RECALLING ECONOMIC CONSIDERTIONS FOR LAWYERS

AND POLICY MAKERS UNDER CIVIL LAW TRADITION

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ABSTRACT

This study examines, the role of economic thinking on government regulation. It pretend to acknowledge some of the core rationales of economic science at the time of addressing a policy, as well as, for understanding regulation developed at different levels. At the present time there is a need to enhance the study of this subject in order to built much solid economic based structures and institutions within the Civil Law Tradition. This paper is not designed to be used as a guideline for good regulation, but rather tries to deal with a rethinking of the paradigms or supposed “ideal categories” derived from predefined law foundations, for lawyers and policy-makers under Roman - French Law influenced countries, such as Ecuador.

### I. INTRODUCTION

The impact of government regulation on many firms’ performance, has long been a topic of great importance. How important would it be that law makers, legal theorists, sociologists of law, transnational legal practitioners, comparative law scholars, governmental agencies, congressmen and judges take into account the working of the market?, for which within the Civil-Roman Law countries, have been disregarded in many ways? Is there no room for this countries to avoid inconsistencies and solve social problems, having the less possible harm on the rest of society due to the legal system they work for and with? I believe *Pareto efficiency*[[1]](#footnote-1) needs to be revisited more constantly, for the common good of the Civil Law world.

Since I am in front of a huge responsibility and not able to dig and asses the differences among what can be called Continental and Anglo-Saxon approaches to law, I will try to set up some premises that would let us reinforce some possible new approaches or use cross-fertilization from common law scheme in the area of economic analysis of law.

It should be understood, that depending on the law system that rules a nation, the theoretical approach to the study of the existent relationship among law and economics differs. It is generally known that *civil or continental law tradition* searches for what is called “Economic Law” or in French “*Droit de la Economie*”. As for the *common law* perspective it digs into the economic impact of judge ruling and regulation development, under “*Economic Analysis of Law*”.

Civil lawyers, do believe that law can probably solve many of the problems arisen from social inequality, but they are not considering if such postulates are efficient or inefficient. Are such maxims or paradigms not an disease for other social problems? Such predetermined categories, have merely a smooth economic analyses in much of the cases. Is the Civil approach enough then?

In the one hand, the Economic Analysis of Law pretends to use economic theory and econometric methodology to develop and structure judge ruling, law-making, regulation development and building up all kinds of juridical institutions, as well as to analyze, the effects of law for human kind activities. Its origins are tied to the Common Law countries mainly to Great Britain and the United States. Many scholars emphasize that this approach makes no substantial differences between public and private law, as for instance civil law scholars do emphasize. The general conception uses a deductive methodology, were categories go from the general issues to specific premises.

In the other hand, Continental or Civil Law scholars, who at large have a strong French influence, as well as some German and Italian too; have even diverged in their postures regarding Economic Law. Some tend to think that this “science” is not a science at all, but just a mere technique for development, application, interpretation and a method for teaching Law.

# “Mentally structured” categories seem to look for predetermined juridical postulates, were every activity must be part of the Aristotle’s syllogism. Hypothetical descriptions arise and the use of inductive work methodology shows upon the Napoleonic Code.

Usually in Latin-American countries (civil law countries) the Economic Analysis of Law, comes to be a mere chapter of a text book, rather than a core course of the curricula. The same course has been thought for almost four decades. This is the case in most Law Schools in Ecuador, which greatly differs from the American undergraduate or postgraduate educational scheme. Civil lawyers and policy makers should regard this as a basic tool in their field, therefore it is of my interest to develop further approximations and pose the importance that Economic Analysis of Law requires. I will try to convey that a well structured economic thought and theory must be taken into account in this part of the world.

# II. THE MODERN STATE

What is the role of a modern state? How much of government[[2]](#footnote-2) intervention must take place? There is vast literature for such issue, but this question raises the necessity to let me introduce some insights for a new perspective on the area of “*Economic Analysis of Law*” for the Civil Law countries. It should be said that much better outcomes have being seen in countries under the Common Law that in the Civil Law, for many industries, nevertheless an in depth analysis of some empirical works, would provide readers with a clear understanding about this issue.

Is the government entitled to regulate every single sphere of the “market”? [[3]](#footnote-3), Or is the society the one to determine how much state intervention and or regulation should exist? Now a day there is a vast amount of scholars and literature trying to answer theses questions. The concern here is not to answer them, but to redefine or re-address the proper actions to be taken by the key player, in this case, the government as well as the role of the authorities in and for the market. It is always said that the traditional government duties just deals with defense, justice administration, provision of public goods (which by the way come along with the free-raider problem), etc. Although the government frequently enters into positions, under which it gets involved (at the same level) as any other consumer or producer, a firm in a broader sense, with no sovereignty. The difference mainly regards that when it buys or sells it affects diverse economic agents to a larger extend. In fact as Ronal Coase, states:

 “*The government is, in a sense, a super-firm (but of a very special kind) since it is able to influence the use of factors of production by administrative. But the ordinary firm is subject to checks in its operations because of the competition of other firms which might administer the same activities at a lower cost, and also because there is always the alternative of market transactions against organization within the firm if the administrative cost become too great. The government is able, if it wishes, to avoid the market altogether, which a firm never do. The firm has to make market agreements with the owners of the factors of production that it uses. Just as the government can conscript or seize property, so it can decree that factors of production should only be used in such-and-such way. Such authoritarian methods save a lot o trouble (for those doing the organizing) Furthermore, the government has at its disposal the police and the other law enforcement agencies to make sure that its regulations are carried out*.” [[4]](#footnote-4)

Generally speaking, and in addition to what was quoted, we should remember that business does not in practice operate precisely or seek to operate according to the free-market principles. Markets and firms are often analyzed by economists under models or in abstract terms of rational calculation. It is not to be forgotten that markets exist in and are sustained by societies (human beings with feelings, cultural influence and a variety of deep emotions). Accordingly, Coase attempts to clarify that we are in front of a complex relationship in the marketplace, and states:

“*It is clear that the government has powers which might enable it to get some things done at a lower cost than could a private organization (or at any rate one without special governmental powers). But the governmental administrative machine is not itself costless. It can, in fact, on occasion be extremely costly…. it follows that direct governmental regulations will not necessarily give better results than leaving the problem to be solved by the market or the firm. But equally, there is no reason why, on occasion, such governmental administrative regulation should not lead to an improvement in economic efficiency*.”[[5]](#footnote-5)

Regulation after all, is a permanent government duty (presumably efficient). No one is able to say that a further alternative, would be letting things run out of control (no government regulation) and do nothing about a particular problem at all. The problem arises when this regulation effort, involves some bureaucrats work closely to some interest groups. It seems then, that at that point it is difficult to identify clearly, who are the advocates for new regulation, and if their claim supports or not a real “public interest theory” [[6]](#footnote-6).; and would it truly be beneficial for society at the time of improving welfare.

## A. Liberalism and Neo-liberalism

Is this postulate really true? May be the title suggests to much, and clearly I am not the right person to asses this question. A preliminary though, lead me to think, that there is not such a difference among liberalism and neo-liberalism within a regulatory society, where intervention by the government takes place were “market failure” is visible. Probably it would be much more suitable to talk in the broader sense, where liberalism encompasses a whole plethora of concepts that apply to the capitalist society. Neo-liberalism might be regarded as the new approach to some issues such as telecommunications, that were most likely not considered by liberals at the time were advocates developed theories), yet neo-liberalism works over the pillars of the liberal conceptualism. Then why not recalling simply just upon capitalism instead?

Meanwhile the first question brings upon discussion, we can turn our attention to understand up to what extend capitalism has contributed to a largely regulated society. Public interest theorists, may offer a variety of different categories for such complex economic model, since it has had a very large range of multidisciplinary approaches. One of these categories that could be taken into account, from my personal scrutiny, is the one given by Horowitz which is simply called “*the capitalist theory*”. He introduces regulatory agencies or institutions to be seen merely as one of several types of state apparatus designed to safeguard the accumulation of capital, towards which the state is structurally biased, when the market fails to do the job. [[7]](#footnote-7)

Regulation has three major phases, as proposed by Clarke. One roughly encompassing industrialization, were individualism became the central political, economic and moral idea: markets were seen as composed primarily of competing individuals who were given equal rights before the law and whose rights of decision-making and integrity were increasingly required to be respected, along with a moral expectation of individual responsibility and self-help.[[8]](#footnote-8)

A second stage, summarizing Clarke’s illustrative definition, probably be the time right after technological innovation to industrialization took place, were the first Factory Acts, as i.e. were passed by the British[[9]](#footnote-9). Thus the introduction of regulation was concerned with establishing standards. A wide range of regulation affecting the economy followed this Acts for gas regulation, water and electricity on the economic side and care of criminals and insanity on the social side. All this as we know, lead to an increasing urban wealthy society that would look for street-pavin, lighting, and clean drinking water, that would not probably not have taken place without local authorities taking over these tasks and thus regulating its use.

While a third phase, would have probably started after the general public were able to acknowledge the concept of formal citizenship, labor and social rights and the origin of consumer rights started. These considerations of different, though powerful rights, were indeed sought due to the complexity concerns that technical and technological processes posed on people. Issues such as safe manufacturing practices or product safety demanded crystal clear rules and hence regulatory provision for reliability and safety standards. As a concluding remark Clarke wisely states that: “The consumer-based economy of affluence is then perforce a regulatory economy, in which consumer rights increasingly prevail and the market principle of *caveat emptor* is compromised”[[10]](#footnote-10) The difference between the two latest ones, could probably be a change of attitude in people, while during industrialization when scarcity was replaced with abundance, for which people were mere observers. As for consumer-based economy, which is more inspired on social, democratic and political grounds, society could see how there was enough for all, but the reality was that cyclical unemployment, low wages, and poverty appeared more frequently. From my point of view, Boyer has perfectly depicted it and pointed out, as he says that: “*Since the emergence of industrial capitalism, the accumulation process launches expansion phases*, *but usually also provokes a reversal, since cumulative disequilibria appear from within the system, in an endogenous manner*”.[[11]](#footnote-11) This assertion should be regarded as remarkable, since at the time it appeared to be, that this common trends observed in more constantly in those past two decades are where becoming the rule, rather than the exception.

Further more new issues such as financial, organizational and mainly technological innovations had posed new challenges for regulation matters, as well as raised new questions for the future. For the purpose of clarification I can illustrate this previous subject, for example, the telecommunications industry (that would be explained more explicitly latter in this paper), where technological innovations may menace the complementary nature of fix and mobile telephony, since many issues were not foreseen.

At some point one can even think that some problems could have also been waived since for example Internet network (back-bone) is becoming a serious contender of conventional telecommunications services. While current regulation is typically based on laws specifically designed to deal with traditional network architectures there is risk in regulation concepts for this specific industry that might seem obsolete or will be lagging behind since conceptions will be to a certain extent, biased or distorted at some point or another.

Nevertheless, whatever participation the government takes, it would be desirable in any time to have a true and respectful guardian of the Constitution which would embrace the principles of Rule of Law. It is of course the objective of this paper to acknowledge the influence on the economy derived from state intervention, but it is equally useful to recall on the economic considerations of the importance and desirability for businesses and others market players, creating stability and security and forgiving even part of their “constant expansion”. Many can say that the bigger the size of a business, the worse it would be its collapse, as well as the easiest[[12]](#footnote-12).

Regulation is regarded then, as to be the mechanism with which business can be induced to perform well, and social objectives can also be seen to be pursued.

*“The prevailing wisdom ever since the rise of capitalism has been that the maintenance of free markets is the best basic model for achieving this, but that free markets may often need to be restrained and modified to accommodate other social objectives.”* [[13]](#footnote-13)

However regulation theory, has being normally criticized by political scientists and lawyers[[14]](#footnote-14) in the sense that it “…*overemphasizes the economic aspects of regulation at the expense of the political*”[[15]](#footnote-15). But are political objectives much more supportive for welfare than economic ones? I definitively presume not. Nevertheless as nothing could be regarded as absolute in life, nor regulation theory is; there is a constant search from scholars to re-address this theory in *restructuring relations between the political and economic spheres*[[16]](#footnote-16) as pointed out by Boyer. This is due to the recognition of varied interactions at work in contemporary societies. A visible inertia coming from the growing number of institutions or regulatory bodies could be explain the often attributed to the irrationality of agents or the inability of political authorities to implement the “right” solutions recommended by economists.

***B****.* ***Minimum intervention of the Government***

Can it be true that “*Government is getting more powerful, not through owning[[17]](#footnote-17), but through regulation*”,[[18]](#footnote-18) as stated by Peter Drucker in the Financial Times on April 1999.

Given the huge size and responsibilities of the state in a modern industrialized democracy, it is natural to associate regulation off all kinds, with state regulation. Thus it seems as many people agree that much of state attention has being put over creating the proper atmosphere for businesses, trust and an economic friendly environment, in other words, creating the conditions for the market to work, preceded by redistribution of wealth for at least the past century. With regard to this Jorge Witker regards the subject by saying that: “*In fact, it is true that the current neo liberal model, supersedes the state, is it not less true that assigns the public power a minimum regulatory function: looking at the law as fine filter that creates no difficulties for the open market possibilities of all productive and business agents*”.[[19]](#footnote-19)

Regulation Theory emphasizes that fact that markets are not self-established, since their daily operation involve a complete network of rules and external enforcers to ensure honest transactions.

Being part of what is so called neo-liberal world demands also a clear understanding of new technological advancements (as was regarded for concepts of liberalism applied to telecommunications, as referred earlier), as well as the new legal perspectives and clearly new legal foundations. It is clear that legal environment is not static, as örücü concludes, for instance that, “*The framework of international legal order is in transition. Existing traditional paradigms are inadequate. Increasing globalization and regionalisation on the one hand and fragmentation on the other, put into question the functionality and centrality of the nation State*”. [[20]](#footnote-20)

As for Barnes and Stout, as they smartly pointed out: “*There must be power in the States and the Nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts*.”[[21]](#footnote-21)

Government has to be involved in different regulation issues, but there has to be a shift to a more keen approach to Economic Analysis of Law, since regulation and ruling, within a globalized atmosphere is taking place at different levels, as result of international standardization, and being developed out of the national borders. It is also relevant to try to have a broad understanding of policy makers’ reasonings, which will enable us to comprehend the whole picture at the time of criticizing rule making. “*Legal ideas, concepts and institutions are on the march… and the transfrontier mobility of law is becoming more important in the emerging relationships”* [[22]](#footnote-22),as said by örücü.

Many considerations must be made, since law making and regulatory measures will always have an economic impact. See for example what actually happens when licensing or zoning takes place. Government officials should take into account much of research studies and impact simulations, to determine the path to follow; thus not all policy actions taken by government could have a great impact as probably thought.

To enlighten the case aforementioned it is worthwhile showing what Kleiner and Kudrle (1997) found in a working paper for the National Bureau of Economic Research. It shows that within the dental health industry in the United States, licensing restrictiveness did not improve dental health, but it did raise prices of basic dental services. Furthermore, their estimates were consistent in showing that “… *more regulated states have higher dental prices. Consequently, overly restrictive policies that limit the customer access could only reduce the welfare of consumers.*” [[23]](#footnote-23) Ecuador presumably has licensing restrictive measures in different industries that probably are raising the costs of such goods or services.[[24]](#footnote-24) Research studies then have to prove that still if some data could probably not be used to see the impact. As a result, monitoring processes would probably be implemented to better measure the quality of those goods or services, because quality is part of better outcomes, hence a complementary measure of policy making as an *ex post* device. Even good regulation can become bad regulation over time, if governments give little attention to reviewing, updating and eliminating unnecessary or harmful regulation.

Much attention should be placed in such outcomes, which a largely consists on the right assessment of different regulation fundamentals. Currently much of the regulation takes place at the Governmental or State Agencies level (defined as a category by some academics[[25]](#footnote-25)), normally responsible for controlling a specific industry or economic activity[[26]](#footnote-26). Not necessarily the staff that produces “norms and rules” in those organizations, are highly trained lawyers, legal theorists, sociologists or regulation professionals. They have to be trained in regulatory schemes as well as in technical issues regarding that particular area, which later on will be subject to regulation. Baldwin concerns arise from his doubt that it is presumably government departments (not autonomous agencies) “*will bring the same levels of expertise and efficiency to bear on a topic as would bodies specifically devoted to the task…*”[[27]](#footnote-27) It is consistent then to recall Baldwin’s conceptual framework when he acknowledges that “*There is a growing perception by policy-makers and legislators during this century that certain industries and activities required a special and continuing form of control…”* [[28]](#footnote-28)

It is precise for government and third party organizations or regulators to define quality criteria, as argued by Boyer. This author stresses out that … “*for each market and for there to be an authority to determine which actors can enter the market (otherwise it would be destroyed by opportunistic behavior on the part of agents for whom it is rational to be dishonest).”* [[29]](#footnote-29)

## C. State planning: up to what point?

In addressing this question, it must be recognized that a variety of factors, not only economic or legal ones, explain government intervention as well. Regardless of this, it has been acknowledged that traditional economic management tools based on monetary and fiscal policies seemed not to work well anymore, and regulatory reform offered new hope to economic policy officials faced with the high unemployment rates, low productivity, and new demands in becoming internationally “competitive”.[[30]](#footnote-30)

In 1997, the OECD stated that: “The emergence of the regulatory state in this century was a necessary step in the development of the modern democracy…” The scope of government involvement in, and regulation of, the economy is exceedingly diverse an difficult to characterize succinctly. The regulation i.e. “public utilities” is said to be easier to describe, from a range of industries that go form energy to communications (some of which will be described shortly). Much of the impact of regulation on the performance of firms (monopolistic ones, said to be more), whoever has long being an important and controversial topic.

Important findings can always be driven out from economic considerations, either good or bad. Such a case is that not all economic models work properly or fit exactly as thought during policy design. Rate-of-return regulation for instance (an economic theory to approach normative efforts), seems to be outdated or simply poor. For example the Federal Communications Commission (FCC) in United States, even concluded that rate-of-return regulation does not encouraged optimal efficiency[[31]](#footnote-31) for the markets they controlled. A move away trend far from cost-based rate-of-return regulation was manifest in the long-distance telephone service markets shortly after AT & T divestiture in 1984.[[32]](#footnote-32) After these set of situations were witnessed, a switch from rate-of-return regulation to a pricing flexibility was seen from then on. Burnstein has even arose, as he consistently summarizes that, if market power exists in these markets, and assuming that the existing price controls are binding, then removing these controls should lead to price increases. Alternatively, if the price controls serve to restrain the incumbent’s ability to respond aggressively to its new rivals through price reductions, then removing these controls should result in prices decreases. So tendencies for policy choices will be seen everywhere, but still rational thinking could lead people to change and improve living conditions.

Planning must be regarded as a key issue within social market economies, such as the Ecuadorian, in order to determine the optimal point of it. This consideration must be driven in terms of cost-benefit analyses, distributional objectives and a wide range of social outcomes. Not all policies are quantifiable in economic terms, such as economists suggest at all times in the search for efficiency. The extent of the conflict between efficiency and fairness due to its complexity could be the topic of another discussion. A temptation for some economists may be to assert that regulation is good if it is efficient in the sense that it maximizes wealth.[[33]](#footnote-33) And for this I fully agree with Baldwin and many lawyers and legal theorists that says “it can be objected, that wealth maximization provides no ethical basis” for actions by the government. “*Human beings, the objection runs, have certain basic rights that it would be morally objectionable to put up for sale.*”[[34]](#footnote-34) This idea can be backed by Baldwin’s conclusion, when saying that the most fundamental objection to a purely economic approach – one tailoring regulation to economically efficient ends – is an ethical one. It can not be disregarded, in any way, that regulation have helped governments make impressive gains in protecting a wide range of economic and social values.[[35]](#footnote-35)

The thesis just mentioned, will gain much more adepts from legal professions than the ones in which people are compelled to use economic tools (which in turn will get more advocates from economic researchers or market makers). No matter up to what point there is a use of economic models, there it is a strong need to built this pillar for constructing general or tailor made policies. “*At theoretical level, the use of economic instruments should a priori be the preferred means of achieving policy objectives in a wide range of situations. …, the fundamental of a regulatory instrument is precisely to reduce existing distortions in the operating of markets by better aligning price incentives with the broad social welfare .*” [[36]](#footnote-36) This assertion arises because, tools such as taxes, subsidies, permits, etc. operate directly through the market giving a room for distorting market incentives inherent in most forms of regulation.

Government should never act in such a way as to strangle entrepreneurialism and innovation. Policy makers should try to use a central coordination agency that evaluates policies, so that policy fragmentation in the structure of the government does not occur. Governments have often lacked the co-ordination and planning capacities necessary to move forward with coherent and efficient packages of policies and reforms. State planning should come up to the point were society gets a higher output, welfare is gained, and all things considered all together will leave a country better off, considered as a whole.

Surveys can act as means to rate governments action, thus avoiding those incumbent participants or undercover public interest, being the ones that gain from regulation. Vested interests have often been able to install and defend regulations to benefit from them, blocking needed reform even when its benefits to wider society at large are vastly bigger than the concentrated (and highly visible) costs of the interest groups ones.[[37]](#footnote-37)

IV. ECONOMIC IMPACT OF LAW MAKING AND REGULATION:

SOME COMMON EXAMPLES

Privatization comes hand in hand with the pressure of open markets, liberalization for goods and services, as well as migration of the labor force. Much of this privatization can be regarded as “openness”, while for the contrary this leads to further and increased regulation. Post-privatization and regulation are widely associated since the first visible actions in which regulation took place after public utilities where privatized and hence this stage could be labeled as “*De-regulation or Re-regulation?*”, as G. Majone suggests in his writtings.[[38]](#footnote-38) A common myth is that we live in an age of deregulation. This misconception is rooted in the confusion of “market liberalization”, which is indeed underway, with “deregulation”, which has occurred in only few areas and in very few countries. In fact, market liberalization usually requires new and sophisticated regulatory regimes.

## A. Regulation of Telecommunications Industry

Telecommunications markets have undergone and will undergo through radical changes in the years to come. Until 1980’s, operators in Europe used to be state owned, vertically integrated monopolists.[[39]](#footnote-39) This big monopolistic state owned companies (strategic sectors argument - for many years)[[40]](#footnote-40) have been privatized and markets liberalized. The first example of this trend took place in the UK under Thatcher’s regime for the British Telecom in 1984. The Dutch incumbent operator, KNP Telecom, was also state monopolist until, 1989, when it became a public limited liability company, although still fully owned by the state.[[41]](#footnote-41)

In addition to liberalization of European Telecommunications markets, the industry itself faced huge technological innovations. Such progress had even made this idea of natural monopolies fall apart since building a network was not of the proportions that it was before. Another important consideration was that a convergence in economic policy and institutional structures at the European Level were seen. European Union member states have adopted broad and general rules for liberalization and deregulation have been formulated by the European Comission.[[42]](#footnote-42) An important step was the publication of the “Green Paper” in 1987, which proposed the introduction of competition combined with harmonization measures and application of competition rules. As result of these efforts markets were liberalized (telecommunications network and services) form 1 January 1998.[[43]](#footnote-43)

No matter to what extent the knock down of the thesis of natural monopoly has being seen, for the Europeans (welfare states economies), they have conceived the importance of affordable telephony services for all citizens, or what is called *universal service*.[[44]](#footnote-44), as part of the supplementary policies. In this direction Open Network Provision (ONP) discussions were held, but the ONP’s framework was primarily concerned in reducing entry barriers and improving efficiency in the market, it also taking into account political considerations.

Currently in the EU, national regulatory authorities can put regulation mechanisms in place, so that costs associated with the provision of universal service among market players is shared, if they find that the universal service obligation represents an “unfair” burden. For example in the UK, the Office of Telecommunications (Oftel), as well as other European regulators, found that the universal service obligation does not represent an unfair burden, so neither transfers need to be made nor a universal service fund to be established. Oftel also imposes uniform pricing across geographic areas.[[45]](#footnote-45) Also price caps and other pricing constraints have been used in the region to guarantee (up to some point) affordability of telephony services. Any way, incumbent operators may still benefit from monopoly positions in market segments that are sometimes viewed as less profitable, given the fixed costs of rolling out local networks.

Another big step within the EU was taken by the European Commission, who seemed worried about their policies, and decided to re-evaluate them. As a result the origin of the so-called “Review” of the European Commission in 1999 originated, approximately, one year after markets were liberalized. This Review identified different and important developments in the telecommunications industry, such as mergers, acquisitions, alliances, etc., Internet participation in the market, (voice and data transmition), wireless applications as well as digital TV and other new technologies, were able to reduce costs significantly. Finally a big new movement in reforming packages took place in 2000 as regulatory framework for electronic communication network and services.

Overall the European Commission is turning its attention, in shifting from opening up traditional markets for telecommunications to stimulate effective competition (in infant markets), to promoting and reinforcing competition in more mature markets.

Market liberalization has led to the entry of different players in the market, in different network dimensions and forms, introducing new network operators, service providers, and resellers, just to name a few.

From my standpoint five important features for telecommunications markets, must be mentioned:

***a)*** *Convergence as part of development:* This means that there is a wide range of possibilities for transmitting a variety of communication services over a variety of networks (interchangeably).[[46]](#footnote-46) This feature will suggest important considerations at the time addressing policy strategies and regulation.

***b)*** *Asymmetric information and asymmetric markets:* especially when the market is in transition and the incumbent (monopolistic) unique operator has more information and thus dealing also with adverse selection and moral hazard. Also the price new entrants have to pay to be “in the market”.

***c)*** *Complex market systems for goods and services:*  Such goods and services can be seen as substitutes or have complementary relationships with other goods and services provided by the industry.

***d)*** *Diverse transformation processes take place at the same time:* Due to the fast technological progress accompanied by changes in the regulatory environment, the relevant framework for parts of the industry is transforming form protected monopoly, via a market with monopoly segments and imperfectly competitive segments, to a market characterized by imperfect competition.[[47]](#footnote-47)

***e)*** *Network elements of the industry:* This is an important assertion that could be to be taken into account could be this assertion, since this is a particular characteristic from this market, as well a few other industries such as electricity, railroads and water, absent in other industries. In this case network can be referred as the relevant dependency on third parties, competitors or not, as agents or players of a market.

Telecommunications is a good example of the current trend of the so called “de-regulation and re-regulation”, as it has being peculiarly named by Baldwin. It can also give a clear cut of the new stage in the regulatory process since this industry is part of the basic structure of businesses around the world that are taking advantage of new technologies in the search of competitiveness. Additionally it is relevant to say that the industry is involved seriously with the standardization practice in different commercial activities as was commented earlier.

An example of the standardization, are wired telephones that have encompassed the highest technological advancements around the globe. This trend need to make homogeneous a part of the industry was a response on the threat that could arise for emerging economies and technological trends in the case of a lack of transparent connectivity with latest technologies as identified by David Lassner. [[48]](#footnote-48) He also said that increasing standardization is almost universally considered to be a positive trend. Users of information and telecommunications seem to be the major beneficiaries as shown in some economic literature on this issue of David 1990 or Berren and Saloner in 1989.

*“The quickening pace of technological advancement, increasing internationalization of business, and worldwide trends toward deregulation and liberalization of telecommunications have relentlessly spurred the demand for more open and timely global telecommunications standards.”[[49]](#footnote-49)*

In 1992 the European Conference of Postal and Telecommunications (CEPT) was responsible for imposing standards. Europeans were concerned and saw this issue with much anxiety. CEPT tried at all times to push for standardizations and the EU knew it was a crucial issue in the hunt for facilitating the single market.

There should be no fear in years to come for major new developments in this area. People have to be aware that most regulatory encounters are dominated by a few high profile individuals commanding media and public attention. The truth about such asseverations is not completely true for market developments that should capture economic attention.

Holl, Scott and Hood have depicted the regulatory issues within the UK (from an inside look research study too) [[50]](#footnote-50) and came up with different categories of decision-making for regulation, as result of their work within Oftel, which can be said are the followings:

***a)*** *Cartesian – bureaucratic:* In which regulation is a result of a well though and analyzed policy. Where the regulator is an enlightened strategist, applying reason and especial expertise to “create public value” and solve the market-failure for the public good as referred by Moore, and quoted by the previously mentioned authors. This style looks like the one were use of readily available data, debate on economic modeling and other rational approaches are being used.

***b)*** *Bargaining – diplomatic:* This view sees regulation for “grown ups” as almost an inevitably political negotiation and arrangements and doing deals, power broking and diplomacy. Oftel used this mechanism once when it needed to reduce the bargaining power of British Telecom, through out workshops and working groups.

***c)*** *Adhocratic – chaotic:* This category set by the authors, is meant as one in which neither the information input nor any agreed conception of the outputs being sought are available within the cultural frame within the decisions are made. This last category can derive into a bargaining – diplomatic one, when people with a little more information (trying to sort out the input information input) are one step ahead.

In Europe the national regulatory authorities are in charge of implementing (with some discretion) European legislation. In fact, de Bijil and Peitz said that most of the work of the implementation process has been done by local or national authorities. Nevertheless the speed and effectiveness of liberalization is not the same every country within the EU. The regulatory regimes in Germany, the Netherlands, and the UK are usually viewed as relatively pro-competitive, being that they place heavy pressure on incumbents. In some cases, there is not complete separation of regulatory functions and the state ownership of the incumbent (e.g. Belgium and France). It is sometimes argued that the French regulators are somewhat biased in favor of the incumbent. In Italy regulation implementation has come about only very recently.

A search to improve welfare will also comprehend and try to attain price reduction (affordability), as for example, that AT&T case in the US, when the corporate giant was divided into other seven smaller companies, the prices were supposed to fall. However it was not true as the evidence showed by Economides on his working paper, in which a decline in prices was not substantially large, but rather was possible due to technological change and cost decreases.

It should also be pointed out *a priori* and as result of several empirical works, that it is not clear if intervention of regulation by a regulator is needed or if the existing rules and institutions to enforce competition policy are sufficient to guarantee a proper functioning of the market.[[51]](#footnote-51) But nevertheless some economic literature has identified situations in which access price regulation, as an example of an economic-regulatory approach, seems desirable, even in the case of mature competition in network industries.[[52]](#footnote-52)

In this specific industry, the predominant price flexibility regulatory policy has been observed since 1984 (after AT & T divestiture), as mentioned earlier, in the way of price caps. This is partly due to the dramatic changes and transformations that telecommunications industry has faced. Rate-of-return regulation has been disregarded. All this caused a significant change in ownership structure and the regulated interaction between carriers in the telecommunications industry. In addition to this the fast technological change that followed this phase had also a major impact on the method of long-distance transmission and the cost structure of the long-distance carriers. [[53]](#footnote-53)

Regulators in the US moved quite consistently from rate-of-return to price flexibility and better outcomes were seen, but not as large as expected. One of the rationales of pricing flexibility was that it should give the carriers (for long-distance calls telephony) some chance to respond in a timely manner to changes in the market and “thus promote” an efficient and regulated firm behavior. However it is quite interesting to know, as stated by Burnstein, that: “*it is important to recognize that reducing regulatory constraints provided only an ability to engage in price competition, not necessarily an incentive to do so.*” [[54]](#footnote-54) In this case, with disregard of the peculiar characteristics of the market, from the regulator’s perspective pricing flexibility was deemed an intermediate step that (a), provided the regulator a degree of price control sufficient to facilitate competition and influence the uncertain effects of their decision while, (b), protecting consumers from higher prices. This switch from rate-of-return to pricing flexibility was also because many times was almost impossible to support the argument, which at the same time supported rate-of-return policies. Typically it was assumed that the equilibrium monopoly price exceeded the existing rate-of-return’s regulated price.

I have to point out that it is much better that regulation exists in the market thn the absence of it, since lot of uncertainty is created in the market, without the presence of regulation. As a result of this, a great part of investment can be delayed or have sources flee to other industries. An efficient regulation passed under any legal form can be extremely favorable when applied at the right time. The lack of regulation can also cause the market to mature much slower. Therefore, even if a not so effective regulation exists, but at least the best possible practices for that society are in effect and regulators commit to it, then better outcomes could be seen.

Reasons for implementing regulation or alternative means of regulation will still be around as long as the State exists, were information within the industry is deemed to be asymmetric and were agencies within small markets will rely upon the regulatee’s information. Since regulation in some subjects is a very technical one, some areas may be ending up with a adverse selection problem. Then a recommendation would be that regulators should be aware at all times, that interest groups and lobbyists may present a not so reliable picture of what is really going on in an specific market.

## B. Regulation of the Energy Sector Industry

After the oil shocks of the 1970s, various governments were prone to intervene in order to control price and assure supply. Governments’ interventions were looked in the past as reactions to changing needs and opportunities in different countries, industries, and policy contexts. Preoccupation for external shocks was overwhelming, because many started to think economic growth seemed to have a turnover. Governments saw that a growth in scope an scale of regulatory interventions, started to reveal the hidden costs of low-quality and out-dated regulation. These factors were also seen in the oil shocks.

Price control and output (through out the OPEC) for oil and energy related commodities, were seen almost everywhere. The following chart can rapidly illustrate the trend observed in selected OECD countries:

***Chart 1.***

|  |  |  |  |
| --- | --- | --- | --- |
| **Country** | **Year(s)** | **Commodities or strategic areas** | Policy measures |
| USA | 1979 - 1982 | Oil  | Price deregulation |
| Canada | 1985 | Oil  | Price deregulation and lifted export controls |
| Canada | 1986 | Gas | Market deregulation |
| France | 1985 | Oil | Lifted control over retail prices |
| France | 1987 | Petroleum products | Liberalized the conditions for imports |
| Finland | 1988 | Petroleum products | Liberalized the conditions for imports |
| Australia | 1988 | Refiners and crude oil | Able to negotiate freely quantities and prices |
| New Zealand | 1988 | Motor spirit distribution | Main regulations removed |

Source: OECD report on Regulatory Reform, Privatization and Competition Policy, 1992

As for the European countries within the Union, many policy makers think that the energy sector does not offer a good example of positive and effective European integration, or at least it has not proved to be adequate. An important legal consideration would probably be that diverse energy matters for European Energy Policy, up and until mid 1980’s, were treated in three separate Treaties. [[55]](#footnote-55) Disperse regulation in the energy industry appears to be a common problem that affects other industries as well. This problem derives from poor regulation, creating poor outcomes and has even brought major energy crises from Auckland (New Zealand) all the way to California (OECD 2002).

It could be said that there was and will always be a general interest on pursuing common objectives within the energy industry, since energy fuels all industries. The energy industry itself is a sensitive issue. Political interests and private interests (each country’s interest) are present, putting pressure from one country to another at the time of addressing the policy, as energy industry is a sensitive issue. Thus it must be emphasized that energy strategy approaches are broadly similar, both in political and economic terms.[[56]](#footnote-56) The European Commission then has always thought to exercise to a large extent common goals and discipline, since several countries are eager in committing to it.

Nevertheless commitment has also has not appear to be enough, since planning at the state level seems also to be a not so more or less an important activity for the government. France for example, is a great representation of planning, while the Netherlands and United Kingdom have been less concerned about “preparing”. But in terms of planning or policy development we should always take into account that policy makers don not consider “energy policy” in an isolated manner, they combine it with other policies and economic goals. Even though it was mentioned earlier, that the Netherlands was not a great example for planning their economy, mixed and/or comprehensive policies are widely seen. The Dutch’s income tax deductions are available for those people commuting via public transport, therefore differential indirect tax rates favor the use of unleaded petrol. This clearly, illustrates that energy strategies are not complex when they work as energy policies alone, thus social welfare is maximized for different groups when they might probably aiming to avoid consumers paying higher gasoline prices, at the same time that better quality of air exists.

Despite the growth of European energy regulation, this industry has to deal more and more with other areas of concern, such as environment. But environment concerns are not the only ones to take into account. The commercial sphere should be attended as well, since this activity involves substantial amounts of money. Dougall and Wälde stated “*as any discussion of energy regulation requires an analysis of key legal/commercial concerns, notably financing issues, facing the industry, as commercial factors play a vital role, if not more so, than political factors in most energy developments.*”[[57]](#footnote-57)

Such policy mixtures not purely “energetic” has being the scenario for all governments in Ecuador. On average, oil revenues have accounted for approximately a 40% [[58]](#footnote-58) of the total government revenues, from 1992 to 2002. Thus, Ecuador has sustained its economy due to a high price per barrel in the past 3 years combined with a enhanced tight tax collection policy. For instance, a tax cuts in exchange for more cleaner air, will be rarely seen in Ecuador.

Also policy targets might be different, since one government might be willing to remove all barriers for free markets, while another government might likely try to pursue in keeping control of the so-called “strategic sectors of the economy”. What is certain is that the EU is looking to review: *investment* (more rational use of energy and alternatives to oil, such as coal); *energy pricing and taxation* (better approach); and, concern measures for instability (lack of supply)[[59]](#footnote-59) of the oil markets.[[60]](#footnote-60) Italians are devoted to pursue development of solar energy, which certainly scores higher in priority than for the British, meanwhile France and Germany seek to stabilize coal production.[[61]](#footnote-61)

Around the globe, policy makers search for economic targets with energy strategies. They try to achieve certain economic results and there is a time when normative development comes into action. Since this pattern is generally observed, thus oil and other energy raw materials determine, in a large scale, how well a county does, and effects on industry are easy to measure. We could say then that the implementation of an economic policy is the starting point from which to commence legal studies. Lawyers seem to be reluctant to accept this and may see it as a little to unusual, from the a legal point of view. Then the role of legal instruments seem purely formal or technical, rather that elaborated categories to run the energy business; consequently the policy instrument chosen will determine the form of the provisions, such as were in criminal cases the conduct is prohibited and as a result the sanction is enacted.

Despite the growth of European energy regulation, this industry has to deal more and more with other areas of concern, such as environment. But environment concerns are not the only ones to take into account, commercial spheres should be attended as well, since commercial activity involves substantial amounts of money. As such, “*as any discussion of energy regulation requires an analysis of key legal/commercial concerns, notably financing issues, facing the industry, as commercial factors play a vital role, if not more so, than political factors in most energy developments.*”[[62]](#footnote-62)

It is widely known that energy policies determine regulation, where law has always served for policy achievements and not the other way around. “*Law, … (including the constitution) should be seen as shaping the instruments of policy (and, a fortiori, the measures which operationalise those instruments) as well as serving them.*” [[63]](#footnote-63)

There are off course other instances were legal rules provides the authority for the government action, such as establishing the possibility for subsidies in a general way, in which the conditions will derive from certain policy objectives.

Much of the action taken by lawyers and policy makers who wish to enforce law enactments or any kind of provisions with different backgrounds (nationalities) will vary depending on “the way of doing things”. Anglo-Saxons prefer the use of procedural rules and safeguards as a guarantee of fair administrative action, in contrast to the French who rely on judicial review of administrative action on substantive grounds.[[64]](#footnote-64) Nevertheless much of economic rationales are an important content of regulation efforts no matter the way regulators think or their way of doing things.

The economic sector, doesn’t look different from other sectors, where differences in legal structure or in a way of using or interpreting law poses several difficulties in the way a policy would probably undergoes within the EU country members.

## C. Other visible regulation efforts

Many other regulation efforts could be depicted. It is useful to address one some problems arisen from transfrontier mobility of law, such as understanding specific issues, language barriers, way of things are done and go about, so on and so forth. As a matter of fact some might probably think that Ecuadorian is lagging behind other countries in terms of Public Procurement, but this is not really true. It might even be said that Ecuadorian lawyers can even contribute on possible solutions for problems seen in The Netherlands. The Dutchs have problems in the use and definition of public contracts and contracting authority. Thus “public procurement is becoming a world of its own”, as said by Wedekind states. Some assume efficiency will always result from open or international public procurement, in a wide sense, since more competitors can place its tenders, hence more options and better prices. Certainly this appears as an economic cost-benefit approach for the use of this public contracting foundation, but within all cases this is not true, as for example, corruption is able to deplete gains from savings at the time of awarding a contract.

**Public procurement**

Lets consider also that from an economic point of view, that public procurement for goods and services, accounted for 15% of the GDP of European Union. For the Netherlands, some issues involving public contracts[[65]](#footnote-65) might cause a filter or a inconvenient that will constraint the market since clear uncertainties are still around the Directives issued at Brussels. The Dutch have worked under private law sphere all problems arising from contracts entered with the State, even though public procurement has always been enlisted as a sub-category of what juridical sciences define by Public Law Up to 90% of the conflicts related to public works contracts and the award of contracts is decided by arbitration [[66]](#footnote-66)(Wedekind, 1995).

Within this field, some inconveniences derive from or create economic inefficiency. Procedures themselves can probably can increase costs and reduce consumer surplus, such as for example:

***a)*** Issues that would arise from interpretation of legal terms or conditions are a problem that can be often seen in this field. French argue that realistic interpretation must be used, while Dutch allege that teleological understanding is to be employed. In addition to such misunderstandings, local practitioners for public procurement, have plenty of work generated for them, earning money from this business, so practicioners are not interested in changing much of the law’s terminology and interpretation for this specific reason. As result of this, companies that are to put a tender or are close to be awarded with a contract, need to use this domestic lawyers, previously mentioned, to be able to rely on their knowledge (asymmetric information). Who benefits from this is quite clear, because lawyers in which country an international public procurement takes place, are not willing to sacrifice private interest for public interest; it is much on their side, such as in many Latin American countries.

***b)*** As for French and Dutch approach to deal with new foundations of public procurement within the EU (even harder for Dutch) some growing concerns have dealt with procedures of concession contracts. This form of contracts have amongst the several processes some “negotiated contracts”, name given primarily since there is some consultation with contractors, which appears a little bit awkward. As Dutch legal theorists and lawyers suspect this so called “negotiated procedure” or “preliminary consultation”[[67]](#footnote-67), could led to abuses, assertion with which I agree totally.

Public officials are eager to demonstrate to their superiors their good performance at the time when negotiations takes place. They would probably want to show how much money they have saved for the government disregarding issues like quality of products or post consumer service and maintenance. These problems are less likely to occur if tenders are presented in closed envelopes. Then it seems that this preliminary negotiation process pose a high risk for competition, while the authority can place bidders one against the other. “*In vulnerable markets, such as construction market or the information technology markets, in which there is strong competition, this is very risky for the subscribers, since the contracting authorities are in a position in which they can squeeze out the subscribers*”.[[68]](#footnote-68)

**Other brief examples of privatization of public services and utilities**

▪ Much of price-competition after privatization takes place, puts some players out of the market, such as the case of bus services in Britain in the 1980s and 1990s, which saw a few companies directly getting the benefits from taking over local bus companies city after city, as pointed out by Clarke. This takeovers, made many bus companies to sell their business and at the same time forced them to reduce fares almost to zero, if it was necessary. This led to the traditional market penetration; and, after many companies were out of the market, the ones taking over, raised the prices, acted as imperfect market players and thus tried to capture monopolistic rents.

▪ The aforementioned price squeeze was also seen in the airline industry in the United States, as referred by Clarke (2000) when serious problems were seen and even some plane’s crashes revealed that companies were not able to absorb the costs of takeovers and do suitable maintenance works on planes. Hence in the late 90s prices went up while the number of operators had fallen.[[69]](#footnote-69)

An OECD report on Regulatory Reform, Privatization and Competition Policy (1992) mentions that deregulation in the US aviation industry brought lower prices only for longer routes (not true for short relative flights), and development of a more efficient route network. Researchers though (Morrison and Winston) estimated that by the end of the 90s benefits to consumers were in the order of US $ 5.7 billion, distributed over all, but not for the short distance flights markets.

A concluding remark then would probably be, that regulators and lawyers should estimate the total expected costs and benefits of each regulatory proposal and of feasible alternatives, and should make the estimates available in accessible format to decision-makers. The costs of government action should be justified by its benefits before action is taken. It is worthwhile quoting one of OECD’s 1992 concluding remarks saying that: “*Where product markets are competitive, public and private enterprises perform more efficiently than when competition is absent*”.[[70]](#footnote-70)

### VI. CONCLUSIONS

Law that has or will have impact on the State Economyshould aim to take advantage of the theoretical achievements gained throughout time, in order to develop more efficient outcomes in the economy. It should use scarce resources much wisely, making the industries targeted to get the benefits of public policy, better off. Thus regulatory activities should be regarded as services to the community. Services in which better outcomes can be seen in terms of security for the society, stability, welfare distribution in a more equitable way, etc.

The inherent world related to regulation is very complex and there a vast source of sound studied policies that require support of a well-established agency or institution, but many private interests will always be around to destroy regulations’ rationales. A typical situation can even arise from agencies acting as regulators, resulting in agencies with limited power under typical statutory provisions.

It is quite clear that necessarily the government will always be involved in different regulation issues. Hence, there has to be a shift to a more open approach to Economic Analysis of Law in Civil Law tradition countries, since many of the ruling and regulation in this presently globalized atmosphere is taking place in different places around the world and certainly coming from supranational levels.

Even if some required data is not available for use at the time of policy design while working with economic models forecasts, we can be better off by using those provisional or forecasted models, rather than using common sense as an economic tool. It is preferable, at all times to use economic thinking, even in cases were you have imperfect information exists, because a model al least gives you a brief insight of possible risks and benefits. For that reason, complementary measures can be much faster to overcome any possible negative neglected issues. Then as times goes by it is necessary to work on a serious monitoring scheme that could allow policy makers to react and implement any corrective measures if needed, because not all policies are or would be plausible.

It should also be recalled, that the absence of regulation will create uncertainty and such can become troublesome. As a result of uncertainty investment has incentives to delay purring funds or even flee to other industries. Delayed investment can presumably also become less beneficial than if it would be, if it was stimulated at the right time. This situation can also cause that market to mature much slower, therefore even if best regulation can not be achieved at some point, but some sorte of regulation exists (and regulators can precommit to it), better outcomes would certainly would be seen, than with the lack of it.

Nevertheless, whatever participation the government takes, it would be desirable in any time to have a true and respectful guardian of the Constitution in a way to pursue the Rule of Law. It is of course the objective of this paper to acknowledge the influence on the economy from state intervention, but it is also imperative to recall on the importance of how much beneficial it is for businesses and others market players to seek for stability and security, even at the expense of giving away some of its constant expansion.

Those responsible in drafting or passing laws or any kind of of regulatory effort, should bear this recommendation in mind. Economics should be and indispensable tool used by regulators since society the sooner or later bear the consequences of regulation. Thus for Ecuador in the years to come, the outcome of privatization is not just “deregulation” but increased and clearer regulation, where a clear insight of Economic Analysis of Law will be useful for many regulators in this huge task.

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1. A particular situation is said to be *Pareto efficient* if it is impossible to change it so as to make at least one person is better off (on his own estimation) without making another person worse off, as defined by Robert Cooter and Thomas Ulen in their book, *Law and Economics* (Massachusetts: Adison – Wesley, 1997), p. 12. [↑](#footnote-ref-1)
2. Government or State, should be understood for didactical uses and in the context of this paper, in its broader sense, being that regulation is prepared and drafted in different instances of the public administration, and categories could be the followings: 1) self-regulators, 2) local authorities, 3) Parliament, 4) courts and tribunals, 5) central government departments, 6) regulatory agencies. This classification was the one mentioned by Robert Baldwin in his book Understanding Regulation, except for one that does not apply for Ecuadorian context. Regulation on the other hand can be regarded as: ***a)*** *Specific set of commands (where regulation involves promulgation of a binding set of rules to be applied by a body devoted to this purpose;* ***b)*** *A deliberate state influence (where regulation has a more broad sense and coves all state actions designed to influence industrial or social behavior);* **c*)*** *As all forms of social control or influence (where all mechanisms affecting behavior – whether state-derived or from other sources are deemed regulatory).* [↑](#footnote-ref-2)
3. Market should be understood in its general economic meaning, unless specified differently, as “the physical or not physical place were exchange takes place, where consumers and producers confluence will satisfy their needs, rendering them to the forces of demand and supply (in the world of zero transaction costs)” [↑](#footnote-ref-3)
4. Ronald H. Coase, *in The Firm, the Market and the Law* (London: The University of Chicago Press, 1997) p.117. [↑](#footnote-ref-4)
5. Ronal H. Coase, Ibidem 4, p. 118. [↑](#footnote-ref-5)
6. For Public Interest Theory see Gerard C. Rowe, “Economic theories of the nature of regulatory activity”, Ch. 6, *on Business Regulation in Australia*, (Sydney: CCH Australia Limited, 1984), p. 153 - 155. Also see Anthony I. Ogus, *Regulation:* Legal Form and Economic Theory, Chapter 3 (Oxford: Oxford University Press, 1994). As for Private Interest Theory, also see Anthony I. Ogus, and see Robert Baldwin and Martin Cave, *Understanding Regulation*, Oxford University Press, 1999, p. 21-25. [↑](#footnote-ref-6)
7. See George Gantzias, *The Dynamics of Regulation: Global Control, Local Resistance*, (England: Ashgate Publishing Ltd., 2001) p. 19. [↑](#footnote-ref-7)
8. Michael Clarke, *in Regulation: The social control of Business between Law and Politics*, (Great Britain: Macmillan Press Ltd., 2000), p. 12. [↑](#footnote-ref-8)
9. This particular issue is related directly withEngland specifically, relevant to previous reference, since many of these political and economical stakes took place in Britain as the symbol of industrialization, from a historical point of view. [↑](#footnote-ref-9)
10. Michael Clarke, Ibidem. 8, p.15 [↑](#footnote-ref-10)
11. Robert Boyer, “Is regulation theory an original theory of economic institutions?”, *in Regulation Theory*, Ch. 42 Edited by Robert Boyer and Yves Saillard (London: Routledge, 2001) p. 321 [↑](#footnote-ref-11)
12. Easiest to collapse since what normally happens is that Governments stand for big conglomerates (usually lending money directly or indirectly) in case of malfunction, intending to prevent unemployment. Thus the lessons learned in the South East Asia, during 1997 crisis recalled for the moral hazard lesson from the “*too big to fail*”.; i.e. Daewoo Corporation in South Korea. [↑](#footnote-ref-12)
13. Michael Clarke, Ibidem. 8 p. 38 [↑](#footnote-ref-13)
14. Lawyers is a profession that could be regarded as the most influential and with close links to politics and involved with policy-making. [↑](#footnote-ref-14)
15. Stephen Elkin quoted by Gantzias, Ibidem 7. [↑](#footnote-ref-15)
16. Robert Boyer, Ibidem 11, p. 332. [↑](#footnote-ref-16)
17. Owning, refers in this quotation to the power that the government used to exercise specially when public utilities (as state-own companies) where own and run by the state. Nevertheless this work does not stress out the importance or impact on ownership, rather give some brief insights on outcomes as pointed out later in this document. Numerous studies regarding public or private ownership effects have being presented through out time. Some of them show that there is superior performance by public enterprises, while others, suggest that private ones do better. Empirical findings could probably show that unit costs in public firms are higher, whether other research studies as Millward, quoted by OECD’s reports finds “*no broad support for private enterprise superiority*.” [↑](#footnote-ref-17)
18. Clare Hall, Colin Scott and Christopher Hood, *Telecommunications Regulation: Culture, chaos and interdependence inside the regulatory process*, (London: Routledge, 2000), p. 15. [↑](#footnote-ref-18)
19. Jorge Witker, *Derecho Económico*, (México D.F.: McGraw Hill / Interamericana Editores S.A., 1997), p. 7., unofficial translation by Jorge Cevallos. [↑](#footnote-ref-19)
20. Esin örücü, “A theoretical framework for Transfrontier Mobility of Law”, *in Transfrontier Mobility of Law* (The Hague: Kluwer Law International, 1995), p. 18. [↑](#footnote-ref-20)
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22. Esin örücü, Ibidem 20. p. 18. [↑](#footnote-ref-22)
23. Morris M. Kleiner and Robert T. Krudrle, “Does Regulation improve outputs and increase prices?: The case of dentistry.” Working Paper Series, Cambridge: National Bureau of Economic Research Inc., 1997), p.26. [↑](#footnote-ref-23)
24. Note that advocates of licensing stand for the argument that this form of regulation (intervention - market failure) is seen as a way of further enhancing the formation of human capital, which is perceived as being the primary method to enhance quality of services. As quoted by Kleiner and Krudrle, is that restrictive licensing is an unnecessary barrier on the entry of individuals to occupations that serves mainly the interests of practitioners, with little or no benefit to the public (Shepard, 1978). It is also said as well as referenced, that main effects are assumed to drive up prices with a potentially negative impact on the quality of services received by consumers (Friedman and Kuznets, 1945). For such is the case of dentistry research work outputs that can probably be measured in terms of quality of adjustments to inputs to see better service outputs. As for example we may use productivity equations, that will let us know the relation of price to attempts needed to cure a tooth and/or materials involved. [↑](#footnote-ref-24)
25. See footnote 1, for categories of regulation bodies. [↑](#footnote-ref-25)
26. In the United States for example, clearly defined agencies are in charge of regulation of the traditional defined public utilities. This regulation come is commonly based on statutes and ordinances from local, state or federal governments. For example the Federal Communications Commission (FCC) or the Federal Energy Regulatory Commission (FERC), clearly control this areas. [↑](#footnote-ref-26)
27. Robert Baldwin and Martin Cave, on Understanding Regulation, (Oxford: Oxford University Press, 1999), p. 69. [↑](#footnote-ref-27)
28. Robert Balwin and Martin Cave, Ibidem 27, p. 70. [↑](#footnote-ref-28)
29. Robert Boyer, Ibidem 11. p. 332 [↑](#footnote-ref-29)
30. OECD, Regulatory Policies in OECD Countries, “From Interventionism to Regulatory Governance” for the Review of Regulatory Reform, Paris, 2002, p.22. [↑](#footnote-ref-30)
31. Mark W. Frank, *The Impact of Rate-of-Return Regulation on Technological Innovation*, (Aldershot: Ashgate Publishing Limited, 2001), p. 10. [↑](#footnote-ref-31)
32. David E. Burnstein, “An examination of market power in the interstate long-distance telephone service markets: evidence from a natural experiment”, in Journal of Law and Economics, Vol. XLVIII, (Chicago: The University of Chicago, April 2005) p. 145. [↑](#footnote-ref-32)
33. See Robert Baldwin and Martin Cave, *Understanding Regulation*, (Oxford, 1999), ch. 6. [↑](#footnote-ref-33)
34. Robert Baldwin, Ibidem 11. p. 77. [↑](#footnote-ref-34)
35. OECD, Ibidem 30, p.20. [↑](#footnote-ref-35)
36. OECD, Ibidem 30, p. 137. [↑](#footnote-ref-36)
37. This consideration completes my own suggestions and ideas, which were stressed very similarly on the OECD Report 2002. [↑](#footnote-ref-37)
38. A paper written in London by G. Majone, quoted by Robert Baldwin, Understanding Regulation: Theory, Strategy and Practice, (London: Oxford University Press, 1999). [↑](#footnote-ref-38)
39. Paul de Bijl and Martin Peitz, *Regulation Entry into Telecommunication Markets*, (Cambridge: Cambridge University Press, 2002), p. 15. [↑](#footnote-ref-39)
40. Also as Bijl and Peitz point out, because of large fixed cost of building a network, telecommunications networks providing voice telephony were traditionally viewed as natural monopolies. [↑](#footnote-ref-40)
41. As de Bijl and Peitz describe, although entry in the Dutch market has been substantial, KPN Telecom (Dutch monopolistic operator) still had large shares in several markets. For instance, KPN’s market share in 1999 was 80 to 95 percent in the markets for national telephony and calls from fixed phones to mobile phones, 90 to 99 percent in the market for local telephony, and 85 percent in the consumer market for international telephony. [↑](#footnote-ref-41)
42. European Commision Review, 2000**.** [↑](#footnote-ref-42)
43. Paul de Bijl and Martin Peitz, Ibidem 32., These liberalizations have being accompanied by partial of full privatization of incumbent operators. The fundamentals of European regulation are defined in the so-called open network provision (ONP) framework, which establishes the need for harmonized access conditions in line with principles of objectivity, transparency, and non-discrimination. In practice these principles entail the operators apply similar access terms and conditions to all operators offering similar services, including their own activities. Also, interconnection agreements must be available to all interested parties: incumbents are required to meet all reasonable requests for access. In principle, the terms and conditions for access are to be negotiated by the operators. In case of disputes, they can ask the national regulatory authority for help. [↑](#footnote-ref-43)
44. Universal service is defined by European legislation as a minimum number of services (including voice telephony) of a certain quality, available to all consumers no matter where they live. It requires that the national regulatory authorities in the member states make sure that in each geographic area, al least one operator provides basic services. In the past as it has been seen in many countries such as Ecuador too, under the monopoly situation, cross-subsidies were used to guarantee affordable prices for different telephony services. For example local calls were subsidized by higher revenues originating from long-distance calls. Even in the US, because of the industry’s structure, some local operators have to be compensated for providing universal service and a complicated mechanism for universal service funds is implemented. [↑](#footnote-ref-44)
45. Paul de Bijl and Martin Peitz , Ibidem 36, p. 17 [↑](#footnote-ref-45)
46. Paul de Bijl and Martin Peitz , Ibidem 36, p. 250. [↑](#footnote-ref-46)
47. As depicted by Armstrong, quoted by Bijil and Peitz. [↑](#footnote-ref-47)
48. David Lassner, “Global Telecommunications Standardization in Transition”, in Telecommunications: A bridge to the 21st Century, Edited by Meheroo Jussawalla (Amsterdam: Elsevier Science B.V., 1995), p. 151. [↑](#footnote-ref-48)
49. David Lassner, Ibidem 45, p. 166 [↑](#footnote-ref-49)
50. For a complete understanding of the whole regulatory process (as an inside story) within the Office of Telecommunications in Great Bretain, see Clare Hall, Colin Scott and Christopher Hood, *Telecommunications Regulation:Culture, chaos and interdependence inside the regulatory process*,( London: Routledge, 2000). [↑](#footnote-ref-50)
51. Paul de Bijl and Martin Peitz , Ibidem 36, p. 26. [↑](#footnote-ref-51)
52. Any costs or much properly called “sunk costs” are not discussed in this paper, not because of a lack of importance to illustrate economic impacts of those in the telecommunications market, but because it is an issue that should be treated separately. These total or partial sunk costs could consist on i.e. advertising campaigns, construction of a whole back-bone network for long distance calls, avoidance of deterrence strategy set by an incumbent, access licenses or prices, which are not discussed here neither, since it is a complex topic for which several chapters can be devoted to it. [↑](#footnote-ref-52)
53. In the United States, in the early 1980s, digital fiber-optic transmission began replacing analog microwave and coaxial cable transmission. This conversion resulted in a significant increase in the capacity of the long-distance network and contributed to the volatility and variation in the competing long-distance carriers’ production costs. [↑](#footnote-ref-53)
54. David E. Burnstein, Ibidem 32, p. 153. [↑](#footnote-ref-54)
55. Daintith Terence and Leigh Hancher, *Energy Strategy in Europe: The legal framework,* (Berlin: European University Institute, W. de Gruyter, 1986), p. 1. [↑](#footnote-ref-55)
56. To see more of strategy approaches seeDainthith Terence and Leigh Hancher, *Energy Strategy in Europe: The legal framework,* (Berlin: European University Institute, W. de Gruyter, 1986). [↑](#footnote-ref-56)
57. David S. Mac Dougall, and Thomas W. Wälde, *European Community Energy Law*, (London: Graham & Trotman / Martinus Njhoff, 1994), p. 10. [↑](#footnote-ref-57)
58. http://www.eumed.net/cursecon/ecolat/ec/lavm-petr.htm [↑](#footnote-ref-58)
59. Concerns over security of supply are everywhere, nevertheless the European Commission has also endorsed the introduction of “commercial criteria” as a future guideline for the gas and electricity sectors; thus trying to maintain a balance or the necessary links among supply (public interest obligations) and economic considerations as suggested by Mac Dougall and. Wälde, in their book, *European Community Energy Law*, (London: Graham & Trotman / Martinus Njhoff, 1994) [↑](#footnote-ref-59)
60. We have seen that up to date Germany and other countries suffer from shortages in oil production, where gasoline per liter costs on average € 1,09 as shown by DW TV/Journal (Deutch Welle) on “Journal” on 21-06-05. It seems that Italy has come into recession and Germany is experiencing a fall of its Gross Domestic Product (GDP) for the second trimester of 2005. The evolution of French economy also is worrying and only Spain keep economic growth as shown in OPEP paper presented in www.diariodenavarra.es/actualidad/noticia.asp?not=2005061702075605&dia=20050617&seccion=economia. [↑](#footnote-ref-60)
61. Daintith Terence and Leigh Hancher, Ibidem 55, p. 41 [↑](#footnote-ref-61)
62. David S. Mac Dougall, and Thomas W. Wälde, Ibidem 54*.*, p. 10. [↑](#footnote-ref-62)
63. Daintith Terence and Leigh Hancher, Ibidem 55, p. 8. [↑](#footnote-ref-63)
64. Daintith Terence and Leigh Hancher, Ibidem 55, p. 9. [↑](#footnote-ref-64)
65. The Netherlands, have not a long tradition in the public procurement area, as France or Belgium Many supply contracts of goods and services to authorities or governmental institutions (*organisms de droit public*) are not covered by the umbrella of public law, such as it is in France, instead they were by private law. France and Belgium have had much influence in setting the Directives for the EU on this area. For further historical and primary development over public procurement, see Will Wedekind, “The Mobility of Law in the Field of Public Procurement”, in *Tranfrontier Mobility of Law* (The Hague: Netherlands: Kluwer Law International , 1995), p. 19-26. [↑](#footnote-ref-65)
66. In Ecuador, arbitration takes time, since any claim against contracting authority, derived from such contracts will have to have a written approval of the Attorney General such as it is stated in the Arbitration and Mediation Law published in the Official Gazette No. 145 of September 4, 1997, and its amendments published in the Official Gazette No. 532 of February 25, 2005. This written approval can take up to 15 business days to be issued, hence it is time consuming and uncertainty results from the this process. [↑](#footnote-ref-66)
67. Ecuadorian law “prohibits” any kind of contact with the parties in terms of revealing any information, since it could be regarded as preferential treatment or privileged information that could prevent a real competition, thus enhance corruption. [↑](#footnote-ref-67)
68. Will Wedekind, “The Mobility of Law in the Field of Public Procurement”, *in Transfrontier Mobility of Law* (The Hague: Kluwer Law International, 1995), p. 27. [↑](#footnote-ref-68)
69. For additional examples in different OECD countries for different industries (Energy, Transportation, Post and Telecommunications, Financial Services, Radio and Television Broadcasting) during 1980s, see *Regulatory Reform, Privatization and Competition Policy*, (Paris: OECD, 1992), p.23-28. [↑](#footnote-ref-69)
70. OECD, *Regulatory Reform, Privatization and Competition Policy,* (Paris: OECD, 1992). p.29. Some OECD studies had shown that where product competition market is absent, or partial, a more complex picture emerges. Studies in sectors as different as electric utilities en the US and services in Germany, has demonstrated no real difference in efficiency terms by public or private firms. [↑](#footnote-ref-70)