlling interest. The authors restrict their discussion to the safety net established to limit the extent of foreign government investment in a telecommunications company. However, it should be noted that, particularly in view of the ingenuity with which terrorists recently infiltrated the geographical boundaries of the United States,¹⁸ the 25% ownership restrictions on telecommunication companies also apply to any corporation (1) owned of record or voted by aliens, their representatives; or (2) by any corporation organized under the laws of a foreign country, if the FCC finds that the public interest will be served by the refusal or revocation of said license.¹⁹ The same national security arguments discussed by the authors with regard to foreign governments are also applicable in the two listed situations involving foreign controlling interests in U.S. telecommunications systems.

II. BACKGROUND

The modern information infrastructure is a driving force behind globalization and the emergence of a borderless economy.²⁰ Industrialized countries have embraced the new technologies and the global world of cyberspace.²¹ The traditional telecommunications model, and the one with which people are most familiar, is domestic companies providing domestic services to domestic customers.²² With the advent of the integrated international globalization system, which replaces the former divisions created by the nation-state borders of the Cold War era, the intra-country activities of the traditional telecommunications

18. See Johanna McGeary & David Van Biema, *The New Breed of Terrorist*, TIME, Sept. 24, 2001, at 28.

19. 47 U.S.C. § 310(b)(4) (1996).

20. See THOMAS FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 8 (Farrar, Straus & Giroux 1999).

21. Brian Knowlton, *Wired World Leaves Millions Out of Loop*, INT'L HERALD TRIB., Oct. 8, 1999, at 7.

22. FRIEDMAN, *supra* note 20, at 8.

companies are being replaced by technological systems intended to provide global services.²³ One author has noted that “[g]lobalization has its own defining technologies: computerization, miniaturization, digitization, satellite communications, fiber optics and the Internet, which reinforce its defining perspective of integration.”²⁴

The technology of communications has led to the emergence of a globally integrated telecommunications infrastructure that does not differentiate on the basis of artificially drawn geographic boundaries. At the beginning of the twentieth century, the only technology was a rudimentary system of radios, telephones and telegrams. At the end of the twentieth century, electronic communications were commonplace in developed countries through a variety of mechanisms, including pagers, mobile phones, electronic cash machines, facsimile machines, e-mail, and the Internet.²⁵

Telecommunication networks are a critical part of the nation’s information infrastructure. They provide the central means for transmitting through voice, data, and video, a vast amount of private commerce, government business, and personal communications. The ability of business to function effectively is dependent on information and communication technologies. Businesses have proliferated on the World Wide Web and telecommunications companies have rushed to provide voice, data, and Internet services for them.²⁶

Companies are contemplating international mergers to meet the rising challenge of delivering a wider range of services, with more innovative solutions, at lower prices. In a globalized environment, greater business opportunities are available as deregulation of the telecom-munications industry drives a more competitive environment in widely divergent geographical locations such as the United States, the Member States of the European Union, and Japan.²⁷ An interconnection of complementary business organizations through mergers and acquisitions is a natural outcome of the convergence of a variety of telecommuni-cations technologies: telephone and cable, telephone and the Internet, wireless and the Internet, and telecommunications and

23. *Id.*

24. *Id.* at 9.

25. Knowlton, *supra* note 21.

26. Catherine Tsai, *Japan’s NTT Communications Acquires U.S. Internet Company*, DOW JONES INTERACTIVE NEWSSTAND, Sept. 1, 2000.

27. See *Significant Regulatory Developments Within 12 Months*, BT WORLD COMM. REP. 1998/9, at http://www.bt.com/global_reports/1998-99/exec.htm#index (last visited Oct. 23, 2000).

broadcasting.²⁸ The transition to an information society is fraught with perils and pitfalls, but the potential wealth and convenience are an overwhelming temptation.

III. NATIONAL SECURITY CONCERNS

Ownership and control of U.S. communications networks gives a foreign government the capacity to gain access to confidential information about the targets of U.S. national security and law enforcement investigations, the nature of those investigations, and the sources and methods used, as well as information about the extent to which the U.S. government is aware of foreign governments' intelligence activities.²⁹ It is important for the United States to protect the integrity of domestic law enforcement operations.³⁰ If a crime has been committed, with the facilities located abroad, our law enforcement officers cannot investigate properly.³¹

The DOJ and the FBI are involved in the evaluation process for national security implications of foreign ownership applications pending before the FCC.³² The DOJ and the FBI have worked with the FCC to determine conditions³³ that must be met to prevent potential impairment of the interests of the United States and its citizens.³⁴

The DOJ believes that it is critical to national security and law enforcement investigations that there be safeguards to protect the effectiveness of U.S. court orders and statutory authorities when dealing

28. See Arlan Gates, *Convergence and Competition: Technological Change, Industry Concentration and Competition Policy in the Telecommunications Sector*, 58 (2) U.T. FAC. L. REV. 83, 86 (Spring 2000).

29. *Hearings*, *supra* note 4 (testimony of Larry R. Parkinson, General Counsel, FBI).

30. *Id.*

31. *Id.* (testimony of Kevin V. Digregory, Deputy Assistant Attorney, General Criminal Division, Dep't of Justice). See Richard A. Serrano & Carol J. Williams, *FBI Seeking 100 People With Ties to Hijackers*, L.A. TIMES, Sept. 15, 2001, at A12 (stating that the Internet trail could fall apart if the terrorists involved in the September 11, 2001, attack on the United States "tapped into U.S. owned Internet systems by first bouncing their requests off Internet computers in countries hostile to the U.S., since FBI agents wouldn't be able to get access to the needed computer logs").

32. The FBI and DOJ have the authority under the Foreign Surveillance Act to prevent, investigate, and prosecute instances in which U.S. communications and data have been acquired or disclosed in violation of the law. 50 U.S.C. § 1802 (1996); see *Hearings*, *supra* note 4 (testimony of Larry R. Parkinson, General Counsel, FBI).

33. It has been contended that the FBI uses the technique of extensive and exhaustive scrutiny of international mergers to extract concessions from the foreign companies as a prerequisite to dropping objections to the merger. See King, *supra* note 3. These conditions include such requirements as locating the switching systems in the United States. *Id.*

34. *Hearings*, *supra* note 4 (testimony of Kevin V. Digregory, Deputy Assistant Attorney, General Criminal Division, DOJ).

with a foreign-owned or controlled company.³⁵ In recent years, the FBI has intervened in two prospective international telecommunications mergers.³⁶ The primary concern has been centered around the protection of the integrity of domestic law enforcement operations where foreign governments retain a substantial financial stake in the telecommunication companies.³⁷

The work of the FBI often necessitates intercepting communications, obtaining communications transaction data pursuant to existing legal authorities, and obtaining basic subscriber information and other transactional records relevant to the target communications. It is imperative that the communications service provider cooperate with the investigation.³⁸ The FBI needs the capability to detect, investigate, and assert jurisdiction (criminal or civil), but this is “impeded, if not eliminated, when entire or significant components of the communications systems operating in the United States are located outside our borders.”³⁹ The FBI fears that it may lose its legal right to wiretap or to engage in electronic surveillance if the control for U.S. communications and data are entirely outside the jurisdiction of the United States.⁴⁰

In addition there are concerns that foreigners could use control of phone networks in the United States to conduct surreptitious electronic surveillance on business conversations and to steal trade secrets, or that foreign companies might work on behalf of their own countries’ intelligence services, using U.S. telecommunication devices to funnel information back to their home country.⁴¹ Special FBI Agent Alan McDonald, Special Counsel for Electronic Surveillance, expressed no regrets for the extent of FBI intervention in international telecommunications mergers stating: “[w]e have things that we have to do to protect the American people and U.S. security. That’s what we get paid for.”⁴²

This necessary intervention is supported by the recent circuit overload and partial destruction of the cell phone and regular phone

35. *Id.*

36. One example of such intervention by the FBI is the failed negotiations in 1996 for the British Telecom and MCI merger. *See King, supra* note 3, at A1, A8.

37. *Id.*

38. Letter from Tom Bliley, Chair, Foreign Government Ownership of Incumbent Telecom Monopolies Subcommittee, W.J. “Billy” Tauzin, Chair, Subcommittee on Telecommunications, Trade, and Consumer Protection and Michael G. Oxley, Chair, Subcommittee on Finance and Hazardous Materials to U.S. Trade Representative Charlene Barshefsky (Sept. 12, 2000) [hereinafter Letter from Tom Bliley].

39. *Hearings, supra* note 4 (testimony of Larry R. Parkinson, General Counsel, FBI).

40. *King, supra* note 3.

41. *Id.*

42. *Id.* at A8.

system in New York City, making it virtually impossible for calls to go in or out of the city after the destruction of the World Trade Center Towers. It would, therefore, be dangerous to allow a foreign government, which could become an eventual enemy, to have the potential power to severely disable or shut down the communications system in the United States.⁴³

IV. DEREGULATION: SETTING THE STAGE FOR INTERNATIONAL TELECOMMUNICATIONS MERGERS

Significant regulatory developments within the last five years have completely changed the telecommunications marketplace. Historically, the structure of the telecommunications business in most of the world was built on government-owned monopolies. Competition was restricted by confinement to rigid bilateral agreements and movement toward privatization of the industry was stagnant.⁴⁴

The world's largest telecommunication markets, the United States, the European Union, and Japan, enacted legislation in the late 1990s opening their telecommunications markets to free competition.⁴⁵ Specifically, in 1997 the World Trade Organization obtained the agreement of sixty-nine countries, accounting for 90% of the world's \$650 billion telecommunications service market at that time, to privatize their telecommunications businesses so that there could be open and free competition.⁴⁶

A. *Telecommunications Act of 1996*

The FCC is charged with administering the Telecommunications Act and its resulting regulations. The FCC has considerable power as it can bar a foreign entity from applying for a license ownership.⁴⁷ The original Telecommunications Act was passed in 1934.⁴⁸ Major amendments to the Telecommunications Act, enacted in 1996, represent the first major overhaul of telecommunications law in more than sixty years.⁴⁹

43. Thornton, *supra* note 1.

44. See *Significant Regulatory Developments Within 12 Months, Transformation of Telecommunications*, BT WORLD COMM. REP. 1998/99, at http://www.bt.com/global_reports/1998-99/exec.htm#index (last visited Oct. 23, 2000).

45. See *id.*

46. See *id.*

47. 47 C.F.R. § 310 (1988 & Supp. 1991); see Christopher F. Corr, *A Survey of United States Controls on Foreign Investment and Operations: How Much Is Enough?*, 9 AM. U. J. INT'L L. & POL'Y 417, 443 (1994).

48. See 47 U.S.C. § 310 (1934).

49. See *id.* § 310 (1996).

Immediately prior to the passage of the amended Telecommunications Act in 1996, there were several applications for proposed international telecommunications mega-mergers considered by the DOJ and the FCC. There was a proposed merger of MCI and British Telecom in 1994 that was ultimately approved.⁵⁰ Nevertheless, the FCC wanted to protect the U.S. markets from an imbalance of opportunities, i.e., a lack of reciprocity, between the foreign country seeking to enter the U.S. telecommunications market and U.S. firms seeking to enter foreign markets.⁵¹ This issue of reciprocity was one of the serious considerations in the debate over whether to retain the restrictions on foreign investment in the 1996 Telecommunications Act. The concern was to ensure equivalent market access to U.S. companies in those countries whose companies seek to merge with U.S. companies.⁵² This is a legitimate threat to U.S. businesses because, for example, many countries in Europe, directly or indirectly restrict investment by foreign companies.⁵³

The 1996 Act deregulated the U.S. telecommunications business. Through the passage of the Act, Congress intended “to promote competition, reduce regulation in order to secure lower prices and higher quality services for consumers, and encourage the rapid deployment of new telecommunications technologies.”⁵⁴ At the time of passage of the Act, Reed E. Hundt, then Chairman of the FCC, noted that “the bill’s removal of barriers to competition will have a dramatic impact on investment in this country and the creation of new jobs.”⁵⁵ One of the FCC commissioners, James H. Quello, also commented at that time that “the passage of this historic legislation marks the end of the old primary reliance on government regulation rather than marketplace competition

50. United States v. MCI Communications Corp., 549 Fed. Reg. 33009, 33016 (1994).

51. See Krista Schwarting Rose, *Changing Frequencies: The Federal Communications Commission Globalizes the Telecommunications Industry with the Adoption of the WTO Agreement*, 20:8 MINN. J. GLOBAL TRADE 161, 177-78 (1999).

52. See *id.* As a result of these concerns over reciprocity, “the Commission set three goals for regulating the international telecommunications market: (1) promote effective competition in the global market, (2) prevent anti-competitive conduct within this market, and (3) encourage foreign governments to open their markets to other countries.” *Id.* A new public interest standard was henceforth prospectively applied: the effective competitive opportunity test which synthesized the three goals.

53. See Barnard, *supra* note 7.

54. Vincent M. Paladini, *Foreign Ownership Restrictions Under Section 310(b) of the Telecommunications Act of 1996*, 14 B.U. INT’L L.J. 341, 346 (1996).

55. Statement by Reed E. Hundt, Chairman, Federal Communications Commission, regarding passage of The Telecommunications Act of 1996, available at <http://www.fcc.gov/Speeches/Hundt/spre603.txt>.

to secure the benefits of advanced communications technology for the American public.”⁵⁶

With the passage of the 1996 Act, the stage was set for an era of mergers and acquisitions in the telecommunications industry to begin, but current U.S. restrictions on foreign government ownership will affect free trade in the new global society envisioned by the proponents of the Act.

B. Multilateral Organizations

1. First Steps in GAT-GATT (1994)

During the Uruguay Round in 1994 of the organization then known as the General Agreements on Tariffs and Trade (GATT), agreements were reached that began to break down some of the barriers that had prevented global expansion of telecommunications businesses.⁵⁷ Under GATT and the General Agreement on Trade in Service (GATS), member nations are required to treat member nations equally.⁵⁸ GATT also provides that nations must share all relevant public information dealing with telecommunications services and networks.⁵⁹ These agreements began the movement in the direction of worldwide deregulation of the telecommunications business.

2. World Trade Organization (1997)

The United States and sixty-eight other countries signed the Basic Telecommunications Agreement (BTA)⁶⁰ in 1997 sponsored by the World Trade Organization (WTO),⁶¹ the successor organization to GATT, which

56. Statement by James H. Quello, Federal Communications Commissioner, regarding passage of The Telecommunications Act of 1996, *available at* <http://www.fcc.gov/Speeches/Hundt/spre603.txt>.

57. *Id.*

58. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, *opened for signature* Apr. 15, 1994, 33 I.L.M. 1140; GATT art. I(11); GATS art. II(1). GATS applies to all GATT members. See Rose, *supra* note 51, at 183-84.

59. See Rose, *supra* note 51, at 184.

60. Statement of U.S. Trade Representative Barshefsky, Basic Telecom Negotiations, Feb. 15, 1997, <http://www.ustr.gov/agreements/telecom/barshefsky.html>; WTO Negotiations on Basic Telecommunications: Informal Summary of Schedules of Commitments and M.f.n. Exemptions, http://www.wto.org/wto/Whats_new/bt-summ3.htm (n.d.).

61. Included in the Uruguay Round agreements is the Marrakesh Agreement Establishing the World Trade Organization (WTO) which replaced the institution structure of General Agreement on Tariffs and Trade (GATT). See General Agreement on Tariff and Trade 1994, Apr. 15, 1994, the Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1144 (1994); see also Amelia Porges, *The Marrakesh Agreement Establishing the World*

became effective February 5, 1998. The purpose of the agreement was for the signatories to take steps to open their respective telecommunications services markets to competition.⁶² The intent was to spur greater efforts to privatize among foreign telecom monopolies. Many of the countries had monopolistic operations in their basic telecommunications market. The AT&T monopoly in the United States, prior to its 1984 break-up, had a similar monopolistic operation but without any U.S. government ownership interest.

As a result of the WTO Agreement, the FCC reexamined its use of the effective competitive opportunity (ECO) test as the standard to judge applications from foreign telecommunication companies, with government ownership interests, seeking to acquire U.S. companies.⁶³ When the WTO Agreement was adopted, the FCC created a rebuttable presumption in favor of WTO member countries that allowed a foreign government to own a controlling interest in a telecommunications company involved in merger negotiations with an American firm.⁶⁴

Then U.S. Trade Representative Charlene Barshefsky reported that the WTO agreement has made some progress because the number of governments with majority stakes in their telecommunications companies has dropped from twenty-four to sixteen in the top thirty-five WTO telecom markets.⁶⁵ Before the agreement only 17% of the top twenty telecommunications markets were open to foreign service providers. With the agreement, 100% of those markets are now (at least theoretically) open.⁶⁶

Trade Organization, in THE WORLD TRADE ORGANIZATION: MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION (1996).

62. *Id.*

63. Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, 12 F.C.C.R. at 23,913 (1997); see Rose, *supra* note 51, at 189-91.

64. See Rose, *supra* note 51, at 190-91.

65. *German Government Reassures U.S. It Will Sell Deutsche Telecom Stake*, Associated Press Newswires, DOW JONES INTERACTIVE NEWSTAND (last visited Oct. 2, 2000).

66. The basic telecommunications services covered by the agreement are defined as any telecommunication transport network or service. These services include telephone, circuit-switched data transmission, packet-switched data transmission, telex, telegraph, facsimile, private leased circuits, analog and digital cellular mobile telephone service, mobile data services, paging, personal communications services, submarine cable services, satellite-based mobile services, fixed satellite services, VSAT services, gateway earthstation services, teleconferencing, video transport, and a trunked radio system service.

V. LEGISLATIVE ENVIRONMENT FOR ESTABLISHING FOREIGN
GOVERNMENT OWNERSHIP RESTRICTIONS

Congressional concerns about sabotage, foreign propaganda, foreign radio interference, and threats of war precipitated the passage of legislation restricting foreign ownership in U.S. telecommunications companies.⁶⁷ The first restriction on foreign ownership appeared in the Radio Act of 1912, without a numerical benchmark on the extent of such ownership.⁶⁸ This was followed by the Radio Act of 1927 that capped foreign ownership interests at 20%.⁶⁹

A. *Telecommunication Act (1934)*

The first Telecommunications Act, adopted in the United States in 1934, established the cap on foreign ownership of a communications company at 25%.⁷⁰ The Act was passed at a time when the nation feared a pending war and Congress worried about the risks of alien interference with the U.S. communication systems, which at that time mainly consisted of radio, telephone, and telegraph. This statute designated the FCC to administer the Act, and established the FCC's mandate to use its powers to promote "public interest, convenience, or necessity."⁷¹

B. *Exon-Florio Amendment (1988)*

The Exon-Florio Amendment to the Defense Production Act of 1950, passed as a part of the massive Omnibus Trade and Competition Act in 1988, is considered one of the most controversial laws governing foreign investments.⁷² The U.S. President is given the discretion to block any proposed investment that appears to threaten national security.⁷³ In order to block a foreign acquisition of a U.S. corporation there must be a finding "(1) that there is credible evidence that the foreign entity exercising control might take action that threatens national security; and (2) that the provisions of the law, other than the International Emergency Economic Powers Act[,] do not provide adequate and appropriate

67. See Rose, *supra* note 51, at 162-63.

68. Radio Act of Aug. 23, 1912, ch. 287, 37 Stat. 302-03 (1912); see Rose, *supra* note 51, at 162.

69. Radio Act of 1927, ch. 169, 12, 44 Stat. 1162 (repealed 1934).

70. 47 U.S.C. § 310 (1934).

71. *Id.* § 309.

72. Pub. L. 100-418, § 721, 102 Stat. 1107, made permanent law by section 8 of Pub. L. 102-99, 105 Stat. 487 (50 U.S.C. App. 2170) amended by section 837 of the National Defense Authorization Act for Fiscal Year 1993, Pub. L. 102-484, 106 Stat. 2315, 2463.

73. *Id.*

authority to protect the national security.”⁷⁴ The Exon-Florio provision lists the following factors that the President or his designee may consider in determining the effects of a foreign acquisition on national security. These factors are:

- (1) domestic production needed for projected national defense requirements;
- (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;
- (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the U.S. to meet the requirements of national security;
- (4) the potential effects of the transaction on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; and
- (5) the potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security.

1. Functions of the Committee on Foreign Investment in the United States (CFIUS)

In the implementation of the Exon-Florio amendment, President Reagan designated responsibilities under the Exon-Florio Amendment to CFIUS.⁷⁵ The Secretary of Treasury serves as the chair of CFIUS.⁷⁶ In a statement, from the United States Department of Treasury, it is explained that the committee “seeks to serve U.S. investment policy through thorough reviews that protect national security while maintaining the credibility of our open investment policy and preserving the confidence of foreign investors here and of U.S. investors abroad that they will not be subject to retaliatory discrimination.”⁷⁷ CFIUS was authorized to enforce and administer the amendment by investigating the national

74. See Pub. L. 100-418, 102 Stat. 1107, made permanent law by section 8 of Pub. L. 102-99, 105 Stat. 487 (50 U.S.C. App. 2170) amended by section 837 of the National Defense Authorization Act for Fiscal Year 1993, Pub. L. 102-484, 106 Stat. 2315, 2463. Communication from Gay Hartwell Sills, Staff Chair, Committee on Foreign Investment in the United States, U.S. Department of Treasury, Office of the Assistant Secretary International Affairs, Office of International Investment, available at <http://www.treas.gov/oii/> (last visited Oct. 16, 2000).

75. CFIUS was originally established in 1975 by Executive Order 11,858 issued by President Ford to evaluate the general impact of foreign investment in the United States. See *id.* In 1988 President Reagan issued Executive Order 12,661 delegating to CFIUS the specific purpose of carrying out the national security investigations under the Exon-Florio amendment and making a report to the President on its findings. See *id.*

76. *Id.*

77. *Id.*

security implications of proposed or pending mergers, acquisitions, or takeovers by or with foreign persons.⁷⁸

The President issued implementing regulations governing the operation of the Committee, designating the Secretary of Treasury as Chair, and including representatives from a number of other government entities.⁷⁹ A voluntary system of notification was established with the possibility of CFIUS member-agency notice when notice has not otherwise been given. Reviews are conducted on a case-by-case-basis.

The statute established a thirty-day review following receipt of a notification. For those transactions for which an extended forty-five day review is completed, a report must be provided to the President, who must announce the final decision within fifteen days. Further, the President must inform the Congress of the determination of whether or not to take action.⁸⁰

The Exon-Florio Amendment contains a confidentiality provision that prohibits members of the Committee from discussing any cases that may come before it. This provision even prohibits an acknowledgement as to whether a particular transaction has been filed with the Committee.⁸¹

C. *Byrd Amendment (1992)*

The Byrd Amendment attempted to further strengthen the Exon-Florio Amendment.⁸² The legislation limits the president's discretion and makes it mandatory that there be an investigation of acquisitions by a foreign government if such transaction "could result in control" of a U.S. company involved in activities that "could affect the national security."⁸³ CFIUS has important discretionary powers to investigate and decide

78. C.F.R. § 800.301 (1993).

79. 31 C.F.R. § 800 (1992). The other members of CFIUS include the DOJ, the Commerce Department, and the State Department, the U.S. Trade Representative, White House Office of Management & Budget, the Office of Science & Technology Policy, and the Assistants to the President for National Economic Policy and National Security Affairs, among others. See Communication from Gay Hartwell Sills, *supra* note 74. *TelekomNet-NTT Extends Verio Deadline as U.S. Decision Nears*, TelekomNet, Aug. 15, 2000, at http://www.telekomnet.com/news/8-15-00_ntt_veriodeadline.asp.

80. Pub. L. 100-418, § 721, 102 Stat. 1107, made permanent law by section 8 of Pub. L. 102-99, 105 Stat. 487 (50 U.S.C. App. 2170) *amended by* section 837 of the National Defense Authorization Act for Fiscal Year 1993, Pub. L. 102-484, 106 Stat. 2315, 2463. See Communication from Gay Hartwell Sills, *supra* note 74.

81. Pursuant to an e-mail communication dated Oct. 17, 2000, from Gay Sills, Staff Chair, CFIUS, Office of International Investment, Dep't of Treasury (on file with authors).

82. Pub. L. 100-418, 102 Stat. 1107, § 721, made permanent Law by section 8 of Pub. L. 102-99, 105 Stat. 487 (50 U.S.C. App. 2170) *amended by* section 837 of the National Defense Authorization Act for Fiscal Year 1993, Pub. L. 102-484, 106 Stat. 2315, 2463.

83. 50 U.S.C. app. § 2170 (1991).

whether activities affect national security of the United States. The effectiveness of the Byrd Amendment depends on the discretionary decision made by CFIUS despite the mandatory language applicable to the U.S. President.⁸⁴

The Byrd Amendment requires the President to report to Congress at the conclusion of all investigations, thus placing pressure on CFIUS by virtue of Congress looking over its shoulder at the process the Committee uses to determine whether a merger should be blocked for national security reasons.⁸⁵ The Amendment further sets forth a requirement for the President to consider potential national security ramifications of a proposed transaction on the international technological position of the United States.⁸⁶

D. *Telecommunications Act (1996)*

The Telecommunications Act of 1996 removed some of the restrictions on foreign ownership,⁸⁷ but the old specter of fear remained.⁸⁸ In the 1996 Act, Congress again permitted the FCC to refuse or revoke a license of a telecommunications business involving foreign ownership based on a numerical benchmark with the following provision:

Any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or *by a foreign government* or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such a license.⁸⁹ (emphasis added)

U.S. telecommunications service providers are pursuing every opportunity to enter into international telecommunications business relationships, while U.S. statutes restrict the extent of foreign ownership interests in U.S. businesses. Some commentators have said that these kinds of restrictions are an “anachronism in today’s global market”⁹⁰ or that the xenophobia behind the legislation undercuts the measure’s

84. See *id.* app. § 2170 (Supp. IV 1992); Corr, *supra* note 47, at 429-31.

85. See 50 U.S.C. app. § 2170; Corr, *supra* note 47, at 429-31.

86. 50 U.S.C. app. § 2170(f)(5).

87. The language that was removed was the prohibition against licensing of any corporation of which any officer or more than one-fifth of the directors are alien. See 47 U.S.C. § 310(a)(4) (1934).

88. Telecommunications Act, *id.* § 310(b)(4).

89. *Id.* § 310(b)(4).

90. Rose, *supra* note 51, at 161.

necessity and effectiveness.⁹¹ The U.S. stance has been criticized as “protectionist, arbitrary, and hypocritical.”⁹² Nevertheless, the 1996 Telecommunications Act continued the restrictions, thus reinforcing the intent of Congress to inject a national security consideration into the international telecommunication business transaction.

E. Presidential Decision Directive (PDD) 63 (1998)

President Clinton established, through a directive, the national security objective of protecting U.S. cyber and information networks from attack or disruption.⁹³ A White Paper, issued in May 1998 on the executive directive, set forth the goal that within five years from the day the President signed the directive, the United States shall have achieved and shall maintain the ability to protect our nation’s critical infrastructures from intentional acts that would significantly diminish the ability of, inter alia, “the private sector to ensure the orderly functioning of the economy and the delivery of essential telecommunications, energy and transportation services.”⁹⁴

The creation of the position of a National Coordinator for Security, Infrastructure Protection and Counter-Terrorism was included in the PDD. As part of a national warning and information sharing system, the President authorized the FBI to expand its current organization to a full scale National Infrastructure Protection Center that would include the FBI and other investigators experienced in computer crimes and infrastructure protection.⁹⁵

F. Congressional Hearing (2000)

The unique situation existing in international mergers in the telecommunications industry has caused members of Congress to concentrate an increased amount of attention on protecting national security from foreign governments. Oversight hearings were held on September 7, 2000, by the Subcommittee on Telecommunications, Trade,

91. See Ian M. Rose, *Barring Foreigners from Our Airwaves: An Anachronistic Pothole on the Global Information Highway*, 95 COLUM. L. REV. 1188, 1190 (1995).

92. Paladini, *supra* note 54, at 341-42.

93. The Clinton Administration’s Policy on Critical Infrastructure Protection: Presidential Decision Directive, May 1998. See *Hearings, supra* note 4 (testimony of Kevin V. Digregory, Deputy Assistant Attorney, General Criminal Division, DOJ).

94. The Clinton Administration’s Policy on Critical Infrastructure Protection: Presidential Decision Directive, May 1998.

95. *Id.*

and Consumer Protection on the issue of foreign government ownership of American telecommunications companies.⁹⁶

Representatives from the FBI and the DOJ, along with the U.S. Trade Representative, were asked to testify at the congressional oversight hearings.⁹⁷ The FBI campaigned to raise awareness of the national security dangers it views as inherent when foreign governments hold a substantial ownership interest in telecommunication firms that are merging with U.S. companies.⁹⁸ The White House even had to ask the FBI to tone down its congressional testimony because of fears that its testimony warning of the risks of foreign government ownership of communications might be too abrasive, and could negatively affect trade relations with other countries.⁹⁹

As further evidence of the dissatisfaction with the way in which the former foreign government telecommunications companies were being handled by the United States, a letter was written by some members of the Subcommittee and sent to then U.S. Trade Representative Charlene Barshefsky on September 12, 2000, complaining that four years after the WTO had negotiated the BTA:

- (1) The Japanese government still had a 53% stake in NTT;
- (2) The German government controlled 58% of Deutsche Telekom;
- (3) The French government held 54% of the outstanding shares in France Telecom; and
- (4) The Dutch government still controlled 43% of its national telecom monopoly.¹⁰⁰

G. Failed Congressional Bills for Stricter Federal Restrictions on Foreign Investments (2000)

Both the House and Senate introduced bills during the summer of 2000 restricting foreign government ownership of U.S. telecommunications companies. The House bill, sponsored by John Dingell (D-MI) and Edward Markey (D-MA), barred the FCC from granting waivers to the Telecommunications Act provision that restricts foreign governments from owning more than twenty percent of a company that is acquiring a U.S. telecommunications company.¹⁰¹

96. Letter from Bliley, *supra* note 38.

97. *Hearings*, *supra* note 4.

98. *Id.*

99. Kathy Chen, *White House Asks FBI to Curb Warnings on Foreign Ownership of Telecom Firms*, WALL ST. J., Sept. 8, 2000, at A8.

100. Letter from Bliley, *supra* note 38.

101. H.R. 4903, 106th Cong. (2000); Chen, *supra* note 99.

Senator Ernest Hollings (D-SC), the ranking Democrat on the Senate Commerce Committee, sponsored an identical version that was attached to an appropriations bill.¹⁰²

All of the bills failed. Their intended purpose was to tighten the restrictions on foreign government ownership under Section 310 of the Telecommunications Act by narrowing the authority of the FCC.¹⁰³ The specific language *proposed* in section (f) was:

Limitations on Foreign Government Ownership of Telecommunications Entities Licensed by the FCC:

1. IN GENERAL - Notwithstanding any other provision of this Act or any other law to the contrary, no license, permit, or operating authority under this Act may be granted to or held by a corporation, joint venture, partnership, other business organization, or trust directly or indirectly controlled by a *foreign government* or its representatives. (emphasis added)
2. PROHIBITION ABSOLUTE - The Commission may not waive the application of paragraph (1) under any other authority granted to the Commission under this or any other Act or under any Commission order or rule.
3. TEST OF CONTROL - A corporation or other entity described in paragraph (1) shall be considered to be controlled by a foreign government or its representatives if more than 25 percent of the ownership, voting rights, capital stock, or other pecuniary interest in that entity is owned, held, or controlled, directly or indirectly, by a foreign government or its representatives.¹⁰⁴

There were individual members of Congress who were intent on a mandatory prohibition against foreign government ownership in excess of 25%. However, the arguments about the imposition of unfair trade restrictions prevailed and the measures were not passed in either the House or the Senate.

VI. RECENT CASE EXAMPLES

A. *Nippon Telegraph and Telephone (NTT) Communications, Corp. (Tokyo, Japan)—Verio, Inc. (Englewood, CO) (2000)*

The FBI intervened in the acquisition of Verio, Inc. by NTT Communications Corp.¹⁰⁵ Verio, Inc. is the world's largest Web-hosting

102. See S. 2793, 106th Cong. (2000).

103. 47 U.S.C. § 310(b)(4) (1934).

104. H.R. 4903, 106th Cong. (2000); see S. 2793, 106th Cong. (2000).

105. John Schwartz, *NTT Deal for Verio Questioned by FBI*, INT'L HERALD TRIB., July 8-9, 2000, at 15.

company, primarily serving the small and mid-sized business markets.¹⁰⁶ NTT Communications Corp. is a subsidiary of NTT Corp., in which the Japanese government owns a 46% interest.¹⁰⁷ NTT Communications provides the long distance telephone service and the Internet service for the parent corporation, NTT Corp.,¹⁰⁸ in more than two hundred countries.¹⁰⁹ The total value of the transaction was approximately \$5.5 billion and gave NTT Communications Corp. ownership of 95.6% of the outstanding shares of Verio, Inc.¹¹⁰

The U.S. company that is being acquired, Verio, Inc., is relatively new, beginning its business in 1996 with an initial public offering in 1998.¹¹¹ It is a major provider of Internet services to corporations. It has expanded its national network by steadily acquiring smaller Internet service providers, while continuing to maintain a presence with its small-to-medium sized business customers.¹¹²

The combination of NTT Communications Corp. and Verio, Inc. is a good strategic move on the part of NTT Corp. as a bridge into the U.S. telecommunications market. From a business standpoint, the merger will provide both companies with an opportunity for expansion. The combined company resources, customer base, and talent allow the merged companies to provide customers of all sizes in the United States, Asia, and Europe with a complete range of Internet-based business services—"from high-quality IP network services including global connectivity, network management, and IP-VPN, to advanced Web-based business solutions, including Web-hosting and e-commerce platforms."¹¹³

1. Extent of NTT Corp. Enterprises

Operating in a regulated market for many years, NTT Corp., the parent corporation, has had a monopoly in the telecommunications industry. It has grown into the world's largest telecom enterprise with its long distance and mobile phone units dominating the markets, its status

106. *NTT Communications Completes Tender Offer for Verio—Combination Creates Global IP Force*, *supra* note 15.

107. *Id.*

108. *NTT Comm/Verio-2: Advances into U.S. Internet Market*, *supra* note 14.

109. Schwartz, *supra* note 105.

110. *NTT Comm/Verio-2: Advances into U.S. Internet Market*, *supra* note 14; see *NTT Communications and Verio Announce Completion of Merger*, *supra* note 16.

111. *NTT Communications and Verio Announce Completion of Merger*, *supra* note 16.

112. *NTT Communications Completes Tender Offer for Verio—Combinations Creates Global IP Force*, *supra* note 15.

113. *Id.*

as a leading internet service provider, and its offering leased lines, telecom equipment, and data systems and services.¹¹⁴

NTT Corp. has extended its operations in the Asian region by making investments in a number of companies, including 49% of Hong Kong's HKNet, 15% of Philippine Long Distance Telephone and an agreement to buy a 49% stake in Australia-based Davnet's telecommunications unit.¹¹⁵ In the United States, NTT Corp. has already acquired a 10% stake in the fixed wireless carrier Teligent and in spring 2000 reached out, through its subsidiary NTT Communications Corp., to acquire Verio, Inc.¹¹⁶

2. U.S. Agency Concerns and Review of the NTT Communications Corp.-Verio, Inc. Merger

The FCC offered no licensing or competition objections and did not review the potential merger transaction. The FBI, with the cooperation of the DOJ, held up the acquisition of the U.S. Internet Web-hosting company, Verio Inc., until the Japanese buyer agreed to strict U.S. national-security safeguards.¹¹⁷ When the FCC chose not to review the merger plans, the FBI used the 1988 Exon-Florio law to slow the progress of the merger and force an investigation by CFIUS.¹¹⁸

The concerns of the FBI were mainly centered around the foreign espionage risk. Because of Internet services to businesses throughout the world, the FBI worried about the risk of giving government-controlled NTT Corp. access to U.S. wiretapping activities.¹¹⁹ The tender offer was extended six times as regulators debated whether to permit the merger.¹²⁰

3. Concessions

Negotiations with NTT Corp. were delayed for several months as the conditions were agreed upon for the merger to occur, including a provision that the Japanese government would have no role in Verio, Inc.'s day-to-day operations or involvement in wiretapping Verio's

114. *Id.*

115. *Id.*

116. *Id.*

117. King, *supra* note 3.

118. Exon-Florio Provision, Section 721 of Pub. L. 100-418, 102 Stat. 1107, made permanent law by section 8 of Pub. L. 102-99, 105 Stat. 487 (50 U.S.C. app. § 2170), amended by section 837 of the National Defense Authorization Act for Fiscal Year 1993, Pub. L. 102-484, 106 Stat. 2315, 2463.

119. *NTT Closes \$5.5 Billion Offer For Net Services Provider Verio*, ASIAN WALL ST. J., Sept. 1, 2000, at 8.

120. *Id.*

network, and a variety of restrictions on who would have access within Verio, Inc. to federal wiretapping information.¹²¹ NTT Corp. issued a statement that the merged company would “supplement Verio’s existing internal operational policies, manuals and procedures for handling lawful requests of law enforcement agencies, including formal security procedures to protect classified information.”¹²²

4. Final Approvals

Approvals had to be obtained from the DOJ, FBI, FCC, and CFIUS. The DOJ and FBI gave their approvals after negotiating the concessions discussed above. The FCC approved the merger without review. After completing its investigation, CFIUS did not recommend that President Clinton prohibit or suspend the transaction. Ultimately President Clinton gave his approval at the end of August 2000.¹²³ The CFIUS investigation and ensuing review caused NTT to delay the expiration of its deadline for completion of the transaction with Verio.

B. *Deutsche Telekom (Bonn, Germany)—VoiceStream (Bellevue, WA) (2000)*

Deutsche Telekom is Germany’s largest telecommunications company. The German government holds a 60% voting interest in the company.¹²⁴ Even with the acquisition of Voice Stream, the government’s stake only fell to 45.7%¹²⁵ and with the Powertel, Inc. transaction added, it fell to 45%.¹²⁶ Deutsche Telekom initially offered to pay about \$55 billion for the company.

The proposed merger of Deutsche Telekom and VoiceStream caused more anxiety in security circles than the immediately preceding NTT-Verio deal. Presumably, this anxiety was a result of the acquisition of VoiceStream which involved approximately ten times the price of Verio (\$55 billion compared to \$5.5 billion). In addition, the FBI and Congress recognized a more significant national security interest between the global wireless communications systems of Deutsche

121. King, *supra* note 3.

122. *NTT Extends Verio Deadline As U.S. Decision Nears*, ONLINE PROFESSIONAL SERVICES TELEKOMNET, at http://www.telekomnet.com/news/8-15-00_ntt_veriodeadline.asp (last visited Oct. 17, 2000).

123. *NTT Comm/Verio*, *supra* note 14; *NTT Extends Verio Deadline*, *supra* note 122.

124. See Memorandum Opinion, *supra* note 11; John Schmid, *Telekom Reportedly Seeks to Buy VoiceStream*, INT’L HERALD TRIB., July 12, 2000, at B11.

125. See Memorandum Opinion, *supra* note 11.

126. *Id.*

Telekom and VoiceStream as compared to the combination of wireless phone services and business market web hosting of NTT Communications Corp. and Verio, Inc.

1. Advantages of Acquisition to Deutsche Telekom

VoiceStream provides wireless phone service to about 3 million people in the United States.¹²⁷ While the merger with Deutsche Telekom was pending, VoiceStream proposed in August 2000 to buy Powertel, Inc. (West Point, GA), which has a Global System for Mobile Communications (GSM) digital wireless network spanning twelve states in the southeastern U.S.¹²⁸

VoiceStream has been a fast growing but relatively unprofitable cellular services group that offers GSM service. “With three million customers, VoiceStream is the largest U.S. wireless service that uses the same GSM standard as European phone companies making it easier for [Deutsche Telekom] to deliver integrated global services like Internet access on mobile phones.”¹²⁹ The predominant U.S. systems are incompatible with the GSM standard used throughout Europe.¹³⁰ Through a merger with Deutsche Telekom, VoiceStream and Powertel’s network provide Deutsche Telekom with the ability to create a company able to offer the basic technology for future free roaming of cell phone users from the United States into Europe, and vice versa.¹³¹ Under existing technology, U.S. customers using the GSM standard cannot use their phones with absolute ease between countries.¹³² Although the GSM *standard* is the same, it is not the same *frequency*.¹³³ U.S. customers will need a dual-band phone or must remove the chip from the U.S. phone and place it in a telephonic instrument used in Europe.¹³⁴

2. Extent of Deutsche Telekom Business Enterprises

Deutsche Telekom has been determined to become a global player with forays into France, Italy, and the United States.¹³⁵ As a result of its

127. Charles Wallace, *It’s Ron Sommer Calling—Again*, TIME, July 31, 2000, at 32.

128. *VoiceStream to Buy Powertel for Nearly \$5 Billion*, L.A. TIMES, Aug. 28, 2000, at C6

129. See Wallace, *supra* note 127, at 32. The United States uses four standards: CDMA, TDMA, GSM, and IDEN.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Deutsche Telekom had partnered with France Telecom over a period of years, but it damaged that relationship in 1999 when it tried to switch partners to make Telecom Italia SpA its

former state monopoly status, Deutsche Telekom is a phone giant that is Germany's biggest telephone company.¹³⁶ Deutsche Telekom has been openly looking for a big U.S. firm to add to its growing list of acquisitions.¹³⁷ It made overtures to Quest¹³⁸ and failed in its attempt to acquire Sprint Corp.¹³⁹

Deutsche Telekom moved to consolidate its dominance in Eastern Europe in anticipation of an expansion of the Member States within the EU.¹⁴⁰ Last year it acquired stakes in wireless telephone operations in Poland, Hungary, and Russia from MediaOne Group, Inc. It already had other operations in these countries, along with the Czech Republic and Croatia.¹⁴¹ It further added to its position in Hungary by buying a controlling stake in Matav, Hungary's biggest phone company, for \$2.2 billion from Southwestern Bell Telephone Co. Also, it purchased a 51% stake in Slovakia's national phone company, Slovenske Telekomunikacie AS.¹⁴²

A. Michael Noll, of the *Los Angeles Times*, views these expansive acquisitions as a policy reason for refusing to allow the merger with an American company.¹⁴³ It was his opinion, that with the large controlling interest owned by the German government, the company will thus become a subsidiary of the government.¹⁴⁴ Thus, the acquisitions done in the name of globalization are simply another form of colonialism and imperialism.¹⁴⁵ His argument was that without complete privatization of the company, it "should not be allowed to have dominant ownership of any telecommunications firm in the United States."¹⁴⁶

main European affiliate. See John Schmid, *France Telecom Turns Against German Giant*, INT'L HERALD TRIB., Oct. 19, 1999, at 17.

136. See Memorandum Opinion, *supra* note 11; *Telekom's First Half Disappoints, Profit Weak as Company Pursues Licenses and Assumes Debt*, INT'L HERALD TRIB., Aug. 30, 2000, at 13.

137. Shawn Young, *Deutsche Telekom Flirts with VoiceStream*, USA TODAY, July 11, 2000, at 1B.

138. *Id.*

139. Schmid, *supra* note 135.

140. *Id.*

141. *Id.*

142. John Schmid, *Waiting in the West, Telekom Grows in East*, INT'L HERALD TRIB., July 8-9, 2000.

143. A. Michael Noll, *A Big 'Nein' to Deutsche Telekom*, L.A. TIMES, July 26, 2000, at A17.

144. *Id.*

145. *Id.*

146. *Id.*

3. Arguments For and Against the Merger

a. Against the Merger

With the foreign government ownership issue raised in the NTT merger with Verio, which was followed closely by the proposed Deutsche Telekom-VoiceStream merger, members of the House and the Senate began raising national security questions. One of the most vociferous congressional members, Senator Ernest Hollings (R-SC), introduced a bill, referred to earlier in this Article, to (1) cut off the discretionary authority of the FCC, and (2) ban firms with more than 25% foreign ownership from taking over U.S. companies.¹⁴⁷ Also, a provision was added to an appropriations bill that would cut off funds to the FCC review of the merger for twelve months. In October 2000, Senator Hollings indicated that he would no longer pursue his proposed legislation and, as a result, bills in the House were dropped, removing possible legislative impediments to the merger.

b. For the Merger

There were concerns that the negative reaction against international mergers could be viewed as restricting trade, particularly in view of the fact that the United States is a signatory to the 1998 WTO Agreement, the BTA.¹⁴⁸ Then, former Senate Majority Leader, Trent Lott, was opposed to the restrictive bill on foreign government investors being proposed by Senator Hollings, and asked that it be dropped.¹⁴⁹ The Hollings bill, if passed, would have effectively barred Deutsche Telekom from merging with VoiceStream because the German government interest would exceed the mandatory limit of 25%.¹⁵⁰

U.S. Deputy Treasury Secretary Stuart Eizenstat argued that investment by foreign government-owned companies should not be banned. Although admitting that national security concerns were present and not downplaying the importance of privatization, he nevertheless argued that, "a ban is overkill and we should not deny ourselves of the capital and other advantages that these firms have offered."¹⁵¹

147. S. 2793, 106th Cong. (2000); see *Eizenstat Urges Congress Not to Bar Deutsche Telekom/VoiceStream Merger*, *supra* note 8.

148. Letter from Bliley, *supra* note 38.

149. S. 2793, 106th Cong. (2000); see *Eizenstat Urges Congress Not to Bar Deutsche Telekom/VoiceStream Merger*, *supra* note 8.

150. See *Eizenstat Urges Congress Not to Bar Deutsche Telekom/VoiceStream Merger*, *supra* note 8.

151. *Id.*

The U.S. Chamber of Commerce warned that erecting congressional barriers to Deutsche Telekom's arrival could hurt the U.S. position as a champion of free trade, when U.S. companies are trying to pry open new markets.¹⁵² The European Union threatened to bring the United States before the WTO for hampering free trade if the congressional bills became law.¹⁵³ The White House was interested in the success of the merger because of concerns that mandatory legislative restrictions on the extent of foreign government ownership would be a threat to free trade.¹⁵⁴

4. Concessions

The FBI presented its testimony at the fall 2000 congressional hearings in which the pending merger was reviewed because of the concerns of several members of Congress about the potential threat to national security posed by the substantial foreign government ownership in the company.¹⁵⁵ In December 2000, the DOJ, the FBI and the Applicants filed a Joint Petition to Defer Action stating that the approval of the Deutsche Telekom Transfer Applications as filed would "present significant impediments to the ability of [the U.S. government] to preserve the national security, enforce the laws and protect the public safety."¹⁵⁶ The FBI and the DOJ later dropped their objections because they concluded there had been an agreement between the parties to institute proper safeguards.¹⁵⁷

The Deutsche Telekom-VoiceStream/DOJ/FBI Agreement provides, inter alia, that VoiceStream and/or Deutsche Telekom shall:

- i. ensure that its network is configured so as to be capable of complying with lawful U.S. process;
- ii. make certain call and subscriber data available in the U.S., if VoiceStream stores such data;

152. Peter S. Goodman, *German Move for VoiceStream Erupts into Battle*, INT'L HERALD TRIB., Sept. 7, 2000, at 11.

153. *Id.*

154. *Id.*

155. See Hearings, *supra* note 4.

156. VoiceStream Wireless Corporation, Powertel, Inc. and Deutsche Telekom AG., IB docket No. 00-187, Joint Petition to defer (filed Dec. 15, 2000).

157. The U.S. government received assurances that it can conduct legally authorized wiretaps of domestic calls and conduct surveillance of calls that begin or end in the United States. Also, assurances were made that the German government, exercising its rights as a substantial shareholder in Deutsche Telekom, would not impede Deutsche Telekom's compliance efforts with respect to the wiretaps and the surveillance of calls.

- iii. take reasonable measures to monitor the use of facilities used in domestic telecommunications, information storage, and access to foreign entities; and
- iv. not disclose domestic communications, transactional data, classified or sensitive information to any foreign government, agent, component or subdivision thereof without the express written consent of the Department of Justice or a court of competent jurisdiction.¹⁵⁸

Further, the agreement contains the significant provision that DT agreed to provide written notice to the Department of Justice and Federal Bureau of Investigation if any foreign government or entity controlled by a foreign government obtains an ownership interest or increases its existing ownership interest in DT.¹⁵⁹

To meet the demands of the United States, the German government declared its intent to sell its entire stake in Deutsche Telekom, in order to privatize the company, at some unascertained date after completion of the merger.¹⁶⁰ However, some skepticism should be exercised about the German government completely divesting itself of control over the company. EU Competition Commissioner Monti has campaigned to “stop governments from influencing business decisions of former monopolies with the use of ‘golden shares’ and special rules governing privatised companies.”¹⁶¹ Specifically there has been mention that EU governments “are loathe to loosen their grip on former monopolies, especially telecoms [sic] firms which are one of the locomotives of the ‘new’ economy.”¹⁶²

5. Final Approvals

The Antitrust Division of the DOJ approved the merger of Deutsche Telekom, VoiceStream, and Powertel, Inc. on September 7, 2000. The approval for the merger was received by the summer of 2001 from the DOJ, FBI, CFIUS, and the FCC. The FCC hearings on the proposed merger and licensing of Deutsche Telekom, VoiceStream, and Powertel began during the fall of 2000, with a carryover from the Clinton administration into the Bush administration in 2001. The change in

158. See Petition to Adopt Conditions Exh. 1, DT-VoiceStream/DOJ/FBI Agreement, arts. 2-3 (Jan. 24, 2001).

159. *Id.* art. 5.

160. In a letter to United States National Security Adviser Sandy Berger, released by the German government press office, top chancellery adviser Michael Steiner wrote that Berlin would eventually sell its entire stake in the company. See *German Government Reassures U.S. It Will Sell Deutsche Telecom Stake*, *supra* note 65.

161. Barnard, *supra* note 7.

162. *Id.*

administration improved Deutsche Telekom's chances for a rapid approval of the issuance of a license by the FCC because greater encouragement of free enterprise prevailed as compared to President Clinton's administration. On April 24, 2001, the FCC issued a Memorandum Opinion and Order approving the licenses on the grounds that such issuance would "serve the public interest, convenience, and necessity."¹⁶³

There is no information on the exact recommendation made to the President by CFIUS resulting from their investigation into the matter, but CFIUS closed its file on the proposed merger without comment, thus eliminating that potential obstacle to closing the transaction.¹⁶⁴

VII. CONCLUSION

The telecommunications industry plays a critical and special role in the new international system of globalization such that examination of proposed international mergers carry with it much more than the usual antitrust considerations. Control over the telecommunications infrastructure in a country carries with it inherent national security threats. The world has ceased to operate with traditional geographic borders, causing an integration of individuals, corporations, and nation-states in a way never before witnessed. The position of power held by the giant telecommunications companies emerging from the current mergers could negatively affect national security when substantial foreign government ownership is involved. Consequently, there is justification for the United States to approach the technology mergers in a careful and prudent manner.

The United States has shown sensitivity toward the differences in the level of national security threats inherent in the foreign government involvement in the NTT-Verio merger compared to the same kind of security threats in the Deutsche Telekom-VoiceStream/Powertel merger. In the NTT-Verio merger, national security threats are far less than in the Deutsche Telekom situation because of the distinctive types of business in which they are engaged. NTT-Verio will offer predominantly Internet-based business services which are far less pervasive and threatening than

163. Memorandum Opinion and Order, Federal Communications Commission, *In re Applications of VoiceStream Wireless Corporation, Powertel, Inc., Transferors and Deutsche Telekom AG, Transferee for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Petition for Declaratory Ruling Pursuant to Section 310 of the Communications Act*, IB Docket No. 00187, Apr. 24, 2001, at <http://www.fcc.gov>.

164. VoiceStream Wireless Notes Completion of CFIUS Review (Press Release), BUS. WIRE, May 1, 2001.

Deutsche Telekom-VoiceStream/Powertel that will be involved in an integrated global wireless communications system.

Consideration must be given to the issues of free trade and competitive opportunity. The telecommunications field involves sensitive, pervasive, invasive, and highly competitive qualities. These qualities serve to emphasize that the United States must maintain a delicate balance between national security implications which arise when companies with substantial foreign government ownership merge with U.S. companies, and the need to keep the country at the forefront of free and competitive international trade relations in the fast moving telecommunications field. Mr. Eizenstat, U.S. Deputy Treasury Secretary, has succinctly stated the U.S. position in saying that in order to maintain a competitive edge for America, Congress should not deter capital flows into the country by blocking market access to foreign government owned companies.¹⁶⁵

A clash of purposes exists between businesses' arguments for free trade and the FBI/DOJ arguments for protection of national security. The business purpose is to increase profits in a deregulated industry, with seemingly endless opportunities, while the national security purpose is more remote, driven by the contingencies of future conflicts with now friendly countries.

Another factor in conflict with the national security issues is the commitment by the United States, as a signatory to the Basic Telecommunications Agreement of the World Trade Organization, to take steps to open its telecommunications services markets to competition. There is also an implicit commitment to open competition in the deregulation legislated in the 1996 U.S. Telecommunications Act.

A prudent course of action for the United States is to continue to be insistent and persistent in its demands on foreign governments for de jure, rather than de facto, privatization of their telecommunications companies.¹⁶⁶ If the United States is to maintain its balance between national security and competitive opportunity, Congress should exercise restraint in proceeding in the direction of an inflexible nondiscretionary limit of 25% on foreign government ownership. On the other hand, because of the very nature of the telecommunications industry and its newly deregulated global environment, it is important that there be safeguards when foreign governments (or other foreign entities) are involved. The present dual track system of the FCC approval process,

165. *Eizenstat Urges Congress Not to Bar Deutsche Telekom/VoiceStream Merger*, *supra* note 8.

166. Barnard, *supra* note 7.

with its right to waive the application of the 25% foreign ownership restriction, and the President's review process, with his right through CFIUS intervention to block a foreign investment which may create a valid security threat, provides a reasonable balancing of the interests of business and the national welfare in transactions involving foreign government ownership interests. The present system keeps the United States alert and appropriately cautious in the especially sensitive area of telecommunications, but provides businesses with sufficient latitude to enable them to compete effectively in the marketplace.