

**Law and Politics in the European Union**  
**The Europeanization of Market Regulation and its Discontents**

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Abstract

This paper examines the impact of decisions by the European Court of Justice (ECJ) on processes of market liberalization in the European Union (EU). Research on national responses to European legal obligations in the telecommunications and electricity sectors concentrates on France, Germany, and the United Kingdom. I argue that political responses to parallel legal obligations resulted in distinct regulatory outcomes. Traditionally regulated on a national level as public services, telecommunications and electricity markets offered different opportunities and costs. Distinct patterns of political mobilization among concentrated, intensely interested actors encouraged a wide-ranging program of telecommunications liberalization but only a limited competitive regime for electricity.

The liberalization of the European telecommunications industry is widely cited as an instance of legally induced policy reform that represents a dramatic increase in supranational control over economic regulation.<sup>1</sup> In this story, the Commission and Court of Justice manipulated legal interpretation to open the telecommunications field to competition, forcing national representatives in the Council of Ministers to harmonize a progressively liberal framework for an internal market in telecommunications and abandon exclusive national systems of provision. Yet the Commission's attempt to use the same legal basis, justified by ECJ jurisprudence, failed to open electricity markets. Instead, the Commission retreated to an intergovernmental process of reform that substantially diluted the application of competition rules to the electricity sector.

The application of the European competition regime was controversial in both sectors: the liberalization of Europe's telecommunications sector necessitated confrontations with monopolistic public enterprises that were uncompetitive by international standards, and the liberalization of European electricity provision invited a face down with enterprises that preferred exclusive provision in captive markets over expansion into new markets. Furthermore, in both fields, industrial restructuring associated with the introduction of competition threatened the job-security of well organized public sector workers in an era of high unemployment and recession.

In this paper I will argue that variation in the concentration and intensity of interests affected by liberalization in each sector contributed to these distinctive policy

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<sup>1</sup>David Gerber, "The transformation of European Community Competition Law," *Harvard International Law Journal* 35 (1994), 138-141; Stephen Wilks and Lee McGowan, "Disarming the Commission: the debate over a European cartel office," *Journal of Common Market Studies* 32 (1995), 261; Volker Schneider, Godefroy Dang-Nguyen, and Raymund Werle, "Corporate actor networks in European policy-making: harmonizing telecommunications policy," *Journal of Common Market Studies* 32 (1994), 483, 489-491; S.K. Schmidt, "Die wettbewerbsrechtliche Handlungsfähigkeit der Europäischen Kommission in staatsnahen Sektoren," Ph.D. Dissertation, Universität Hamburg, 1997. Although these authors do not all attribute change exclusively to legal mechanisms, the basic assumption that underlies these works is that legal mechanisms are available to compel reform.

outcomes. Furthermore, I will demonstrate that member states retained a substantial degree of influence over both policy processes. The competing interests associated with liberalization foreclosed the capacity of national governments to either actively evade or passively accept legal obligations. Failing to block the introduction of competition outright, member states have been able to exercise influence over the pace and content of policy reform in each sector.

Section I discusses the legal basis that justifies and requires the liberalization of European markets in telecommunications and electricity. Section II specifies the competing positions of those affected by efforts to open these sectors to competition. Section III traces the impact of this political response on the development of European competition policy in these two fields.

### **I. Legal Innovations: Article 90 and Liberalization**

Article 90 prohibits national measures that are contrary to Treaty rules with respect to "public undertakings and undertakings to which Member States grant special or exclusive rights."<sup>2</sup> Article 90 subjects state enterprises and state-sanctioned monopolies to European competition law, insofar as competition rules do not obstruct their capacity to provide "services of general economic interest." Services of general economic interest typically include obligations to provide universal service. Restrictions on competition granted to meet these obligations must not affect trade "to such an extent as would be contrary to the interests of the Community."<sup>3</sup> Finally, Article 90 grants the Commission competence to "address appropriate directives or decisions to Member States" in order to ensure its application.<sup>4</sup> Article 37 EEC includes parallel obligations, requiring member

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<sup>2</sup>Article 90, paragraph 1, *Treaty Establishing the European Economic Community* (25 March 1957).

<sup>3</sup>Article 90, paragraph 2, EEC.

<sup>4</sup>Article 90, paragraph 3, EEC.

states to abolish restrictions on the free import of goods that compete with state monopolies of a commercial character.<sup>5</sup>

These rights and obligations under the Treaty of Rome attracted little attention prior to the entry into force of the Single European Act (SEA) in 1987. In 1971 the European Parliament requested that the Commission prepare directives and decisions to eliminate distortions in competition between public and private enterprises.<sup>6</sup> The Commission responded by issuing a directive to increase transparency in the financial relations between member states and their public enterprises in 1980. This directive required member states to reveal financial information associated with state aids investigation and did not extend the application of competition rules.<sup>7</sup> Despite the limited scope of this "transparency directive," France, Italy, and the United Kingdom challenged the Commission's competence to issue the directive unilaterally before the ECJ. The Court of Justice upheld the Commission's right to adopt directives independently under Article 90 in 1982,<sup>8</sup> and the Commission extended the application of the directive in 1985<sup>9</sup> and began to adopt individual decisions under Article 90 as well.<sup>10</sup>

From 1974 to 1985, ECJ case law that identified abuses of dominant positions by public monopolies provided further legal justification to extend European competition

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<sup>5</sup>Article 37 EEC and confirmed in ECJ jurisprudence, *Pubblico Ministero v Manghera* C-59/75, 1976.

<sup>6</sup>*Official Journal of the European Communities* C-66, 1971.

<sup>7</sup>Commission Directive 80/723/EEC, *Official Journal of the European Communities* L-195 (29 July 1980), 35.

<sup>8</sup>*France, Italy, and the United Kingdom v the Commission* C-188/80, 1982.

<sup>9</sup>Commission Directive 85/413/EEC, *Official Journal of the European Communities* L-229 (28 August 1985), 20.

<sup>10</sup>Commission Decision 85/276/EEC of 24 April 1985, *Official Journal of the European Communities* L-152 (11 June 1985), 25; Commission Decision 87/359 EEC of 22 June 1987, *Official Journal of the European Communities* L-194 (15 July 1987), 28; Commission Decision 90/16 EEC of 20 December 1989, *Official Journal of the European Communities* L-10 (12 January 1990), 47; Commission Decision 90/456/EEC of 1 August 1990, *Official Journal of the European Communities* L-233 (26 August 1990), 19; Commission Decision 94/119/EEC of 21 December 1993, *Official Journal of the European Communities* L-55 (26 February 1994), 52. The Netherlands challenged Commission Decision 90/16 EEC and lost before the ECJ, *Kingdom of the Netherlands and Others v Commission of the European Communities* C-48, 66/90, 1992. For a discussion of the Commission's independent competence to issue directives and the history of Article 90 actions, see Christian Hoceped, "Les directives Article 90 Paragraphe 3: une espèce juridique en voie de disparition?" *Revue des Affaires Européennes* No. 2 (1994), 49-53.

rules to public enterprises and enterprises granted exclusive rights under national law.<sup>11</sup>

In response to complaints about exclusive rights and in support of the SEA effort to create an internal market, the Commission prepared Article 90 directives to apply European competition rules to state owned or state-sanctioned monopolies. In contrast to its narrowly targeted application of Article 90 in the past, the Commission used Article 90 directives to exercise broad regulatory powers after 1988, demanding the end of exclusive rights conferred at the national level.<sup>12</sup>

Member states opposed the unilateral exercise of regulatory authority by the Commission and challenged the Commission's "legislative" use of Article 90 before the ECJ. The Court of Justice upheld the legal right of the Commission to adopt directives with a regulatory character under Article 90,<sup>13</sup> and continued to limit the capacity of public enterprises to restrict trade and competition in preliminary rulings from 1991 to 1993.<sup>14</sup>

Yet the ECJ complicated the legal situation by recognizing legitimate exceptions to the application of competition rules in preliminary rulings in 1993 and 1994. In its

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<sup>11</sup> *Sacchi* C-155/73, 1974; *Italy v Commission* (British Telecom) C-41/83, 1985; and *Centre Belge d'Études de Marché-Télé-marketing SA v Compagnie Luxembourgeoise de Télédiffusion SA* (CBEM-Telemarketing v CLT) C-311/84, 1985. See George Bermann, et al, *Cases and Materials on European Community Law*, (St. Paul: West, 1993), 881-882 for a specific discussion of the legal precedents developed in these cases.

<sup>12</sup> Commission Directive 88/301/EEC of 16 May 1988, *Official Journal of the European Communities* L-131 (27 May 1988), 73; Commission Directive 90/388/EEC of 28 June 1990, *Official Journal of the European Communities* L-192 (24 July 1990), 10; Commission Directive 94/46/EC of 13 October 1994, *Official Journal of the European Communities* L-268 (19 October 1994), 15; Commission Directive 95/51/EC of 18 October 1995, *Official Journal of the European Communities* L-256 (26 October 1995), 49; Commission Directive 96/2/EC of 16 January 1996, *Official Journal of the European Communities* L-20 (16 January 1996), 59; Commission Directive 96/19/EC of 13 March 1996, *Official Journal of the European Communities* L-74 (22 March 1996), 13; July 1991 draft directives on "Completion of the Internal Market in Electricity and Gas" and "Commission Directive on Competition in the Markets for Natural Gas." For further discussion of the Commission's intention to use Article 90 in the electricity sector, see Section III on policy responses.

<sup>13</sup> *French Republic v Commission of the European Communities* C-202/88, 1991 and *Kingdom of Spain and Others v Commission of the European Communities* C-271, 281, 289/90, 1992.

<sup>14</sup> *Régie des télégraphes et des téléphones v GB-Inno-BM SA* C-18/88, 1991; *Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* C-260/89, 1991; *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* C-179/90, 1991; *Klaus Höfner & Fritz Elser v Macrotron GmbH* C-41/90, 1991; *Christian Poucet v Assurances générales de France (AGF) et Caisse mutuelle régionale du Languedoc-Roussillon (Camulrac)* and *Daniel Pistre v Caisse autonome nationale de compensation de l'assurance vieillesse des artisans (Cancava)* C-159-160/91, 1993.

*Corbeau* ruling,<sup>15</sup> the Court of Justice accepted that a restriction of competition may be justified where it is necessary to ensure the performance of public service obligations. The ECJ reiterated this position in the *Almelo* case,<sup>16</sup> drawing attention to the competing demands of the "general economic interest" clause and the restriction on trade in Article 90, paragraph 2:

Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.<sup>17</sup>

The Court left the criteria for the "proportionality test," which balances the general economic interest against the damage done by the restriction of trade, to the national court that had referred the question.<sup>18</sup> At the same time that it resurrected an escape clause within the Treaty, the ECJ confirmed that electricity is a good in *Almelo*, subjecting the sector to Article 37 which requires the "adjustment" of state monopolies to eventual import competition. In verifying that electricity is a good, the Court put prohibitions against import restrictions on the strongest legal basis. By contrast, liberalization in telecommunications services lacks the explicit obligations present for goods under Article 37 EEC.

A classic example of judicial decisionmaking, the Court of Justice handed down a decision that allowed all parties to claim victory despite their fundamentally incompatible positions on electricity liberalization. The Commission claimed that the ruling suggests

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<sup>15</sup>*Procédure pénale v Paul Corbeau* C-320/91, 1993.

<sup>16</sup>*Gemeente Almelo and Others v Energiebedrijf Ijsselmij NV* C-393/92, 1994.

<sup>17</sup>Article 90, 2 EEC.

<sup>18</sup>A European competition official chided the ECJ for "hiding behind the national court," interview Commission Directorate General IV, Brussels, 30 May 1995. A European legal advisor on electricity expected that the ECJ was lenient, in not denouncing a restriction outright, because the restriction was imposed by one undertaking on another, rather than being imposed by national legislation. An individual restrictive agreement between undertakings is less threatening to the operation of the internal market than blanket restrictions imposed by member states on all undertakings, interview with a legal advisor and an administrator of energy policy, Commission Directorate General XVII-A, Brussels, 14 September 1995.

that the introduction of a certain degree of competition in the energy sector is compatible with public service obligations, which it always intended to safeguard in any case.<sup>19</sup> The French praised *Almelo* as a balanced, pragmatic interpretation of Article 90 that respects the principle of subsidiarity enshrined in the TEU.<sup>20</sup> Such balancing of competing Treaty goals before national courts, in the absence of specific criteria to determine whether particular restrictions on trade and competition are proportional to their public service goals, facilitates the development of divergent outcomes across member states.

The Commission's adoption of Article 90 directives and the ECJ's legitimization of this independent regulatory power represent a novel direction in European competition policy. The Commission traditionally focused on private infringements of competition rules and concentrated its enforcement actions against private enterprises.<sup>21</sup> Changing its priorities, the Commission argued in 1990 that "...at the present stage of economic integration in the Community the barriers are greatest in markets currently subject to state regulation."<sup>22</sup> In its 1994 Competition Report, the Commission associated systems of exclusive rights under national regulation with higher prices, insufficient technological innovation, and slow employment growth.<sup>23</sup> David Gerber claims that this orientation represents "... a dramatic shift in the system's substantive focus... away from its traditional concerns with private conduct and toward the problem of government interference with the competitive process."<sup>24</sup>

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<sup>19</sup>European Commission Spokesman's Service, "La Cour de Justice se prononce sur l'applicabilité des règles de concurrence au secteur de l'électricité," Brussels (29 April 1994a).

<sup>20</sup>Interviews with two legal advisors in the Direction du Gaz, de l'Électricité, et du Charbon, Paris, 21 February 1996 and an administrator of policy on energy harmonization, Secrétariat général de comité interministériel pour les questions de coopération économique européenne, Paris, 18 October 1995.

<sup>21</sup>Wilkes and McGowan 1995, 261, 264 and Gerber 1994, 137-138.

<sup>22</sup>Commission, *Twentieth Report on Competition Policy* (Luxembourg: Office for Official Publications of the European Communities, 1990), 50.

<sup>23</sup>Commission, *Twenty-third Report on Competition Policy* (Luxembourg: Office for Official Publications of the European Communities, 1994a), 31.

<sup>24</sup>Gerber 1994, 137.

This extension of competition law also constitutes a major shift in relations between member states and supranational institutions. The European competition regime gives the Commission exceptional autonomy: Articles 85-94 of the Treaty of Rome and Regulation 17 of 1962 enable the Commission to investigate, codify, exempt and fine. The only restraints include the need to achieve Commission endorsement and to defend challenges before the ECJ.<sup>25</sup> Traditionally wielded primarily against private enterprise, the linkage of competition law with public enterprise via Article 90 subjects national governments to supranational control at its most autonomous.

The application of competition law under Article 90 can oblige member states to eliminate all exclusive rights that directly or indirectly inhibit trade. Once the Commission prohibits exclusive rights in a field, all interested parties can enter this market confident that any national efforts to enforce restrictive government regulations will be considered a violation of the Treaty. Therefore Article 90, subject exclusively to the authority of the Commission and ECJ, can immediately open markets for competition.

Unanticipated and unwelcome for member states, liberalization under Article 90 is nonetheless universally accepted to be lawful. The Commission and member states alike recognize the legal status of supranational regulatory authority under Article 90. Utilized multiple times in the telecommunications sector, the Commission consistently insisted on its legal capacity to use this tool in other sectors, including electricity.<sup>26</sup> And member states, even those most opposed to electricity liberalization under Article 90 agreed: French officials recognized the Commission's capacity to use Article 90

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<sup>25</sup>Wilks and Mc Gowan 1995, 261.

<sup>26</sup>Commission 1994a, 30-31 and an interview with an administrator of competition policy related to energy, Commission Directorate General IV-C, Brussels, 27 September 1995. A legal advisor on telecommunications competition policy, Commission Directorate General IV-B, Brussels, 30 May 1995, observed that an energy directive required only the substitution of the words in existing telecommunications directives from "telecommunications" to "electricity".



directives to open the electricity sector, accepting that "juridiquement, c'est claire, c'est possible."<sup>27</sup>

Yet legal recognition need not coincide with political acceptance. In response to a directive to open markets in telecommunications services under Article 90, a Member of the European Parliament (MEP) exclaimed to the Commission, "Vous avez juridiquement raison, mais politiquement tort."<sup>28</sup> Member states and MEPs alike are uniformly hostile to the Article 90 procedure, which can exclude their input entirely. Yet national governments, MEPs, public and private enterprises, and labor unions have contending interests relative to the Commission's promotion of liberalization across sectors. As a result, the use of Article 90, although legally justifiable across sectors, has different political consequences across fields. The following two sections demonstrate that the offensive legal procedure was politically tolerable when its content was broadly acceptable, while that same legal mechanism became fundamentally illegitimate once its substance defied all consensus.

## II. Aggregation of Interests

The Commission's effort to extend the European competition regime to nationally regulated service monopolies in telecommunications and electricity inspired conflict among concentrated, resourceful actors with intense interests. National governments and their public enterprises, corporate consumers, aspiring entrants, and labor unions responded to Commission initiatives with competing demands in both sectors. Yet sectoral distinctions in asset specificity, degree of certainty about policy consequences, and organization of labor relations created a more intense, cohesive base of opposition to liberalization of electricity. In this section, I specify the policy preferences of contending

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<sup>27</sup>"Legally, it's clear, it's possible." Interviews with two legal advisors in the Direction du Gaz, de l'Électricité, et du Charbon (DIGEC), Paris, 21 February 1996 and a legal advisor in the Direction Générale des Postes et Télécoms, Paris, 22 February 1996.

<sup>28</sup>"Legally, you are right, but politically, you are wrong." "Debates of the European Parliament," *Official Journal of the European Communities: Annex* No. 3-381 (11 October 1989), 115.

actors. The following section indicates how these competing interests influenced the policy process and regulatory outcome in each field.

#### A. Telecommunications

The Commission developed an interest in European telecommunications policy in response to US and Japanese advances in information technologies. Associating the information industry with general economic competitiveness, the Commission sought greater European innovation across this field, including the telecommunications sector. Focused on the development of harmonized technical standards and a common infrastructure at the European level during the 1970s and early 1980s,<sup>29</sup> the Commission began to advocate the introduction of competition as a means to promote the telecommunications industry in 1984. In its 1987 Green Paper on telecommunications, the Commission advocated the liberalization of telecommunications terminal equipment (e.g. telephones, facsimile machines) and value-added telecommunications services (e.g. high speed data transmission, but not basic voice telephony).<sup>30</sup> The Commission eventually targeted all areas of telecommunications for full liberalization, including cable networks, mobile communications, and traditional infrastructure for voice telephony.<sup>31</sup> Article 90 directives issued by the Commission between 1988 and 1996 ordered the opening of each of these markets to competition.<sup>32</sup>

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<sup>29</sup>For an explanation of the development of cooperative ventures in European telecommunications, see Wayne Sandholtz, *High-Tech Europe* (Berkeley: University of California Press, 1992).

<sup>30</sup>Commission, *Towards a Dynamic European Economy: Green Paper on the Development of the Common Market for Telecommunications Services and Equipment*, COM (87) 290 final, 1987.

<sup>31</sup>For detailed discussions of the history of European telecommunications policy see Schneider, Dang-Nguyen, and Werle 1994; Claus-Dieter Ehlermann, "Telekommunikation und Europäisches Wettbewerbsrecht," *Europarecht* No. 2 (1993), 134-149; Sa'id Mosteshar, *European Community Telecommunications Regulation* (London: Graham & Trotman, 1993); Herbert Ungerer, *Telecommunications in Europe* (Luxembourg: Office for Official Publications of the European Communities, 1989); J.P. Chamoux, *Télécoms: La fin des privilèges* (Paris: Presses Universitaires de France, 1993); J.P. Simon, "Vers une réglementation européenne unifiée? Généalogie de la réglementation des télécommunications," *Réseaux* 66 (1994), 119-136; Josef Esser and Ronald Noppe, "Private muddling through as a political programme? the role of the European Commission in the telecommunications sector in the 1980s," *West European Politics* 19 (1996), 553-558.

<sup>32</sup>Commission Directives 88/301/EEC, 94/46/EC, 90/388/EEC, 94/46/EEC, 95/51/EC, 96/2/EC, and 96/19/EC.

Member states were not prone to embrace European level action in the telecommunications field with enthusiasm. Traditionally associating telecommunications with internal security and domestic social and economic goals, member states historically pursued national strategies and considered telecommunications to be a field that is exempt from European coordination.<sup>33</sup> Wayne Sandholtz demonstrates that member states responded positively to European initiatives for cooperative ventures in telecommunications only after they exhausted exclusively national strategies.<sup>34</sup> And, when the Commission initially promoted the introduction of competition in the telecommunications field in 1984, the British and Dutch governments were the only immediate allies among the member states.

The UK was already undergoing its own domestic program of liberalization, licensing Mercury to build and operate an independent network in 1982 and privatizing British Telecom in 1984. To promote the international expansion of its telecommunications industries, the British government supported telecommunications liberalization throughout the EU.<sup>35</sup> Other member states and their public telecommunications providers were initially opposed to the prospects of liberalization in their national markets.<sup>36</sup>

However, the position of the French and German governments and their national telecommunications operators evolved rapidly during the 1980s. The French government began promoting telecommunications liberalization in 1986 and launched a domestic

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<sup>33</sup>Sandholtz 1992, 59-112; Schneider, Dang-Nguyen, and Werle 1994, 481-482.

<sup>34</sup>E.g. R&D in Advanced Communications Technologies in Europe (Race) and European Strategic Programme for Research and Development in Information Technology (Esprit), Sandholtz 1992, 113-142.

<sup>35</sup>The UK increasingly opened its telecommunications markets from 1981 to 1994, Department of Trade and Industry, *Telecommunications Liberalization in the UK: Key Elements, History, and Benefits*, (London, March 1995), 5-14.

<sup>36</sup>Schneider, Dang-Nguyen, and Werle 1994, 484, interviews with a legal advisor on secondment from a member state, Commission Legal Service, Brussels, 1 June 1995; EU regulation specialist for Deutsche Telekom, Bonn, 23 January 1996; legal advisor, Commission legal service, telephone interview with Brussels, 18 March 1996 (Competition); private consultant on telecommunications regulation, London, 17 July 1995.

program of reform. By 1988 French measures to liberalize provision in cable television, mobile and value-added services, and terminal equipment preceded European measures. Since 1994, the French government accelerated the pace of further telecommunications liberalization, often ahead of European deadlines.<sup>37</sup>

Official German interest in liberalization originated in the *Bundeskartellamt* (Federal anti-trust authority) from 1980, and was followed by interest within the coalition of Christian Democrats and Liberals who came into power in 1982. By 1986, the German government established an advisory commission to design a coherent program of reform. A reform adopted in 1989 initiated liberalization in value-added services and terminal equipment, which was followed by liberalization in mobile communications, satellite services, and corporate networks in the 1990s. Parallel to the French, the German government accelerated its program of domestic reform after 1994, opening markets largely ahead of the European schedule.<sup>38</sup>

This acceptance of liberalization developed as national governments came to perceive the sector in the context of globalization and industrial competitiveness. National leaders' views converged with the Commission as they observed the international expansion of US firms and liberalization in the UK and Japan. Skeptical about the capacity of their public monopolies to keep pace with technological change, member states decided to promote innovation and expansion in the field by opening their markets to competition. Member states confirmed their support of the Commission's major policy initiatives in telecommunications with Council Resolutions in 1988, 1993,

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<sup>37</sup>Volker Schneider, "Europeanization and the redimensionalization of the public sector: telecommunications in France, Germany, and Italy," *Europeanization and Domestic Structural Change*, eds. James Caporaso, Maria Green Cowles, and Thomas Risse, forthcoming; Chamoux 1993; interviews with a private legal advisor on telecommunications and former Commission official from Directorate General IV, Brussels, 14 September 1995 and a private telecommunications consultant, Namur, 15 September 1995.

<sup>38</sup>Schneider, forthcoming; interviews with an EU regulation specialist for Deutsche Telekom, Bonn, 23 January 1996 and a telecommunications consultant, Namur, 15 September 1995.

1994, and 1995.<sup>39</sup> The Council Resolution of 1988 followed the Commission's corresponding Article 90 directive by six weeks, while Council Resolutions in 1993, 1994 and 1995 preceded the Commission's adoption of corresponding Article 90 directives.

The mobilization of support from a set of concentrated actors with increasing interests in liberalization informed and facilitated this shift in the position of national governments. A critical source of pressure for liberalization developed within the leadership of French and German telecommunications operators. The successful example of the privatized British Telecom, subject to emerging competition in domestic and international markets, interested the French and German telecommunications administrations and managers of France Telecom and Deutsche Telekom. Managers recognized the potential for profitable expansion in a competitive, internationalized telecommunications regime. They could use the need to compete in open markets as justification for changes in traditional practices that inhibited efficiency, including the phasing out of lifetime employment in civil service contracts.<sup>40</sup> Their interest in joint ventures, whose approval the Commission connected with domestic liberalization, led France Telecom and Deutsche Telekom to pressure their governments for faster, more extensive liberalization.<sup>41</sup>

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<sup>39</sup>Council Resolution 88/C257/01 of 30 June 1988, *Official Journal of the European Communities* C-257, (4 October 1988), 1; Council Resolution 93/C213/01 of 22 July 1993, *Official Journal of the European Communities* C-213 (6 August 1993), 1; Council Resolution 94/C379/03 of 22 December 1994, *Official Journal of the European Communities* C-379 (31 December 1994), 4; Council Resolution 95/C188/02 of 29 June 1995, *Official Journal of the European Communities* C-188 (22 July 1995), 3; Council Resolution 95/C258/01 of 18 September 1995, *Official Journal of the European Communities* C-258 (3 October 1995), 1.

<sup>40</sup>Esser and Noppe 1996, 548, 551-552 and interviews with an administrator of policy on telecommunications, Secrétariat général de comité interministériel pour les questions de coopération économique européenne (SGCI), Paris, 16 October 1995; legal advisor, Direction générale des Postes et Télécoms, Paris, 22 February 1996; legal advisor on secondment from a member state, Commission Legal Service, Brussels, 1 June 1995; EU regulation specialist for Deutsche Telekom, Bonn, 23 January 1996; private consultant on telecommunications regulation, London, 17 July 1995; a private telecommunications consultant, Namur, 15 September 1995.

<sup>41</sup>Deutsche Telekom AG, "Position of Deutsche Telekom AG concerning the draft Directive amending the Commission Directive regarding the implementation of full competition in telecommunications markets," 7

Other relatively concentrated actors who demanded reform from national governments included manufacturers of equipment, aspiring entrants, and corporate users. Volker Schneider, Godefroy Dang-Nguyen, and Raymund Werle argue that the Commission helped coordinate this pressure for reform by building a transnational policy network among these actors: the Commission consulted interested parties in order to forge a broad alliance that would support its initiatives at the national and European level. Individual multi-national firms, national peak and sectoral organizations, the Union of Industrial and Employers Confederations of Europe, the Roundtable of European Industrialists, and the association of European Telecommunications Producers represented producer interests in consultations with the Commission. Individual firms, national chambers of commerce, and user associations at the national, European, and international level represented the interests of corporate consumers. Schneider, Dang-Nguyen and Werle trace a process of "reverse lobbying," where the Commission facilitated the collective action of business users as a means to disseminate support in national policy arenas.<sup>42</sup>

Incentives for competition in telecommunications among aspiring entrants and corporate users are strong: the global market for telecommunications equipment more than doubled in value in constant dollars from 1977 to the mid-1980s, when it reached ninety billion in US dollars. The market for value-added services has been growing from twenty-five to thirty percent annually, reaching \$505 billion in 1992. By 1993 the largest

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December 1995, VV2; Joint press release by Deutsche Telekom, France Telecom, and Sprint, "Telekom Top Info," 31 January 1996; France Telecom, "France Télécom, Deutsche Telekom et Sprint lancent Global One," *La lettre de France Télécom* No. 181, 5 February 1996, 1-4. By 1992, the member states' telecommunications network operators had formed their own association, ETNO, to lobby for their interests in Brussels as well, Sonia Mazey and Jeremy Richardson, "Pressure groups and lobbying in the EC," *The European Community and the Challenge of the Future*, ed. Juliet Lodge, (New York: St. Martins Press, 1993), 37.

<sup>42</sup>Schneider, Dang-Nguyen and Werle 1994, 487-491. Wayne Sandholtz has also argued that the Commission plays an important role in promoting the collective action that is necessary for international policy coordination, 1993, 242-243, 254. For a critical view of a policy process driven overwhelmingly by private capital interests, see Esser and Noppe 1996.

twenty-five public telecommunications operators in the developed world were more profitable than the largest hundred commercial banks. In addition to being a lucrative field to enter, access to more sophisticated services at falling costs enhances the competitiveness of industries that rely on information and communication. Advances in the telecommunications sector contribute to technological change across all sectors of the economy.<sup>43</sup>

The telecommunications personnel of national operators constituted the major potential source of concentrated opposition to liberalization. The fear of large scale redundancies in the wake of liberalization could have generated intense opposition to policy change. Organized in public sector unions and privileged through civil service statutes, telecommunications personnel also possess the capacity for collective action.<sup>44</sup> Yet the US and UK experiences in telecommunications liberalization partially diluted negative expectations in the early stages of policy debate. Employment opportunities among new entrants in the aftermath of US deregulation and British liberalization and the achievement of labor reductions through voluntary retirement obscured the specter of mass lay-offs. Moreover, France Telecom and Deutsche Telekom strategically neutralized the most threatening form of organized opposition by retaining privileges for existing civil servants and hiring all incoming employees under private contracts. This policy pacifies existing *fonctionnaires* and *Beamte* (French and German civil servants) and results in their attrition, leading to the gradual transformation of the labor force.<sup>45</sup>

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<sup>43</sup>Sandholtz 1992, 55-57 and European Commission Delegation Office of Press and Public Affairs, "Commission accelerates telecoms liberalization, stresses importance of universal service," *European Union News* No. 13/96 Washington D.C. (1 March 1996).

<sup>44</sup>A strike of seventy-five percent of French telecommunications employees delayed a 1993 attempt to privatize France Telecom, John Horrocks, *European Guide to Telecommunications Liberalization* (Surrey: Horrocks Technology Publisher, 1993), France page 1.

<sup>45</sup>Interviews with two administrators of policy related to European telecommunications, Foreign Ministry of France, Paris, 6 October 1995; administrator of policy on telecommunications, Secrétariat général de comité interministériel pour les questions de coopération économique européenne (SGCI), Paris, 16 October 1995; legal advisor, Direction générale des Postes et Télécoms, Paris, 22 February 1996; EU regulation specialist for Deutsche Telekom, Bonn, 23 January 1996.

Little political resistance to telecommunications liberalization has developed among consumer constituencies in the broader public, despite the potential for increases in local rates. Local telephone services have traditionally been subsidized by high charges for long distance services in most European countries. The disaggregation of local and long distance providers eliminates local subsidies, potentially creating the need to raise local phone rates. This is most problematic for member states with the lowest GDPs per capita, where real costs for local services are prohibitive for many individuals. By contrast, local services in wealthier member states, including France and Germany, primarily pay for themselves.<sup>46</sup>

In summary, the Commission advocated a process of liberalization in telecommunications that gained the political support of member states and organized, resourceful societal interests. Initially opposed to reform, France and Germany began opening their domestic telecommunications markets ahead of European initiatives. The leadership of French and German telecommunications enterprises neutralized the only significant source of concentrated opposition by grandfathering the privileges of highly organized civil servants.

#### B. Electricity

The Commission expressed interest in the liberalization of national electricity markets as part of the effort to create an internal market by the end of 1992. Linking monopolistic provision to high prices and insufficient technological innovation, the Commission argued that segmented and exclusive electricity markets reduce the productivity of European industry as a whole. The Commission advocated the end of import and export monopolies in electricity, and demanded a system of third party access (TPA) to the network that allows certain classes of consumers to choose their electricity

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<sup>46</sup> Interview with an administrator of telecommunications policy, Department of Trade and Industry, London, 14 July 1995.



suppliers. Eligible consumers under the Commission's plan include all large industrial users as well as local distributors who supply residential consumers.<sup>47</sup> Following consultation with the European Parliament, the Commission accepted a system of negotiated TPA that allows network operators discretion in coordinating supply contracts.<sup>48</sup>

Similar to the traditional situation in telecommunications, member states historically have pursued independent energy policies based on extensive systems of national regulation. European initiatives interfere with national autonomy in a sector that has important implications for national security, industrial production, and social welfare. Cooperation had eluded member states during the energy crisis of the 1970s, and most member states did not welcome the Commission's efforts to include electricity within the scope of the internal market. Parallel to the reaction to telecommunications initiatives, the UK was among the few member states to support the Commission.

Once again, the United Kingdom was in the process of liberalizing its domestic electricity market when the Commission initiated plans for competition in European electricity provision. The 1989 Electricity Act established the foundations for the privatization of the nationalized industry, introducing competition into electricity generation and sales to final consumers. The UK introduced a system of independent regulation to ensure access to the network for transmission and distribution activities.<sup>49</sup> The British government has supported the creation of an internal market in electricity

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<sup>47</sup>Commission, "Working paper of the Commission on the organization of the internal electricity market," Brussels, (22 March 1995a), SEC (95) 464 final, 31; Philippe Le maitre, "Une proposition de la Commission européenne: vers un marché commun de l'électricité," *Le Monde* (13 July 1989).

<sup>48</sup>Insisting that denials to transmit electricity over the network must be strongly justified, the Commission recognized additional restrictions on TPA after consultation with the European Parliament: the Commission replaced its original system of regulated access with a system of negotiated access to the network. The relatively open system of regulated access is proposed in Commission proposal 92/C65/04 of 24 February 1992, *Official Journal of the European Communities* C-65 (14 March 1992), 4. The more restrictive system of negotiated access is proposed in the Commission's amended proposal, COM (93) 643 final (7 December 1993), COD 384.

<sup>49</sup>Overseas Relations Service, "The British electricity system," (London: Electricity Association Services, 1994), 2.

from the beginning, arguing that the absence of any derogation for electricity subjects the field to Treaty rules.<sup>50</sup>

The German government was initially opposed to the liberalization of its domestic electricity market. Since 1957 Germany has granted the electricity sector exemptions from its domestic competition law.<sup>51</sup> German electricity suppliers include private and public undertakings at the national, regional, and municipal level. National law enables these providers to agree to geographically exclusive rights among themselves. Local communities also confer exclusive distribution rights to these firms in exchange for financial concessions, which fund a variety of public services at the municipal and regional level.<sup>52</sup>

However, the position of the German government shifted by 1994, when the Kohl government proposed to eliminate competition exemptions for the electricity sector.<sup>53</sup> This change reflects shifts in the preferences of Germany's largest national electricity providers as well as a growing concern with high industrial electricity prices and the incentives that these prices generate for relocation among energy intensive industries.<sup>54</sup> By 1994, the official German position on an internal market broadly corresponded to Commission proposals: Germany supported the system of negotiated TPA for eligible consumers including large industry and local distributors.

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<sup>50</sup>Interview with a representative for energy policy in the Permanent Representation of the UK, Brussels, 28 February 1996.

<sup>51</sup>Article 103, *Gesetz gegen Wettbewerbsbeschränkungen*, 27 July 1957.

<sup>52</sup>Gerhard Holm, "Struktur der deutschen Elektrizitätswirtschaft," *Strombasiswissen* No. 115 (Frankfurt: Bender and Kelkheim, 1995) and Joachim Grawe, "Zentrale und dezentrale Energieversorgung," *Elektrizitätswirtschaft* No. 22 (1990), 1207-1218.

<sup>53</sup>*Gesetz zur Neureglung des Energiewirtschaftsrechts*, Bonn, 15 February 1994.

<sup>54</sup>Interviews with a legal advisor on European electricity policy, Bundesministerium für Wirtschaft, Bonn, 18 January 1996 and an administrator of electricity policy, Commission Directorate General XVII-C, Brussels, 14 September 1995. I specify the shift in preferences among large suppliers in the following discussion of the interests of electricity providers.

France has consistently opposed liberalization of electricity according to the program advocated by the Commission and ultimately supported by Germany.<sup>55</sup> Accepting the right of TPA for large industrial users, the French government opposes the extension of this right to distributors.<sup>56</sup> The EDF's control over ninety-five percent of distribution to communities allows the French to engage in long term planning for their large nuclear sector<sup>57</sup> and maintain their distinctive tradition of *service public*.<sup>58</sup> The French concept of public service involves a system of uniform prices for service in all areas of the country, whether urban or rural. Official French commitment to its tradition of public service is strong: in its public report of 1994, the *Conseil d'Etat* defended the French tradition of public service as an appropriate response to market failure and denounced what it viewed as an extreme European conception of competition that makes inadequate distinctions between the private and public realms.<sup>59</sup> Reports and resolutions of the French Senate and National Assembly also express resolute opposition to the end

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<sup>55</sup>Belgium, Spain, and Italy have been allied with the French on most issues concerning electricity liberalization.

<sup>56</sup>Direction du Gaz, de l'Électricité, et du Charbon, "Functions, role, and tasks of the sole purchaser: draft definition," Annex 10274/94 (1994) and interviews with two legal advisors in the Direction du Gaz, de l'Électricité, et du Charbon (DIGEC), Paris, 21, February 1996 and an administrator of policy on energy harmonization, Secrétariat général de comité interministériel pour les questions de coopération économique européenne (SGCI), Paris, 18 October 1995.

<sup>57</sup>France lacks natural resources for energy production and seeks to avoid reliance on the Maghreb states or Russia for its energy supply. Attaining self-sufficiency in electricity with a large nuclear program has required extensive, long term investments. To recoup these sunk costs, nuclear plants need a large market for the enormous volume of electricity they produce. And because electricity cannot be stored, a captive market contributes to relative stability in demand.

<sup>58</sup>See the 13 April 1995 issue of *Le Monde* for a scathing critique of "Europe's" inability to understand and respect the French tradition of public service, beginning on the cover and continuing on the editorial pages. Debates on the future of French public service in Europe have spawned a major cottage industry among official and academic policy analysts: e.g., see Antonio Castellano and Yannick Moreau, eds. *Europe, Concurrence, et Service Public* (Paris: Masson/Armand Colin, 1995); Bernard Thiry and Jacques Vandamme, eds. *Les Entreprises Publiques dans l'Union Européenne: Entre Concurrence et Intérêt Général* (Paris: Editions Pedone, 1995); Christian Stoffaës, ed. *L'Europe à l'Épreuve de l'Intérêt Général* (Paris: ASPEurope Editions, 1994); Christian Stoffaës, *L'Europe de L'Utilité Publique: Des Industries de Services Publics Rénovées dans l'Europe Libérale*, Rapport au Ministre de l'Économie (Paris: ASPEurope Editions, 1995); Commissariat général du Plan, *Service Publics: Question d'Avenir* (Paris: La Documentation française, 1995).

<sup>59</sup>Conseil d'État, *Rapport Public 1994* No. 46 (Paris: La Documentation française, 1994), 18-52. The French have remained fundamentally resistant to the notion that the market necessarily outperforms authoritative control in many economic sectors. Unlike many member states, the quality of service provided by public enterprises is quite high in France.

of French public service obligations (i.e. including nationally uniform prices) in the electricity sector.<sup>60</sup>

As an alternative to the Commission's proposals on TPA, the French advocated the concept of a Single Buyer. The Single Buyer would purchase electricity from foreign and domestic producers on the basis of competitive tenders and exercise exclusive control over transmission within the national network. Large industrial users could negotiate TPA, but public distributors would not constitute eligible consumers with TPA rights.<sup>61</sup> The Commission initially rejected the French notion of a Single Buyer, with exclusive distribution and transmission rights, arguing that such a commercial monopoly is inherently illegal under Article 37 of the Treaty.<sup>62</sup> The UK concurred,<sup>63</sup> and Germany considered exclusive French control over distribution to be tantamount to a complete closure of the domestic market.<sup>64</sup>

The positions of the British, German, and French governments are largely consistent with the preferences of concentrated, resourceful domestic actors who have intense interests relative to the organization of electricity provision. British electricity producers, who compete for market share in a liberalized regime, see exports to Europe as their major opportunity for expansion. As a result, British electricity producers

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<sup>60</sup>Henri Revol, Sénateur, "Marché intérieur de l'électricité et du gaz naturel: quelle politique pour la France?" *Rapport d'Information* No. 491 (1993-1994), 54; Jacques Oudin, Sénateur, "Électricité et gaz: pour un marché intérieur respectueux du service public," *Rapport d'Information* No. 459 (1993-1994), 12-17, 21; Assemblée Nationale, *Résolution sur des propositions et un projet de directives communautaires relatives aux services publics*, No. 428 (30 November 1995), 5-6; M. Franck Borotra, Député, "Faut-il défendre le service public?" *Rapport d'Information* No. 2260 (6 October 1995), 24.

<sup>61</sup>Direction du Gaz, de l'Électricité, et du Charbon 1994, 9-10.

<sup>62</sup>Commission 1995a, 12; European Commission Spokesman's Service, "Towards a competitive European energy market," Speech given by Commissioner Van Miert at the Royal Institute for Foreign Affairs, London, 28 November 1994b; "M. Papoutsis est optimiste quant à la possibilité d'aboutir pour la fin de l'année à une position commune du Conseil sur la libéralisation du marché de l'électricité, sur la base d'un compromis de la présidence," *Europe* (13 September 1995); A.M. Klom, DG XVII, "Different approaches to electricity liberalisation," *Energy in Europe* No. 25 (1995), 25; interview with an administrator of competition policy related to energy, Commission Directorate General IV-C, Brussels, 27 September 1995.

<sup>63</sup>Interview with a representative for energy policy in the Permanent Representation of the UK, Brussels, 28 February 1996.

<sup>64</sup>Interviews with a legal advisor on European electricity policy, Bundesministerium für Wirtschaft, Bonn, 18 January 1996 and an administrator of electricity policy, Commission Directorate General XVII-C, Brussels, 14 September 1995.

strongly support the creation of an internal electricity market.<sup>65</sup> Electricity producers in most other member states,<sup>66</sup> who largely enjoy captive markets, express no interest in exporting electricity beyond the limited border area exchanges that currently exist.<sup>67</sup>

Germany's largest electricity suppliers, a group of nine regionally based generating companies, came to accept the idea of an internal electricity market. These suppliers' acceptance of liberalization facilitated the German government's decision to support the internal electricity market, but the large producers' relative indifference to the actual introduction of competition has not generated pressures for change. Smaller German electricity producers, who cannot provide electricity at rates that will be competitive at the EU level, and local authorities, who receive revenues in exchange for exclusive contracts with producers, were fundamentally opposed to liberalization. Opposition from small electricity producers and local authorities stalled adoption of the national bill that removes the electricity sector's exemptions from German competition law.<sup>68</sup>

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<sup>65</sup>Interview with a representative for energy policy in the Permanent Representation of the UK, Brussels, 28 February 1996 and a representative of the European Grouping of the Electric Supply Industry (Eurelectric), Brussels, 27 September 1995.

<sup>66</sup>Exceptions include Sweden, Finland and the Netherlands, where hydroelectric plants and deregulation (Sweden and Finland) or natural gas resources and existing import rights (the Netherlands) provide incentives for increasing exports.

<sup>67</sup>Unlike the situation in telecommunications, the electricity market is not attracting many aspiring entrants: initial investment demands are much higher and growth projections do not approximate those in telecommunications. Interviews with a representative of the European Grouping of the Electric Supply Industry (Eurelectric), Brussels, 27 September 1995; a representative of the Vereinigung Deutscher Elektrizitätswerke, Bonn, 19 January 1996; a legal advisor on European electricity policy, Bundesministerium für Wirtschaft, Bonn, 18 January 1996; an administrator of electricity policy, Commission Directorate General XVII-C, Brussels, 14 September 1995; a private legal advisor on European regulation, Brussels, 29 May 1995. For general accounts of opposition to liberalization among electricity suppliers, particularly the French, see "Les électriciens européens ne sont pas mûrs pour la déréglementation," *La Tribune de l'Expansion* (31 May 1988); Edouard Thevenon, "Les difficultés d'un marché commun de l'électricité," *Le Figaro* (3 June 1988); Aline Richard, "Guerre de positions entre Bruxelles et les distributeurs d'électricité," *La Tribune de l'Expansion* (11 June 1991); Caroline Monnot, "Les électriciens européens s'organisent face à Bruxelles," *Le Monde* (2 October 1991).

<sup>68</sup>Interviews with a representative of the Vereinigung Deutscher Elektrizitätswerke, Bonn, 19 January 1996; a legal advisor on European electricity policy, Bundesministerium für Wirtschaft, Bonn, 18 January 1996 and an administrator of electricity policy, Commission Directorate General XVII-C, Brussels, 14 September 1995.

*L'Électricité de France* (l'EDF) prioritizes exclusive provision in its residential domestic market over increased export opportunities in a European electricity market. The leadership of EDF is convinced that a substantial captive market is necessary to guarantee returns on past investment and future nuclear development.<sup>69</sup> Yet EDF, the largest electricity generator and exporter in the world, could nonetheless profit from further expansion in exports: its nuclear sector supplies electricity at highly competitive rates, particularly relative to the rates charged to industrial users in Germany.<sup>70</sup> As a result, a liberalized regime that maintains exclusive rights over residential consumption, possible under the French proposal for a Single Buyer with a distribution monopoly, is highly favorable for EDF.

Large industrial users of energy support measures to liberalize electricity provision since they anticipate lower rates in a competitive market. Associations who represent industrial users at the European level promote the introduction of TPA for their members as a means to increase competitiveness<sup>71</sup> relative to the USA, where electricity costs are thirty percent lower than in Europe.<sup>72</sup> The European Chemical Industry Council (CEFIC), representing a concentrated set of large companies, brings one of the best

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<sup>69</sup>Interviews with a representative of the European Grouping of the Electric Supply Industry (Eurelectric), Brussels, 27 September 1995; two legal advisors in the Direction du Gaz, de l'Électricité, et du Charbon (DIGEC), Paris, 21, February 1996 and an administrator of policy on energy harmonization, Secrétariat général de comité interministériel pour les questions de coopération économique européenne (SGCI), Paris, 18 October 1995. Eurelectric argued that member states should be able to exclude thermal reactors from competitive regimes due to strategic or environmental reasons, "Electricity producers (Eurelectric) outline the main points of a directive they say could increase competition without imposing TPA," *Europe* (10 July 1993), 13.

<sup>70</sup>Eurostat, *Statistics in Focus: Energy and Electricity* No. 8 (Luxembourg: Office for Official Publications of the European Communities, 1995). See also "EDF veut vendre directement aux industriels européens," *Le Monde* (19 October 1988).

<sup>71</sup>Union of Industrial and Employers' Confederations of Europe (UNICE), "UNICE calls for abolition of monopolies' exclusive rights and competition not only in production but also in gas and electricity distribution," *Europe* (19 July 1993), 13; Dirk Hudig, director of European affairs at Imperial Chemical Industries, "Growth, competition, and the public sector," *Revue des Affaires Européennes* No. 2 (1994), 115-121; European Chemical Industry Council 1995, MD/Press/842, joined in support by the Association des Constructeurs européens d'Automobiles, the European Cement Association, European Confederation of Iron & Steel Industries, European Lime Association, European Association of Metals, and the International Federation of Industrial Energy Consumers.

<sup>72</sup>European Chemical Industry Council, *Facts and Figures: The European Chemical Industry in a Worldwide Perspective*, (Brussels: November 1995), Chart 5.3, 57.

organized and most resourceful European level groups behind liberalization efforts.<sup>73</sup> Yet the chemical industry's interest in TPA for large industrial users, and indifference toward other aspects of liberalization such as TPA for local distributors, generated pressure only for the limited competitive regime that has been acceptable to France and EDF.<sup>74</sup>

German industrial users, paying the highest electricity rates in Europe, have the most intense interest in liberalization.<sup>75</sup> Yet German industrial users also have exit options: if liberalization fails, they can increase foreign direct investment and relocate production in areas with lower energy costs.<sup>76</sup> The German government, alarmed about the consequences of such capital flight for domestic economic growth and employment,<sup>77</sup> became increasingly responsive to the interests of industrial users in the 1990s as unemployment climbed<sup>78</sup> and large German electricity producers ceased their opposition to European liberalization.<sup>79</sup> The specter of exit among industrial users ultimately trumped the voice of small electricity producers and local communities as the German government committed itself to domestic reform and support for the European internal market in electricity.

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<sup>73</sup>Wyn Grant, "Pressure groups and the European Community: an overview," *Lobbying in the European Community*, eds. Sonia Mazey and Jeremy Richardson, (New York: Oxford University Press, 1993), 31-32.

<sup>74</sup>Interview with a representative of the European Chemical Industry Council, Brussels, 28 February 1996.

<sup>75</sup>Eurostat 1995, No. 8.

<sup>76</sup>In the energy intensive chemicals industry, this exit dynamic is underway: the three largest German chemical firms relocated many of their activities in southeast Asia, interview with a representative of the European Chemical Industry Council, Brussels, 28 February 1996.

<sup>77</sup>Interview with a legal advisor on European electricity policy, Bundesministerium für Wirtschaft, Bonn, 18 January 1996.

<sup>78</sup>In 1993 unemployment rates averaged 9.8 percent in Germany and ranged between 11.8 and 12.5 percent by 1997, Organization for Economic Cooperation and Development, *Main Economic Indicators* (Paris: OECD, 1998), 132 and International Monetary Fund, *International Financial Statistics*, (Washington, D.C.: Publication Services of the IMF, 1998), 304.

<sup>79</sup>Interview with an administrator of electricity policy, Commission Directorate General XVII-C, Brussels, 14 September 1995.

France did not face any similar problem since French industrial users already enjoyed the lowest electricity costs in Europe.<sup>80</sup> Subject to rates that have been comparable to those of US industry, French industrial users could be largely indifferent to liberalization efforts: the French government's proposals for TPA for industrial users and a continuation of the distribution monopoly for residential consumers would be compatible with the interests of industrial users in France. Essentially, French residential consumers could continue to bear the cost of nuclear development rather than French industry.

In contrast to the relative indifference among industrial users, labor within the French electricity sector constitutes a major source of opposition to full liberalization. EDF personnel are better organized and enjoy more favorable employment privileges than their counterparts in France Telecom.<sup>81</sup> The specter of the loss of their employment statute is particularly threatening given that the electricity sector does not have the high expansion potential of telecommunications. The capacity for collective action is high among EDF workers: organized EDF labor successfully sustained a strike against European initiatives for an internal electricity market in May 1992,<sup>82</sup> and contributed to the simultaneous strike action of all French public sector unions during December 1995. The December 1995 strikes virtually shut the country down for a month, significantly disrupting international travel and communications as well as domestic transportation. Unlike their counterparts in France Telecom, who lobbied the European Parliament, EDF personnel were capable of directly lobbying representatives in the Council of Ministers and Commission.<sup>83</sup>

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<sup>80</sup>Eurostat 1995, No. 8.

<sup>81</sup>Employees at EDF are a special case: EDF employees have job security and pension privileges comparable with *fonctionnaires*, but also earn a salary more comparable to higher paid counterparts in the private sector.

<sup>82</sup>Jeanne Siwek-Pouydesseau, *Les Syndicats des Grands Services Publics et L'Europe* (Paris: L'Harmattan, 1993), 137.

<sup>83</sup>Interview with a legal advisor on telecommunications competition policy, Commission Directorate General IV-B, Brussels, 30 May 1995.



Residential consumers would also be beneficiaries in an internal market for electricity, but with a weak and diffuse interest, they have not played an important role in the policy process. The only exception includes rural consumers in France, where agricultural producers constituted a strong source of opposition to reforms that would end the uniform electricity prices available under the French system of public service. Major beneficiaries of uniform prices include users in remote areas with low population densities. Therefore, French farmers could expect increases in electricity rates if they needed to pay the actual costs of provision to their area. Rural interests enjoy disproportionate representation in the French National Assembly and Senate, both of which remain committed to the French public service tradition.<sup>84</sup> The French government's insistence on a monopoly in electricity distribution accommodates rural preferences for uniform prices.

In summary, the Commission pursued a process of liberalization in electricity that inspired persistent conflict among member states and organized, resourceful societal interests. Initially opposed to reform, Germany ultimately joined the UK and other northern member states in supporting the Commission's plan to initiate competition in electricity production and distribution. However, France remained fundamentally opposed to the liberalization of distribution. The positions of national governments in all cases have been largely consistent with the preferences of the most concentrated segment of electricity producers<sup>85</sup> and large industrial users. The French position also satisfied the demands of highly organized EDF labor and institutionally privileged rural consumers. In contrast to the situation in telecommunications, the competing interests in the electricity sector defied consensus.

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<sup>84</sup>Revol 1993-1994, Oudin 1993-1994, Borotra 1995, and an interview with an administrator of policy on energy harmonization, Secrétariat général de comité interministériel pour les questions de coopération économique européenne (SGCI), Paris, 18 October 1995.

<sup>85</sup>That is, the German government settled on a stance that was acceptable to the nine electricity generating firms that dominate German electricity provision and overlooked the opposition of the approximately 900 other small scale electricity producers.

### III. Policy Responses

Competing demands among member states and concentrated, intensely interested societal actors generated distinctive policy processes in these fields. Construction of a progressively liberal regulatory framework for telecommunications directly followed the Court's sanctioning of the Commission's power to issue competition directives unilaterally under Article 90. Despite the availability of the same legal instrument (Article 90 directive) that launched telecommunications liberalization, the Commission abandoned its Article 90 approach in the electricity sector and proposed Article 100A draft directives that are subject to approval by the Council of Ministers and European Parliament. Nearly six years of negotiation between governments and MEPs culminated in the adoption of an electricity directive that accommodates the demands of the most hesitant liberalizers, significantly diluting the competition regime in electricity. This variation is consistent with the distinct patterns of political support and opposition generated in response to prospects for the full-scale application of European competition rules in each sector.

#### A. The Liberalization of Telecommunications

The Commission successfully invoked its legal authority under Article 90 to liberalize European telecommunications. Repeatedly exercising independent regulatory power through unilateral Article 90 directives, the Commission opened all facets of the telecommunications industry to competition. However, the legal obligations articulated by the Commission and Court of Justice developed in close tandem with the political will of national governments and powerful corporate interests. The substance of each Article 90 directive, formally an expression of supranational authority, broadly satisfied the demands of member states and concentrated, intensely interested actors within the European Union. Furthermore, the specification of a harmonized European regulatory framework in Council directives accommodated the particular interests of national

governments. Member states ultimately controlled much of the pace and content of the new telecommunications regime, gradually phasing-in its application to an expanding range of activities. The following chronology of the policy process demonstrates that the evolution of a broad political consensus was critical to the realization of reforms inspired by legal instruments.

Interest in a common European regulatory framework for telecommunications originated in the early 1980s, but a consensus to liberalize emerged gradually from 1984 to 1993. The Council of Ministers adopted a recommendation to harmonize regulation in this field in 1984.<sup>86</sup> The Council adopted the first binding measure to promote liberalization in a 1986 directive, creating the initial framework for a mutual recognition of standards for terminal equipment.<sup>87</sup> The Commission promoted further liberalization with its 1987 Green Paper, advocating liberalization in terminal equipment and value-added services. Rather than proposing a directive for Council approval, the Commission capitalized on its legal powers under Article 90 to open the market in terminal equipment. In May of 1988 the Commission issued an Article 90 directive to abolish restrictions on competition in the sale of terminal equipment.<sup>88</sup> The basic substance of this directive posed no problems for member states, who endorsed the goals of the 1987 Green Paper in a June 1988 Council Resolution.<sup>89</sup>

However, member states did object to the Commission's "legislative" use of Article 90. France led a legal challenge to this regulatory action under Article 90 before the ECJ, joined by Belgium, Germany, Greece, and Italy.<sup>90</sup> In disputing the legal basis of

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<sup>86</sup>Council Recommendation (84/549/EEC) of 12 November 1984, *Official Journal of the European Communities* L-298 (16 November 1984), 49.

<sup>87</sup>Council Directive (86/361/EEC) of 24 July 1986, *Official Journal of the European Communities* L-217 (5 August 1986), 21.

<sup>88</sup>Commission Directive 88/301/EEC.

<sup>89</sup>Member states expressed a commitment to develop a common market for both telecommunications services and terminal equipment in Council Resolution 88/C257/01.

<sup>90</sup>*France v Commission* C-202/88, 1991. Although the UK was also opposed to the Commission's use of Article 90 to 'legislate' unilaterally, it did not join the suit because its leaders did not want to discourage

the directive, member states sought to preclude any further unilateral exercise of power by the Commission. Although the terminals directive was essentially innocuous, the prospect of future Article 90 directives posed a significant threat to the Council's role as the Community legislator. If the Commission could legally open the telecommunications field, it could impose liberalization on other monopolized public services as well.

Appealing to criticisms about the democratic deficit at the European level, the French denounced the exclusion of the Council and European Parliament from the legislative process.<sup>91</sup>

Confident of its legal authority, the Commission did not wait for the ECJ's ruling on this legal challenge before issuing a second Article 90 directive to introduce competition in value-added services in 1990.<sup>92</sup> This directive also reflects a pre-existing political consensus: the 1988 Council Resolution already accepted liberalization in value-added services,<sup>93</sup> and the Council adopted a directive to implement the open network provision (ONP) for value-added services on the same day that the Commission approved its directive.<sup>94</sup> Yet still rejecting the Commission's capacity to pass legislation without Council approval, Spain initiated a legal challenge before the ECJ, joined by Italy and Belgium and supported by French intervention.<sup>95</sup>

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what they viewed as a sign of progress in the European telecommunications market; they strongly supported the substance of the directive and sacrificed their chance to protest the means in Court as a result.

<sup>91</sup>The French challenge concentrates on the legal procedure and not the substantive content, interviews with a legal advisor on secondment to the Commission Legal Service, who prepared the French case at the ECJ, Brussels, 1 June 1995; administrator of policy related to European electricity liberalization, who rotates policy dossiers regularly, Foreign Ministry of France, Paris, 21 February 1996; two legal advisors in the Direction du Gaz, de l'Électricité, et du Charbon (DIGEC), one of whom formerly worked with telecommunications regulation, Paris, 21 February 1996. For criticisms of Article 90 directives based on arguments concerning democratic accountability, see Revol 1993-1994, Oudin 1993-1994, and Borotra 1995.

<sup>92</sup>Commission Directive 90/388/EEC.

<sup>93</sup>Council Resolution 88/257/01.

<sup>94</sup>Council Directive (90/387/EEC) of 28 June 1990, *Official Journal of the European Communities* L-192 (24 July 1990), 1. The open network provision is the necessary means to create an internal market for telecommunications services, allowing competitors access to infrastructure.

<sup>95</sup>*Spain and others v Commission* C-271, 281, 289/90, 1992.

The Court of Justice upheld both of the Commission's 'legislative' actions under Article 90 in 1991 and 1992. The ECJ did declare a few provisions of each directive void but supported the basic right of the Commission to issue competition directives directed at public undertakings and enterprises with exclusive rights.<sup>96</sup> Meanwhile, the Council had continued to expand the scope for liberalization, approving a directive to extend the open network provision to leased lines.<sup>97</sup> Indeed legislation to construct a competitive telecommunications market progressed steadily, with a careful balance between Commission directives to open up selected telecommunications fields and Council directives to harmonize the regulatory framework for liberalized areas.

Two months after the Council adopted its ONP directive for leased lines in June of 1992, the Commission promoted the liberalization of basic voice telephone services with a proposal to apply ONP to voice telephony.<sup>98</sup> By 1993, the Council advocated the further development of the telecommunications market and accepted the goal to liberalize traditional voice telephony by January 1, 1998. The Council also accepted goals related to the liberalization of cable networks and mobile and personal communications.<sup>99</sup> In the next two years the Commission continued to rally support for its telecommunications agenda, issuing the Bangemann report on "Europe and the Global Information Society" and Green Papers on mobile and personal communications, infrastructure, and cable television networks.<sup>100</sup> After extensive consultation with interested parties,<sup>101</sup> the

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<sup>96</sup>*France v Commission* C-202/88, 1991 and *Spain and others v Commission* C-271, 281, 289/90, 1992.

<sup>97</sup>Council Directive 92/44/EEC of 5 June 1992, *Official Journal of the European Communities* L-165 (19 June 1992), 27. Firms use leased lines for internal links between branches and for connections with clients.

<sup>98</sup>Commission, "First proposal for a European Parliament and Council Directive on the application of open network provision to voice telephony," COM (92) 247 (27 August 1992).

<sup>99</sup>Council Resolution 93/C213/01.

<sup>100</sup>Bangemann Report of the Commission, "Europe and the Global Information Society: Recommendation to the European Council," (26 May 1994); Commission, *Green Paper on a Common Approach to Mobile and Personal Communications in the European Union*, COM (94) 145 final (17 April 1994b); Commission, *Green Paper on the Liberalization of Telecommunications Infrastructure and Cable TV Networks -- Part I: Principle and Timetable*, COM (94) 440 (25 October 1994c); Commission, *Green Paper on the Liberalization of Telecommunications Infrastructure and Cable TV Networks -- Part II: A Common Approach to the Provision of Infrastructure in the European Union*, COM (94) 682 (25 January 1995b).

Commission opened cable networks and mobile and personal communications with Article 90 directives in 1995 and 1996.<sup>102</sup>

The European telecommunications regime progressed toward full liberalization as the Commission solidified support to open infrastructure and voice telephony to competition. The Council accepted the principles and timetable for the liberalization of infrastructure in late 1994,<sup>103</sup> agreed to the implementation of the future regulatory framework for telecommunications in 1995,<sup>104</sup> and responded positively to the Commission's second proposal for a directive to apply ONP to voice telephony<sup>105</sup> by adopting a directive in 1995.<sup>106</sup> After consulting interested parties on its draft directive to liberalize voice telephony and the use of infrastructure for voice services,<sup>107</sup> the Commission issued its final Article 90 directive for the full liberalization of telecommunications markets on March 13, 1996.<sup>108</sup>

With each Article 90 directive since 1990, the Commission has extensively consulted the Council, European Parliament, and private and public actors in its transnational policy network on the content and timing of further liberalization

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<sup>101</sup>Commission, *Communication on the Consultation on the Green Paper on Mobile and Personal Communications in the European Union*, COM (94) 492 final (23 November 1994d) and Commission, *Communication on the Consultation on the Green Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks*, COM (95) 158 final (3 May 1995c); European Parliament Resolution A4-0063/95 of 7 April 1995, *Official Journal of the European Communities* C-109 (1 May 1995), 310; European Parliament Resolution A4-0111/95 of 19 May 1995, *Official Journal of the European Communities* C-151 (9 June 1995), 479; European Parliament Resolution A4-0097/95 of 19 May 1995, *Official Journal of the European Communities* C-151 (19 June 1995), 473.

<sup>102</sup>Commission Directives 95/51/EC and 96/2/EC.

<sup>103</sup>Council Resolution 94/C379/03 of 22 December 1994, *Official Journal of the European Communities* C-379 (31 December 1994), 4.

<sup>104</sup>Council Resolution 95/C258/01 of 18 September 1995, *Official Journal of the European Communities* C-258 (3 October 1995), 1.

<sup>105</sup>*Official Journal of the European Communities* C-122 (31 March 1995), 4.

<sup>106</sup>Council Directive 95/6/EC of 13 December 1995, *Official Journal of the European Communities* L-321 (30 December 1995), 6.

<sup>107</sup>The Commission submitted its draft Article 90 directive on July 19, 1995, London Representation of the European Commission, *Background Report: Telecommunications Liberalization B/1/96* (January 1996), 1.

<sup>108</sup>Commission Directive 96/19/EC.

measures.<sup>109</sup> While rallying political support behind the general liberalization effort, the Commission provides the final push into the market with its Article 90 directives. With its harmonizing directives, the Council articulates many of the conditions of the ensuing market, including exceptions and delayed implementation for particular member states. The specter of Article 90 competition directives facilitated the reform process by encouraging member states to broker compromises for a harmonized regulatory framework before the Commission opened markets.<sup>110</sup> The ECJ contributed to this policy process by legitimating the Commission's regulatory authority, denying member state demands for a purely intergovernmental process in the Council. Although member states still oppose the principle of Article 90 directives and continue to challenge them in Court,<sup>111</sup> they proceed to implement their provisions in the field of telecommunications.<sup>112</sup> Table 6.1 charts the policy process in telecommunications and illustrates the parallel development of political consensus and independent Commission actions.

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<sup>109</sup>Interviews with a legal advisor in the Direction Générale des Postes et Télécoms, Paris, 22 February 1996; EU regulation specialist for Deutsche Telekom, Bonn, 23 January 1996; legal advisor, Commission Legal Service, Brussels 2 June 1995 (Competition); legal advisor, Commission Legal Service, telephone interview with Brussels, 18 March 1996 (Competition); policy analyst at the Center for European Policy Studies (CEPS), Brussels, 1 June 1995 confirmed the process of consultation that I traced through official documentation.

<sup>110</sup>Interviews with a legal advisor, Commission Legal Service, telephone interview with Brussels, 18 March 1996 (Competition); a legal advisor on telecommunications competition policy, Commission Directorate General IV-B, Brussels, 30 May 1995; a private consultant on telecommunications regulation, London, 17 July 1995; a private legal consultant on European regulation, Brussels, 31 May 1995.

<sup>111</sup>A legal challenge against the Article 90 directive on mobile and personal communications, adopted in January of 1996, has already been initiated, and lawyers in the Commission legal service anticipate challenges to the most recent Article 90 directive for the full liberalization of infrastructure as well. Member states try to challenge Article 90 directives on all grounds, forcing the Commission to make a broad defense and hoping to have as much of the directive declared void as possible.

<sup>112</sup>Commission 1992, 14, 18; "Debates of the European Parliament," Addresses by Vice President of the Commission Bangemann, *Official Journal of the European Communities: Annex* No. 3-441 (1994 ), 42 and No. 3-442(1994 ), 24; Commission, "Fourteenth annual report on monitoring the application of Community law -- 1996," *Official Journal of the European Communities* C-332 (3 November 1997), 33-34, 47-49.

Table 6.1 European Regulatory Framework for Telecommunications<sup>113</sup>

	Commission	Council	Parliament	ECJ
<b>Terminal Equipment</b>	Directive 88/301/EEC	Resolution 88/C257/01		C-202/88, 1991
	Directive 94/46/EC	Directive 91/263/EEC		Upholds Commission Directive 88/301/EEC
<b>Value-Added Services</b>	Directive 90/388/EEC	Resolution 88/C257/01		C-271, C-281, and C-289/90, 1992
	Directive 94/46/EC	Directive 90/387/EEC		Upholds Commission Directive 90/388/EEC
		Directive 92/44/EEC		
<b>Cable Networks</b>	Directive 95/51/EC	Resolution 93/C213/01	Resolution A4-0063/95 Resolution A4-0111/95	
<b>Mobile and Personal Communications</b>	Directive 96/2/EC	Resolution 93/C213/01 Resolution 95/C188/02	Resolution A4-0097/95	Legal Challenge initiated against 96/2/EC
<b>Full Liberalization:</b>	Directive 96/19/EC	Resolution 93/C213/01	Resolution A4-0063/95	Legal Challenge anticipated
<b>Infrastructure and Voice Telephony</b>		Resolution 94/C379/03 Resolution 95/C258/01 Directive 95/62/EEC	Resolution A4-0111/95	

Policy reform in telecommunications progressed primarily through political channels. Legal interpretation was at the foundation of the Commission's Article 90 directives, but actors affected by policy change pursued their aims overwhelmingly in

<sup>113</sup>The initial figure for each directive's reference number (or Council resolution) indicates the year it was adopted, e.g. Directive 88/301/EEC was adopted in 1988. The last two digits indicate the year for Parliamentary resolutions.



political arenas. One early instance of legalized bargaining preceded Commission efforts for reform: in 1978 the Society for Worldwide Information and Fund Transfer (SWIFT) issued a complaint with Commission Directorate General IV (DG-IV) about public telecommunications providers' restrictions on the use of international leased lines and prohibitive tariffs. The international consortium of banks represented by SWIFT successfully negotiated the use of public telecommunications infrastructure to operate an independent network for data exchange and abandoned the formal legal complaint with DG-IV. SWIFT attained essentially what the Commission sought fifteen years later with ONP for leased lines,<sup>114</sup> but this example failed to inspire copy-cat claims.

Corporate users and aspiring entrants have been loathe to pursue their goals through legal means. Business skepticism about the possibility of judicial redress in national courts is prevalent across Europe.<sup>115</sup> Private lawyers, telecommunications consultants, and Commission officials all confirm that parties interested in opening telecommunications markets view challenges before national courts as a high risk, inefficient strategy. Rather than initiating suits in courts in each member state, interested parties prefer to contact the Commission for assistance with European-wide opening.<sup>116</sup> Furthermore, most parties pursue their complaints to the Commission on an informal basis, being unwilling to initiate formal claims against national governments.<sup>117</sup>

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<sup>114</sup>Schneider, Dang-Nguyen, and Werle 1994, 483 and the interview cited below. SITA, which operates a system of air traffic control between countries, also successfully negotiated the independent use of public infrastructure for information exchange. Interview with a private consultant on telecommunications regulation, London, 17 July 1995.

<sup>115</sup>Kieran Bradley and Alastair Sutton, "European Union and the rule of law," *Maastricht and Beyond: Building the European Union*, eds. Andrew Duff, John Pinder, and Roy Pryce, (London: Routledge, 1994), 251-252.

<sup>116</sup>Interviews with a private legal advisor on telecommunications and former official in Commission Directorate General IV, Brussels, 14 September 1995; private legal advisor, Brussels, 30 May 1995; a private legal consultant on European regulation, Brussels, 31 May 1995; private legal advisor on European competition law, Brussels, 29 May 1995; legal advisor on telecommunications competition policy, Commission Directorate General IV-B, Brussels, May 30, 1995.

<sup>117</sup>Interviews with a legal advisor on telecommunications competition policy, Commission Directorate General IV-B, Brussels, May 30, 1995; private telecommunications consultant, Namur, 15 September 1995; a representative of the International Telecommunications Users Group (INTUG) and an official from the Department of Trade and Industry, London, 18 July 1995.

Both aspiring entrants and corporate users also avoid legal confrontations with monopolist telecommunications providers. Many potential entrants among other utilities enjoyed exclusive rights in their own domain and hesitated to initiate legal claims that could come back to haunt their own sector. Other potential entrants relied on public telecommunications enterprises as purchasers of their products, in addition to being completely dependent as telecommunications consumers. Even large US firms that had experience with legal battles on the home front, such as IBM and AT&T, abstained from formal complaints and legal challenges.<sup>118</sup> Up through June 8, 1995, only two disputes between enterprises over competition abuses resulted in court action, and only two parties took member states or their agents to court over competition issues in telecommunications. Member states prosecuted four entrants,<sup>119</sup> who had simply entered the market on the sly rather than go bankrupt while they waited for judicial clearance. The defendants invoked the Commission directive on terminal equipment as justification in all of these cases.

In summary, the articulation of new legal obligations in the European competition regime contributed to a process of reform that liberalized telecommunications markets in Europe. However, the ECJ's interpretation of competition law and the Commission's application of these new rules did not independently compel policy change. The positive political response of concentrated, intensely interested actors and ultimately national

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<sup>118</sup>Interviews with a private telecommunications consultant, Namur, 15 September 1995; a legal advisor, Commission Legal Service, phone interview with Brussels, 13 March 1996 (Competition); legal advisor on telecommunications competition policy, Commission Directorate General IV-B, Brussels, May 30, 1995; private legal consultant on European regulation, Brussels, 31 May 1995.

<sup>119</sup>Systeme documentaire Minidoc, Research and Documentation Division of the Court of Justice of the European Communities, 8 June 1995. Respectively: *Société alsacienne et lorraine de télécommunications et d'électronique (Alsatel) v SA Novasam* C-247/86/1988; *Régie des télégraphes et des téléphones v GB-Inno-BM SA* C-18/88, 1991; *SA Centre Belge d'études de marché - télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) et SA Information publicité Benelux (IPB)* C-311/84, 1985; *Telemarsicabruzzo SpA v Circostel et Ministero delle Poste e delle Telecomunicazioni et Ministero della Difesa* C-320-322/90, 1993; *M. le Procureur du Roi v Jean-Marie Lagauche et autres* C-46/90 and C-93/91, 1993; *Procédure pénale v Francine Decoster, épouse Gillon* C-69/91, 1993; *Procédure Pénale v Annick Taillandier, épouse Neny* C-92/91, 1993; *Procédure Pénale v François Rouffeteau et Robert Badia* C-314/93, 1994.

governments was a fundamental component behind the opening of telecommunications markets across Europe. The Commission did not attempt to force change solely through legal means as it theoretically could, but consistently worked to create political consensus and incrementally eliminated exclusive rights. Formal legal challenges represent a small fraction of the policy process in telecommunications, where the vast majority of reform occurred through politically negotiated legislation.

#### A. The Denial of a Precedent for Electricity Markets

The Commission's efforts to liberalize the electricity sector under the same legal basis inspired a fundamentally different political response. The policy process that followed Commission initiatives confirms the extent to which major reforms depend upon political consensus and institutional cooperation. The absence of commitment to liberalization in the electricity field paralyzed the power of Article 90, and a concentrated bloc of opposition to particular reforms protected major components of electricity provision from competition. A prolonged period of debate and substantial dilution of the competition regime for electricity markets demonstrate that national governments are not powerless in the wake of European judicial review. The following chronology of the policy process in electricity liberalization reveals that law alone cannot determine policy outcomes.

Inspired by the success of its strategy in telecommunications, the Commission targeted parallel fields of public service for liberalization under Article 90. One month after the ECJ confirmed the Commission's competence to issue Article 90 directives for telecommunications in March of 1991,<sup>120</sup> Competition Commissioner Sir Leon Brittan suggested that the Commission would use the same legal basis to introduce competition in the electricity sector.<sup>121</sup> During June 1991, Energy Commissioner Cardoso Cunha

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<sup>120</sup>*France v Commission* C-202/88, 1991.

<sup>121</sup>European Commission Spokesman's Service, "Competition in the European Community's electricity and gas markets," Speech given by Commissioner Sir Leon Brittan at the Institution of Civil Engineers, London, 18 April 1991.

expressed a firm commitment to develop an internal market in electricity<sup>122</sup> and proclaimed that commercial relations between electricity producers and distributors would not be left to the exclusive discretion of the member states.<sup>123</sup> The Commission prepared and privately circulated a draft Article 90 directive for electricity competition during July 1991<sup>124</sup> and initiated formal infringement proceedings against import and export monopolies in electricity in nine member states in August of 1991.<sup>125</sup>

These Commission actions met with immediate opposition from electricity suppliers, most member states in the Council of Ministers, and a majority of the European Parliament. The Association of European Electricity Producers and Distributors (UNIPED) considered Commissioner Cunha's statements to be a "declaration of war,"<sup>126</sup> and the European Grouping of the Electricity Supply Industry (Eurelectric) demanded the initiation of a democratic process of reform to include consultation with affected parties.<sup>127</sup> Overwhelming opposition to the Commission's use of Article 90 in the Council and European Parliament seriously threatened the Commission's capacity to act: legally unable to stop an Article 90 directive in electricity, the Council could nonetheless stall all proposals for Council legislation, and the European Parliament could censure the

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<sup>122</sup>Caroline Monnot, "Le commissaire européen à l'énergie veut libérer le marché de l'électricité," *Le Monde* (12 June 1991).

<sup>123</sup>Specifically, "Il serait inadmissible que le contrôle des pratiques commerciales des producteurs et des distributeurs d'électricité en Europe soit laissé à la seule discrétion des gouvernements," Richard 1991.

<sup>124</sup>"Contents of the Directive of DG-IV on the Basis of Article 90.3 of the Treaty," Internal consultation briefing, Madrid, 16 July 1991. This Commission draft directive eliminated exclusive rights for electricity generation, imports and exports, the construction of transport or distribution lines, and rights for connections with the transmission and distribution systems. It imposes third party access to the grid, suppressing all special or exclusive rights for the utilization of the grid. The "First Draft Electricity Directive," Commission, Brussels, 30 June 1991 refers to a Commission Directive for electricity rights that derive from the Treaty in the last paragraph of the first page. Oudin 1993-1994, 5-6; Revol 1993-1994, 37; and interviews with a legal advisor, Commission Legal Service, telephone interview with Brussels, 18 March 1996, (Competition); and two legal advisors, Direction du gaz, de l'électricité, et du charbon (DIGEC), Paris, 21 February 1996 confirmed the Commission's original intention to issue an Article 90 directive in the electricity sector.

<sup>125</sup>The Commission targeted exclusive rights of importation and/or exportation in Belgium, Denmark, France, Greece, Ireland, Italy, the Netherlands, Spain, and the UK, Commission 1993, C-233, 31.

<sup>126</sup>Richard 1991.

<sup>127</sup>Monnot 1991.

Commission.<sup>128</sup> Commenting on reactions to proposals for electricity liberalization, French officials observed that "la loi n'est pas tout."<sup>129</sup>

And the political response was decisive: the Commission abandoned its Article 90 approach by the end of October 1991 and initiated a formally consultative process of reform under Article 100a.<sup>130</sup> Both the Council and European Parliament must approve internal market directives under Article 100a. The Commission proposed an initial directive under Article 100a in early 1992<sup>131</sup> and introduced a new proposal after consultation with the Parliament and Council in late 1993.<sup>132</sup> In its amended proposal, the Commission conceded to demands to require negotiated rather than mandatory TPA rights. The Commission then attempted to mobilize sufficient support for TPA for all eligible consumers under its plan: large industrial users and public distributors. French resistance to TPA rights for distributors forestalled agreement within the Council. In May 1994 the French also introduced their concept of a Single Buyer, whose principles met with opposition from the Commission, UK, and Germany.<sup>133</sup>

As negotiations on the electricity directive failed to produce a consensus, the Commission stressed its legal right to open markets unilaterally<sup>134</sup> and threatened to re-

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<sup>128</sup>Since the European Parliament now has "veto" rights under the Co-decision procedure, it could also stall policy adoption in some fields. Hocepiéd 1994, 61 and interview with an analyst of liberalization in public utilities at the Centre for European Policy Studies, Brussels, 1 June 1995.

<sup>129</sup>"The law is not everything," interview with two legal advisors, Direction du gaz, de l'électricité, et du charbon (DIGEC), Paris, 21 February 1996.

<sup>130</sup>Andrew Hill, "EC energy break-up plan tabled in Brussels," *Financial Times* (16 October 1991); Elisabeth Rochard, "Bruxelles va amender son projet sur l'énergie," *La Tribune de l'Expansion* (28 October 1991); Andrew Hill, "EC takes softer line on energy monopolies," *Financial Times* (30 October 1991); Oudin 1993-1994, 6; Revol 1993-1994, 37; Commission 1994a, 31.

<sup>131</sup>Commission Proposal for a Council Directive concerning common rules for the internal market in electricity of 24 February 1992, *Official Journal of the European Communities* C-65 (14 March 1992), 4.

<sup>132</sup>Commission, "Amended Proposal for a European Parliament and Council Directive concerning common rules for the internal market in electricity," COD 384, COM (93) 643 final, Brussels (7 December 1993a).

<sup>133</sup>Commission 1995a; Klom 1995; interviews with a representative for energy policy in the Permanent Representation of the UK, Brussels, 28 February 1996 and legal advisor on European electricity policy, Bundesministerium für Wirtschaft, Bonn, 18 January 1996.

<sup>134</sup>European Commission Spokesman's Service, "Application des règles de concurrence dans le secteur de l'électricité," Press Release (4 August 1992); Commission 1994a, 31; European Commission Spokesman's Service 1994b; Hocepiéd 1994, 61.

issue its Article 90 directive repeatedly.<sup>135</sup> Competition Commissioner Karel Van Miert issued subtle threats in a 1994 speech in London, arguing that

... the achievement of the internal market cannot be made solely dependent on further legislative action, ... there is already a solid commitment in the existing Treaties to create an internal energy market, ... and [t]here is no reason why the energy sector is to be seen as protected from competition law. All industrial sectors are covered by the Treaties and no exemption is accorded to energy. Yet governments and interested parties persist in seeing the sector as somehow exempt.<sup>136</sup>

This argument reflects the classic defense that the Competition Directorate General invokes to justify its Article 90 directives: DG-IV is merely applying Treaty obligations that member states already agreed to and thus is not really taking independent legislative action. DG-IV officials question the wisdom and legality of the entire Article 100a approach, which violates the Commission's role as an impartial enforcer of the Treaty by allowing the Council to specify Treaty obligations and by leaving supervision of measures related to public enterprises to member states.<sup>137</sup> As bargaining continued to stall, Van Miert again threatened to introduce an Article 90 directive if the Council failed to reach agreement on an internal market directive by the meeting of energy ministers scheduled for May 7, 1996.<sup>138</sup>

The Council did fail to attain any consensus by this date, but the Commission did not issue an Article 90 directive. Both national and Commission officials recognize that the Commission will not issue Article 90 directives unless opposing sides resolve their differences and agree to a common regulatory framework. Ultimately the Commission and national governments view the imposition of competition in the absence of

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<sup>135</sup>Interviews with an administrator of electricity policy, Commission Directorate General IV-C, Brussels, 14 September 1995; representative for energy policy in the Permanent Representation of the UK, Brussels, 28 February 1996; two legal advisors, Direction du gaz, de l'électricité, et du charbon (DIGEC), Paris, 21 February 1996.

<sup>136</sup>European Commission Spokesman's Service 1994b, 2.

<sup>137</sup>Hocepiéd 1994, 61 and interviews with administrators and legal advisors of competition policy, Commission Directorate General IV-A, B, and C, Brussels, 30 May 1995, 2 June 1995, and 27 September 1995.

<sup>138</sup>Interview with two legal advisors, Direction du gaz, de l'électricité, et du charbon (DIGEC), Paris, 21 February 1996.

compromise to be politically impossible: the Commission would probably not overcome internal conflicts to issue the directive, the Council and Parliament could take revenge with legislative stagnation, and threats to eliminate paragraph three of Article 90 would attract increasing support.<sup>139</sup> The risks associated with the need to defend each unwelcome Article 90 action before the ECJ<sup>140</sup> and the specter of treaty revision<sup>141</sup> induced cautious consensus-building rather than bold, independent action.

Contending positions on the inclusion of distributors as eligible consumers with TPA rights complicated the process of consensus building. The French remained firmly committed to the exclusion of distributors, while the Commission and Germany considered their inclusion to be a necessary component of the internal market. Although Article 100a directives formally require only a qualified majority vote in the Council, the threshold for approval is *de facto* unanimity. The German government's and Council

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<sup>139</sup>Hocepied 1994, 61-62 and interviews with an administrator of electricity policy, Commission Directorate General IV-C, Brussels, 14 September 1995; administrator of competition policy, Commission Directorate General IV-A, Brussels, 2 June 1995; legal advisor on telecommunications competition policy, Commission Directorate General IV-B, Brussels, 30 May 1995; legal advisor and administrator of energy policy, Commission Directorate General XVII-A, Brussels, 14 September 1995; legal advisor, Commission Legal Service, Brussels, 2 June 1995 (Competition); legal advisor, Commission Legal Service, telephone interview with Brussels, 18 March 1996 (Competition); representative for energy policy in the Permanent Representation of the UK, Brussels, 28 February 1996; two legal advisors, Direction du gaz, de l'électricité, et du charbon (DIGEC), Paris, 21 February 1996; legal advisor on European electricity policy, Bundesministerium für Wirtschaft, Bonn, 18 January 1996; policy analyst at the Center for European Policy Studies (CEPS), Brussels, 1 June 1995.

<sup>140</sup>The Commission Legal Service, which prioritizes winning cases over advancing particular elements of competition policy, takes a more conservative interpretation of Article 90 than DG-IV, interviews with a legal advisor, Commission Legal Service, Brussels, 2 June 1995 (Competition) and administrator of competition policy, Commission Directorate General IV-A, Brussels, 2 June 1995. These relative priorities are parallel to traditional divisions between lawyers and economists in the US Federal Trade Commission and Antitrust Division, where lawyers prioritize conduct cases that include explicit violations of the law while economists prioritize structural cases that involve the creation and maintenance of dominant positions, James Q. Wilson, "The politics of regulation," *The Politics of Regulation*, ed. James Q. Wilson, (New York: Basic Books, 1980), 379-382.

<sup>141</sup>The European delegation of the French Senat proposed to modify Article 90, M. Jacques Oudin, sénateur, "L'Europe et les services publics," *Rapport d'Information No. 6* (6 October 1993), and France, Spain, and Luxembourg supported a revision to accommodate concerns about public service obligations, Boratra 1995, 75. Although not all member states supported any change in Article 90, Boratra 1995, 74-78, the Commission took seriously the possibility that member states would bargain their way to a revision, Hocepied 1994, 61 and interview with a legal advisor, Commission Legal Service, telephone interview with Brussels, 18 March 1996 (Competition).

Presidency's reluctance to isolate the French on an issue of critical importance subjected the legislative process to a high degree consensus.<sup>142</sup>

The Commission also tried to advance the legislative process by pursuing the infringement proceedings it initiated in 1991 against member states with import and export monopolies for electricity. By 1992 the Commission issued reasoned opinions against Denmark, France, Ireland, Italy, the Netherlands, and Spain.<sup>143</sup> The ECJ's *Almelo* ruling of April 1994, which recognized justifications for some restrictions to trade but did not provide specific criteria for a proportionality test, complicated the Commission's prosecution. By June 1994 the Commission referred infringements by France, Ireland, Italy, the Netherlands, and Spain to the ECJ,<sup>144</sup> preparing to convince the Court that blanket member state prohibitions on import and export are disproportionate measures.<sup>145</sup> Although basic export and import rights were no longer a major point of contention in the Council, the Commission proceeded relatively tentatively with its prosecution. Given the contentious nature of the debate on electricity liberalization, Commission officials commented that, if the ECJ voids a major attack against exclusive provision in electricity, then "we're finished."<sup>146</sup> By late 1996, the Commission dropped its case against Ireland and continued prosecution of France, Italy, the Netherlands, and Spain.<sup>147</sup>

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<sup>142</sup>Interview with a representative for energy policy in the Permanent Representation of the UK, Brussels, 28 February 1996.

<sup>143</sup>The Commission withdrew infringement proceedings against Belgium, Greece, and the UK upon the withdrawal of exclusive rights, Commission, "Tenth annual report to the European Parliament on Commission monitoring of the application of Community law – 1992," *Official Journal of the European Communities* C-233 (August 1993b), 31.

<sup>144</sup>The Commission withdrew its proceedings against Denmark in 1994 upon the withdrawal of exclusive rights, Commission, "Twelfth annual report on monitoring the application of Community law – 1994," *Official Journal of the European Communities* C-254, (29 September 1995d), 54 and Commission 1997, C-332, 49.

<sup>145</sup>European Commission Spokesman's Service 1994a. Van Miert's 1994 speech also includes threats to intensify prosecution of import, export, and commercial monopolies, European Commission Spokesman's Service 1994b, 4.

<sup>146</sup>Interview with a legal advisor and administrator of energy policy, Commission Directorate General XVII-A, Brussels, 14 September 1995.

<sup>147</sup>Commission 1997, C-332, 49. These cases include C-157/94 (Netherlands), C-158/94 (Italy), C-159/94 (France), and C-160/94 (Spain).



Similar to the situation in telecommunications, only a trickle of legal challenges reached the Court of Justice from parties interested in challenging dominant electricity enterprises or member states who granted exclusive rights. Up through June 8, 1995, only three disputes between enterprises over competition abuses resulted in court action, and only four parties challenged member states or their agents in court over competition issues in electricity.<sup>148</sup> The Court saw more disputes as a result of appeals against member state prosecution of activities that violated national regulation (eight cases) and appeals against the Commission's imposition of fines for specific competition abuses (ten cases).<sup>149</sup>

As disagreements within the Council persisted, both member states and the Commission became increasingly concerned that the rules for electricity liberalization would be left vulnerable to random, inconsistent development in courts across Europe. National governments and Commission leaders prefer to legislate the rules for an internal market in electricity since legislation offers more control over outcomes and creates more comprehensive, determinant regulatory guidelines. Both liberalizers and defenders of exclusive rights considered judicial decisionmaking in the absence of framework legislation to be the worst case scenario for coherent policy reform.<sup>150</sup>

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<sup>148</sup>Systeme documentaire Minidoc 1995. Respectively, *SA Établissements Piszko et autres v SA Dammarie Distribution "Centre Leclerc" et SA Carrefour Supermarché* C-114-115/84, 1985; *Petróleos de Portugal - Petrogal SA v Correia Simões & CO. LDA et Correia Sousa & Crisóstomo Lda* C-39/92, 1993; *Almelo* C-393/93, 1994; *Henri Cullet et Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers v Centre Leclerc à Toulouse et Centre Leclerc à Saint-Orens-de-Gameville* C-231/83, 1985; *Compagnie Commerciale de l'Ouest et autres v Receveur principal des douanes de La Pallice Port* C-78-83/90, 1992; *Terni SpA et Italsider SpA v Cassa conguaglio per il settore elettrico* C-99/92, 1994; *Fonderia SpA v Cassa conguaglio per il settore elettrico* C-100/92, 1994.

<sup>149</sup>Systeme documentaire Minidoc 1995.

<sup>150</sup>Interviews with an administrator of electricity policy, Commission Directorate General IV-C, Brussels, 14 September 1995; administrator of electricity policy, Commission Directorate General XVII-C, Brussels, 14 September 1995; legal advisor and administrator of energy policy, Commission Directorate General XVII-A, Brussels, 14 September 1995; representative for energy policy in the Permanent Representation of the UK, Brussels, 28 February 1996; two legal advisors, Direction du gaz, de l'électricité, et du charbon (DIGEC), Paris, 21 February 1996; legal advisor on European electricity policy, Bundesministerium für Wirtschaft, Bonn, 18 January 1996; representative of the European Grouping of the Electricity Supply Industry (Eurelectric), Brussels, 27 September 1995.

Ultimately, compromise in the Council beat the conclusion of the Commission's prosecution of infringement proceedings before the ECJ. The Council and European Parliament approved an internal market directive for electricity on December 19, 1996. The directive guarantees that large industrial users can negotiate TPA as eligible consumers, a position which enjoyed universal support. More a capitulation than a compromise, the Article 100a internal market directive also accommodates all major French demands: member states are free to organize national electricity provision according the Single Buyer model and may deny public distributors the status of eligible consumers with TPA rights. These provisions, along with permission to regulate prices for customers located in particular areas,<sup>151</sup> enable the French to maintain their tradition of public service in the electricity sector.

In summary, the constellation of interests affected by the introduction of competition in the electricity sector contributed to a slow, conflictual, and highly compromising process of regulatory reform, despite the existence of a legal framework generally biased toward liberalization. Neither the Commission's formal legal powers to issue Article 90 directives nor active prosecution of alleged treaty violations could compel member states to accept the competition regime proposed by the Commission. The policy dynamics in this sector demonstrate that concentrated political opposition can cripple the application of a controversial legal framework. Article 90 and European competition rules, formally under the exclusive supranational authority of the Commission and ECJ, depend upon inter-institutional consensus for their realization in concrete policy domains. Agreements across institutions reflect political bargains that accommodate those interests who express their demands in decisionmaking arenas or who possess structural power due to their capacity to evade unprofitable environments

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<sup>151</sup>Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996, *Official Journal of the European Communities* L-27 (30 January 1997), 20.

through relocation. Rather than being dominated by any single set of actors or levels of government, policy outcomes in these two cases reflect a contested process that involved compromise among European institutions, national governments, and organized business interests.