
EUROPEAN TELECOMMUNICATIONS POLICY AND OPEN NETWORK PROVISION: THE EVOLUTION OF A REGULATORY METHODOLOGY

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European integration has been characterized by the gradual process of seeking common solutions to problems affecting the Member States as a collective. The framers of the Treaty of Rome, upon which the European Economic Community is based, believed that even if agreement was not always achieved, working together towards concrete achievements would generate a sense of common destiny, or an *aqui communataire*, moving the Member States towards a more integrated Europe. This belief was founded in part on the realization that prescriptive demands which directly threaten the national sovereignty of Member States had rarely proven successful in promoting integration.¹ For this reason the European Community may be viewed as a “highly developed formal international regime, in which European governments cooperated to manage a wide range of issues within an established framework of rules, norms of behavior, and decision-making procedures.”² The refinement of this framework of rules and procedures through the collective participation of the Member States, rather than a prescribed blueprint for integration, has been essential to the development of European integration.

These characteristics of European integration apply equally well to the development of European telecommunications policy. As with European integration, the diversity of interests which are represented within the telecommunications sector and the lack of a single authority makes it difficult to approach policy problems with prescriptive solutions. Just as the Treaty of Rome did not

1. See Roy Pryce, *The Dynamics of the European Union* (London: Croom Helm, 1989), chap. 3, concerning the collapse of the European Defense Community (EDC) and European Political Community (EPC) in the early 1950s.

2. Helen Wallace, William Wallace, and Carole Webb, eds., *Policy Making in the European Community*, 2nd ed. (New York: John Wiley & Sons, 1983), 405.

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seek political and economic union from the outset, the development of telecommunications policy has not sought to create a single overarching regulatory authority designed to establish policy in a prescriptive way. Rather, its primary concern has been with the creation of a common regulatory methodology based on principles generated through a collective and open process of consultation and consensus. Because the dialogue over policy development has shifted from the isolated domain of the engineers and technocratic elite to the political stage, the growth of telecommunications policy in Europe has developed and expands largely as a result of the participation of diverse interests in this collective process.

The Commission's efforts to develop a policy framework include the *Green Paper on the Development of the Common Market for Telecommunications Services and Equipment*³ — Europe's first comprehensive response to the changes taking place in the communications sector — and the recently established Directive on Open Network Provision (ONP),⁴ which has developed the basis of a new regulatory methodology for telecommunications services in the EC.

The Commission's goal in these efforts ultimately may be to establish a common telecommunications policy, but the approach taken has rather emphasized the development of a framework based on common principles to guide the progressive evolution toward such a policy. Since European telecommunications policy is still in its infancy it is difficult to say whether these responses will provide the basis for a future common policy; however, by agreeing to a fundamental set of principles, the Commission has succeeded in creating the first vestiges of a nascent regulatory authority.

Telecommunications as a Sector for Integration

There are unique problems and pressures in the field of telecommunications which differentiate it from other sectors subject to the forces of integration. Creating policy in this field is hampered not only by the cross-current of consensus politics and the resistance of Member States to subordinate their interests to a supranational style, but also by a variety of regulatory constraints unique to the industry itself.

The first such difficulty is one of definition. A question faced by policy makers in Europe and elsewhere is whether the telecommunications sector is to be considered a public utility, an industry dominated by private enterprise, or a blend of both. In Europe in particular, entrenched state monopolies, PTTs,⁵

3. Commission, *Towards a Dynamic European Economy: Green Paper on the Development of the Common Market for Telecommunications Services and Equipment*, COM (87) 290, (Brussels 30 June 1987): 49.

4. Council, *Directive on the Establishment of the Internal Market for Telecommunications Services Through the Implementation of Open Network Provision*, 90/387/EEC, O.J. L 192/1, (28 July 1990).

5. The term PTT (Postal, Telegraph and Telephone administration) is now an outdated term, since the postal aspect of the authorities are being disaggregated from the telecommunications component. The term Telecommunications Operator (TO) is now used to describe all forms of telecommunications authorities in Europe. However, the term PTT will be used hereinafter to denote the European telecommunications establishment.

which govern the telecommunications industry have used this problem of definition as a way to fend off the intrusiveness of Community-wide telecommunications regulation. PTTs have argued that they provide a public service, and through their natural monopoly over the network infrastructure, are able to offer the public economies of scale that cannot be matched by a competitive telecommunications market covering all of Europe.

Some Member States and PTTs have argued that a public monopoly serves to soften the destabilizing effects of technical advances and ensures that the benefits of progress are redistributed as widely as possible. The main public service benefit that a state controlled monopoly can provide is the assurance of "universal service," which includes the provision of expensive rural networks and low cost service for the poor. Member States who support this view claim that these public service goals would not be met in a truly competitive telecommunications market. The monopoly status of the PTTs, on the other hand, allows them to "cross-subsidize" the costly endeavor of providing universal service by charging higher prices to business customers. From this perspective the public utility monopoly is seen as providing the best guarantee that public service interests will be protected.

Opponents of this argument attack not only the supposed economies of scale afforded by the state governed PTT monopolies, but also raise questions about the extent to which they can be relied upon to protect the public interest. Recent evidence suggests that in fact monopoly structures may not always have the public interest at heart. A *Financial Times* investigation undertaken in 1990 revealed that public phone companies were charging their customers between \$10 and \$20 billion a year more than their costs for international calls.⁶ Proponents of a liberalized telecommunications market believe that the elimination of telecommunications cartels would significantly reduce the cost of long distance calls and as a result, the volume of international traffic could more than double.⁷ The lower prices that would accompany a liberal regime would benefit the consumer foremost — possibly the most neglected participant in the telecommunications debate — and would increase the volume of cross-border traffic, that would in turn boost the profits of telephone companies.

Furthermore, American deregulation has shown that universal service and competition are not mutually exclusive. Competition in American telecommunications has resulted in a greater degree of telephone penetration of some forty-nine lines per one hundred of the population, versus an average of 37.8 among EC Member States.⁸ Furthermore, "the FCC has...concluded that the rise of 1 million in the number of American households with a telephone in 1985-86 suggests that 'universal service' has not been affected by divestiture."⁹ Finally,

6. Hugo Dixon, "Reconnecting Charges and Costs," *Financial Times*, 13 April 1990, 1 & 20.

7. *Economist*, 6 July 1991, 16.

8. Organization for Economic Co-operation and Development (OECD), Committee for Information, Computer and Communications Policy, *Communications Outlook 1990*, Paris, 1990.

9. Jill Hills, "Universal Service: Liberalization and Privatization of Telecommunications," *Telecommunications Policy*, June 1989, 137. (citing 1986 FCC figures).

if price is any indication of social concern, the reduction of some forty percent in long distance services since the early 1980s¹⁰ as a direct result of deregulation would seem to be very much in the public's interest. Nevertheless, the ideal of an open market and single European telecommunications policy strikes many Europeans as implying the inevitable "break up" of their deeply entrenched state monopolies, in a manner similar to the painful US divestiture of the early 1980s. While Europe may not have the powerful forces of the U.S. Federal court system and the independent regulatory authority of the FCC that were central to the American liberalization process, there are substantial pressures working against the well-fortified European telecommunications establishment.

Technological Innovation

Signal digitalization, fiber optic cables, intelligent networks, and satellites have multiplied the range and number of applications for telecommunications as well as reduced the cost of providing basic and advanced services. The technological boom is reflected by the market's growth and size. Globally, the market in telecommunications services is more than 300 billion ecus, as compared with 90 billion ecus for equipment, and the EC market share in services which is around 80 billion ecus.¹¹ More significantly, the services segment is projected to grow at a "rate of 11.5 percent per year to 154 billion ecus by 1995 which is two to three times the projected real rate of growth for the European economies as a whole."¹² Another indicator of technology's impact on the sector might be demand for the new services and applications brought about by technological advance. A Round Table of European Industrialists report indicates that "demand for data communications capacity is growing among Europe's big industrial companies at a rate of as much as forty percent per year."¹³ Furthermore, in 1991, basic telephone services accounted for well over 1.2 percent of GDP in each of the Member States¹⁴ and is projected to represent 7 percent of the Community's GNP by the year 2000.¹⁵

Establishing a common response to the pressures of technological innovation has become especially critical in light of the unevenness with which technology has developed throughout the Member States. Because of technological innovation, the capacity to provide advanced services differs between the Member States and as a result, the so called "costs of non-Europe" are especially high.

10. *Economist*, 6 July 1991,

11. See Herbert Ungerer & Nicholas Costello, *Telecommunications In Europe*, Revised Edition, (Brussels: Commission of the European Communities, 1990), 223; and Michael Hodges, "Telecommunications," in Stephen Woolcock, ed., *Britain, Germany and 1992: The Limits of Deregulation* (London: RIA, 1991), 59. (citing 1988 figures).

12. *Ibid.*

13. "Clearing the lines — a User's View on Business Communications in Europe," the Round Table of European Industrialists, October 1986. Cited in Ungerer, 88.

14. National Economic Research Associates (NERA), *Study of the Application of the ONP Concept to Voice Telephone Services*, July 1991, 32.

15. *Green Paper*, Presentation, 2.

According to one estimate, incompatible technology has meant that approximately one-fourth of all data traffic sent across Europe fails to reach its destination. *European Competition Policy* (London: RIIA, 1990), 54. The costs are also high in economic terms. A call from Germany to Spain, for example, costs about \$1.82 per minute while a call from Spain to Germany costs forty-three percent more.¹⁶ It currently costs an Italian \$20.80 to place a twelve-minute call during peak hours to the United States, while a call made from the United States to Italy costs only \$7.81 for the same duration.¹⁷ It has been argued that the development of a common market in telecommunications could lead to a Community-wide savings of 10 billion ecus.¹⁸ Such gains, which can only be derived from collective participation, provide a significant motivation for developing a common policy to steer the growth of the telecommunications industry.

While technological advance may hinder policy evolution by making agreement over common definitions more difficult, the need for common policy is ultimately stimulated by the demands technological advances place on each of the twelve regulatory environments. Since networks become more powerful the further they extend and better they connect, technology itself can be seen as a driving force in the development of a common policy.

Globalization

A common European policy for telecommunications is also motivated by the external pressure from increased global competition in telecommunications services. Not only have the free market reforms taking place in other nations provided a model for some aspects of European policies, but Europe has also been forced to defend itself against aggressive new foreign competitors arising out of these deregulated environments.

The break-up of "Ma Bell" in 1982 not only released AT&T from its commitment to remain outside the international market, but the divestiture also increased the number of other players seeking a share in the European market. Sprint and MCI, both created in anticipation of deregulation, are now major competitors with AT&T for long distance, voice and data services in Europe. US Sprint International is currently seeking to become Britain's third provider of basic telecommunications services along with British Telecom and Mercury Plc.¹⁹ The "Baby Bells" or Regional Bell Holding Companies (RBHCs, more commonly known as Regional Bell Operating Companies, or RBOCs),²⁰ which

16. Organization for Economic Cooperation and Development (OECD), Committee for Information, Computer and Communications Policy, *Communications Outlook 1990*, Paris, 1990, 14. (figures for peak rates)

17. Federal Communication Commission (FCC), *Calling Prices for International Message Telephone Service Between the United States and Other Countries*, August 1992, 49.

18. "The Economics of 1992 - An Assessment of the Potential Economic Effects of Completing the Internal Market of the European Community," *European Economy*, March 1988 (figure includes equipment and services).

19. "Sprinting to the Red Tape," *Economist*, 11 January, 1992.

20. The AT&T divestiture placed the 22 Bell Operating Companies (BOCs) under the authority of

were created as a result of AT&T's divestiture, have also been expanding into international markets primarily in the fields of fiber-optics, cellular technology and cable television. Pacific Telesis, one the most aggressive RBOCs in the European market, earns just under five percent of its annual revenues from overseas business.²¹ As one commentator remarked regarding the RBOCs' recent entry into the European market, "if the [Baby Bells] are still naive, it is not so much in the commercial sense, but rather by still not understanding that Europe is not the 51st state..."²²

Practices such as private line resale, virtual networks, refiling and dial-back allow operators to transit international long distance calls through hubs that offer less expensive rates.²³ Dial-back is a good illustration of these economizing services. In this scheme, a business customer located in Germany calls the dial-back operator in America. The caller rings once, hangs up and the dial-back operator returns the customer's call from the United States. When the overseas customer picks up, the computer conferences the call to a second line automatically, giving the German caller a United States dial tone so that he is able to place a call anywhere in America or worldwide at U.S. rates rather than expensive German rates.²⁴ While services such as dial-back are still small, they pose a substantial threat by introducing the idea that competition in long distance services is possible by simply bypassing the European telecommunications establishment.

The unilateral move by countries such as the US and Japan to open their markets to increased competition and foreign investment has also placed pressure on Europe to open its doors in a similar manner. Europe's monopoly dominated market, lack of transparency, and bewildering array of standards were the principle causes for the breakdown of the discussions over services (i.e. telecommunications and banking, *et cetera*) in the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), and ultimately to the breakdown of the round in December of 1990. American insistence on competition in long distance, foreign investment in basic services, and non-discrimination and cost-based access to basic telecommunications in Europe continues to be a major stumbling block in current GATT negotiations.

Finally, the need to respond collectively to increasing competitive demands is highlighted by the threat to the creation of global standards posed by large (particularly US) companies by virtue of their market dominance. In responding to a question regarding the American threat, raised at a hearing held by the House of Lords Select Committee on the European Community, one Commission official said, "American standards have become ... worldwide international standards very often without the international process — in particular IBM

seven Regional Bell Holding Companies.

21. "Baby Bells Scramble for Europe," *New York Times*, 10 December 1989, sec. 3.

22. Pliny Allen Porter, "The 'Other' US Carriers in Europe," *Single Market Communications Review*, April 1990, 21-24.

23. Karen Lynch, "Alternative Calling Services on the Rise," *Communications Week International*, 22 June 1992.

24. "Hot-Wiring Overseas Telephone Calls," *New York Times*, 9 January 1992.

standards have become the *de facto* standards in the computer field for the simple reason that there was no other homogeneous market power around which could face up to that type of power."²⁵

The combination of global pressures, technological innovation, and the weakened PTT argument for natural monopoly has somewhat simplified the Commission's constitutional role as the motor for integration. Rather than having to inspire a dynamic for further integration, the Commission finds itself in the position of merely guiding the direction and the dialogue of a dynamic that is already taking place.

Of course, shifting this debate to the political stage has meant that the process of defining and regulating telecommunications is hampered by the problems of obtaining political agreement. Increasingly, the Commission is perceived as playing an overexpansive and supranational role in what has traditionally been the domain of national public interest, common policy based on consensus becomes more difficult to achieve. The policy process is also constrained by regulatory and technological disparities between Member States and the subsequent difficulty of deriving common definitions for an industry in continual flux. For these reasons, coupled with the diversity of interests involved, the development of European telecommunications policy has been at times halting and uneven despite the great pressures for convergence.

Europe's First Response: *The Green Paper*

Amid the great pressure surrounding the development of common policy, the Commission presented its comprehensive response in its *Green Paper on the Development of the Common Market for Telecommunications Services and Equipment* in 1987. Faced with Member States' fear of the Commission's further accretion of regulatory power, PTTs' concerns about losing the comfort of their protected civil service status, and the industry's demand for more access and fewer restrictions, the Commission's only solution was to make the *Green Paper* a delicate balancing act between these interests. The balance struck by the *Green Paper* and the methods used to achieve this middle road have characterized the development of telecommunications policy ever since.

The paper itself hints at the awkwardness of its position by saying that on the one hand "the scope for market forces, competition and innovation must be increased," while at the same time arguing that "the financial viability of the network infrastructure providers [the PTTs] must be assured..." There is a clear conflict between these two positions, and the *Green Paper* itself admits they are "two partially contradictory conditions."²⁶ While opening itself to accusations of inconsistency and ambiguity, the Commission took this approach to ensure that future proposals would not fall on the unresponsive ears of Member States

25. Herbert Ungerer, Directorate General XIII to the House of Lords, Select Committee on the European Communities, *European Community Telecommunications Policy*, 6th Report, Session 1987-88, (17 November 1987), 80.

26. *Green Paper*, 49.

and PTTs already conditioned to mistrust the centripetal forces generated by Brussels. This is precisely why the Commission states more subtly in the *Green Paper* that its real purpose is to begin "a common thinking process" by "identifying common positions...analyzing common objectives...[and]...examining the external problems posed to all Member States..."²⁷ The purpose of this approach is "to set off a *dynamic process* that will give the political, economic and social actors involved a better understanding of their own interests and optimize their activities in the construction of the Community."²⁸ Guided by the Commission's careful balancing of interests, the *Green Paper* establishes a process for the evolution of a common policy. Its success may lie in its avoidance of prescriptive demands which could be easily rejected by Member States, accusing the Commission of over-stepping its original mandate.

It follows, therefore, that the *Green Paper* is not a blueprint for liberalizing, much less deregulating, European telecommunications. The Commission clearly does not believe "that deregulation on the American model could be applied within the Community..." but if a definition is necessary, it concludes that "what is needed is '*re-regulation*' which would permit more rapid development while still providing necessary safeguards."²⁹

Above all, the *Green Paper* spells out a careful bargain between the forces for competition and those of the status quo. Despite this pragmatic, but cynical approach, the compromise struck by the Commission has itself become a basis of authority for the Commission to act in a way which ensures that both sides of the bargain are met and implemented. As such, the *Green Paper* is not an agreement on a common set of principles, but is more a set of political concessions on the road to "re-regulating" telecommunications in Europe.

The Green Paper Bargain

The first *Green Paper* recommendation effectively highlights the Commission's priority of winning acceptance by the Member States and their PTT organizations, and is the first concession in the Commission's careful balancing act. This first concession reflects an "acceptance of continued exclusive provision or special rights for the telecommunications administrations [PTTs] regarding provision and operation of the network infrastructure."³⁰

The *Green Paper* justifies this substantial concession, stating that given the public service goals, economies of scale, and the high cost of building parallel networks, it seems likely that Member States will maintain "exclusive provision of network infrastructure on their territory by a single telecommunications administration or a very limited number."³¹ The purpose of the recommenda-

27. *Ibid*, 19.

28. *Green Paper*, "Presentation," 6. (italics added)

29. Citing statement made by the European Parliament in the *Green Paper*, 22. (citing statement made by the European Parliament) (italics added)

30. *Ibid*, Figure 13.

31. *Ibid*, 72.

tion, therefore, is not to justify the existence of the PTTs' natural monopoly. Instead, it assures these powerful interests that the development of a common policy does not necessitate their demise, but rather it demands their participation.

Having assured the PTTs of their exclusive rights, the second recommendation attempts to define the market segment to remain under the PTTs monopoly control and identifying other segments suitable for liberalization. In particular, the *Green Paper* attempts to draw a distinction between basic and value-added services. Because of the wide range of new telecommunications services available, and the fact that service functions can be performed by either public or private networks, the division between these two types of services especially unclear.³² The *Green Paper* admits that "the trend towards [network] integration has...led to a blurring of traditional boundaries between services [and that] there is at present no agreed definition of "basic services' within the Community."³³ Nevertheless, the *Green Paper* says that the exclusive provision of basic services should be "narrowly construed," and that for the time, "basic services reserved for provision by the telecommunications administrations should be essentially restricted to voice telephony only."³⁴ Voice telephony, however, represents some eighty-five to ninety percent of a PTT's annual revenues,³⁵ indicating that liberalization, if it were to take place, would be limited to only ten to fifteen percent of the telecommunications market. While it may seem as if this arrangement reflects a blow to the proponents of competition, it must be kept in mind that this small percentage of the market (generally defined as value-added services) is projected to grow at some thirty-six percent per year,³⁶ versus basic services which have grown more slowly in comparison.

In exchange for ensuring PTT authority over maintenance of the infrastructure and exclusive provision of reserved services, the *Green Paper* offers a number of concessions to proponents of liberalization. Specifically, these include the "free (unrestricted) provision of terminal equipment," the "free (unrestricted) provision of all services other than basic services," and the "separation of regulatory and operational activities of telecommunications authorities."³⁷ However, one of the most significant, but perhaps more subtle concessions was the authority given to the Commission implementing the *Green Paper* bargain.

Following an extensive consultation period in which telecommunications users groups, government ministries and multinational corporations were encouraged to submit responses to the *Green Paper*,³⁸ the Commission issued a

32. Generally, basic services refer to the underlying voice or data transmission and the operations which surround its transmission, while value-added services refer to telecommunications service such as electronic mail, online databases, managed network services, even caller-ID.

33. The *Green Paper* notes that "by extension there is, at present, no common definition for" enhanced or "value-added" services," *Ibid*, 42.

34. *Ibid*, 14.

35. Ungerer, 33.

36. Scion Networks, *The Market for Value-added Services in Europe 1* (December 1989): 13.

37. *Green Paper*, figure 13.

communication on implementing the *Green Paper* in February, 1988.³⁹ The paper noted the broad consensus expressed in response to the *Green Paper*, and on 30 June 1988, Member States passed a resolution accepting the *Green Paper's* bargain.⁴⁰ What the Member States may not have expected was the zealotry with which the Commission would seek to implement the agreement.

Recommendations "H" and "I" of the *Green Paper* were designed specifically for the Commission to provide "strict continuous review of operational (commercial) activities of Telecommunications Administrations according to Articles 85, 86 and 90, EEC Treaty."⁴¹ Articles 85 and 86 simply refer to the Commission's power to enforce competition laws, concerning practices such as the abuse of a dominant position or restrictive practices such as cross-subsidization. Article 90, however, gives the Commission the authority to apply these competition laws to public undertakings such as PTTs. What threatened Member States most, however, was that Article 90(3) also gave the Commission the power to "address appropriate directives or decisions to Member States" without prior Council approval and over the heads of the Member States. As Michael Hodges has said, while the *Green Paper* may have been soft-spoken, it was obvious "that a big stick was in hand."⁴²

The weight of this "big stick" was tested just one year after the *Green Paper* was published in the Spring of 1988 when the Commission focused on the first concession to proponents of competition by issuing the Directive on a competitive market in telecommunications terminal equipment under Article 90(3).⁴³ The directive sought to make good on the first concession provided by the *Green Paper*, by stripping national organizations of the exclusive right to sell, supply and service telecommunications terminal equipment. While the Member States generally supported the substance of the law, they rejected the Commission's use of Article 90; subsequently, France, Germany, and Belgium challenged the directive in the European Court.

It was not until 19 March 1991 that the Court finally delivered its opinion. The Commission won its claim of maintaining deregulatory power over nationalized concerns, but at a significant cost. The full implementation and acceptance of the equipment directive was postponed by nearly three years — not because the Member States disagreed with its substance explicitly, but because they mistrusted the procedure by which they were being forced into compliance

38. Comments on the *Green Paper* Up to February 1988, Directorate General XIII/d/2, Telecommunications Analysis and Forecasting (48 responses).

39. Commission, *Towards a Competitive Community-wide Telecommunications Market in 1992: Implementing the Green Paper on the Development of the Common Market for Telecommunications Services and Equipment*, COM (88) 48, (Brussels, 9 February 1988).

40. Council, *Resolution on the Development of the Common Market for Telecommunications Services and Equipment up to 1992*, 88/c257, O.J. C257/1, (30 June 1988).

41. *Green Paper*, Figure 13.

42. Hodges, 65

43. Commission, *Directive on Competition in the Markets in Telecommunications Terminal Equipment*, 88/301/EEC, 16 May 1988, O.J. L 131/73. This was a risky move by the Commission, since the council was still in the midst of debate over whether to accept the suggestions made by the *Green Paper*, which it subsequently did in June 1988.

as well as the Commission's seemingly supranational role. This lends credence to the argument that prescriptive demands can hamper the process of policy development, even once general agreement has been reached (in this case the Council Resolution of 1988).

Even before the equipment issue was resolved, the Commission sought to ensure the second *Green Paper* concession and tabled a draft directive under Article 90 calling for Member States to remove exclusive rights for the supply of telecommunications services other than reserved services. This "Services" Directive has been the most controversial assertion of Community authority over the regulation of telecommunications in Europe, and has yet to be resolved.

The Services Directive was initially controversial because the Commission issued the Directive without consulting any of the Member States. Although a European Court battle was avoided, as Hodges points out, "the absence in the Article 90 process of any formalized consultation with the Council of Ministers or the European Parliament, or even informal consultations to generate interest-group support for the measure, must be considered a serious flaw."⁴⁴ By its omission, the Commission risked alienating the Member States from the policy making process.

Ultimately, a political solution to the debate over the Services Directive was reached. In exchange for acceptance of the Services Directive, a Directive for Open Network Provision (ONP)⁴⁵ would be issued simultaneously. This was viewed favorably by the Member States who felt that the ONP process would be designed in a way that would assure Member State influence, if not outright dominance of the emerging regulatory environment. The compromise inherent in the *Green Paper*, despite its occasional obsequiousness and ambiguity, gave the development of a common policy in telecommunications services its first, if not inelegant, push towards the creation of a regulatory methodology.

Open Network Provision

Initially, ONP was seen as a necessary counterpart for the Commission's recognition of the PTT monopoly over basic services since it required Member States to make infrastructure more open for new entrants and service providers through common conditions of usage and standards for interoperability. These principles would apply both to the way in which service providers were able to use the network as well as to the guidelines for infrastructure accessibility. Simply stated, the concept of Open Network Provision is to make the telecommunications infrastructure a "common property" in which the basic elements of the network are open to use by sellers of advanced services and end users.

Because the open network concept represents a radical departure from the traditional hierarchical or "closed" models which have governed European

44. Hodges, 69.

45. Commission, *Directive on Competition in the Markets for Telecommunications Services*, 90/388/EEC, O.J. No. L 192/10, (28 July 1990). (Not to come into effect until 1 January 1991.)

telecommunications since the nineteenth century, some have viewed ONP as an important testing ground for the extent to which Member States are willing to introduce more competition and reduce state control. On the other hand, ONP applies to a relatively limited aspect of European telecommunications services, defined as "non-reserved" services.

As spelled out in the *Green Paper*, PTTs retain control over reserved services, while ONP is to apply only to the remaining, non-reserved services. It is, however, difficult to define this segment precisely. Value-added services certainly constitute a significant portion of this segment and include everything from basic telephone features such as call waiting or call forwarding, to more advanced services such as electronic mail or information retrieval systems like those used in credit card verification networks. Because value-added services are so difficult to define, estimates of its market size differ considerably. Generally speaking, value-added services could represent anywhere from ten to fifteen percent of the market if all services which are not currently considered basic or reserved services are included in the definition. However, the Commission has reported in more precise terms that value-added services total less than one percent of the entire market in telecommunications services.⁴⁶ Perhaps more definitively, a study commissioned in 1989 by Directorate General XIII (DG XIII, for Telecommunications, Information Industries, and Innovation) of the European Commission suggests that demand for value-added services among EC Member States was 2.02 billion ecu, and that its rate of growth was projected at thirty-six percent per year, making it a highly strategic segment of the market.⁴⁷

The ONP Directive that resulted from the political bargain over the Services Directive is not focused on setting out specific parameters for the nebulous value-added segment. Quite the opposite, ONP has become primarily a means for defining the PTTs' position with respect to the developing common telecommunications market, rather than seeking to increase access for service providers. In this way, the "open" network is misleading in that the underlying task of the ONP Directive was not to promote access by service providers, but was to establish the rules which govern the providers of infrastructure.

At the same time, however, the very fact that ONP has become a method for regulating the PTTs' provision of the network infrastructure demonstrates precisely why it must not be viewed as merely a peripheral adjustment. After all, the process of creating conditions for the network infrastructure is the process of regulating the very foundation of the telecommunications industry. From the Commission's perspective, ONP was not only a useful way to appease Member States over its use of Article 90 in the Services Directive, but also a way to avoid the repetitious, case by case application of Community competition law to telecommunications monopolies by achieving agreement between the Member States at the outset. In many ways, ONP may ultimately be seen as a clever way for the Commission to appease the European telecommunications establishment, while, in fact, entangling it in a process of Europe-wide

46. Ungerer, 55. (using 1986 figures)

47. Scion Networks, 13.

regulation.

ONP's foundation on a common set of principles rather than specific regulations has made it a flexible and durable policy which has ultimately engendered support from both sides of the bargaining table. Its success is that it does not seek to establish a single authority which would threaten the boundaries of national sovereignty, but rather utilizes a regulatory methodology which moves the development of telecommunications towards a common policy by first establishing a common set of principles for future regulation — a perspective much different from that taken by the *Green Paper*.

American and European Approaches to Open Networks

The concept of "open network" derives from regulatory conventions adopted as a result of American deregulation in the early 1980s. In 1982, Third Circuit Court Judge Harold Greene decided in favor of the US government in an antitrust suit brought against AT&T for abuse of its dominant position in the telecommunications industry. The settlement which followed, resulted in the structural separation of the 22 Bell Operating Companies into seven Regional Bell Operating Companies, (the "Baby Bells"). This structural separation, however, proved costly in terms of stifling innovation, as it prevented the exploitation of the advantages of technical integration which were then possible both technically and economically. On 15 May 1986, the Federal Communications Commission (FCC) requested the RBOCs to submit plans for the development of an Open Network Architecture (ONA) which would seek to eliminate the structural separation between RBOCs by creating "non-structural safeguards" based on the principle of equal access. The elimination of structural separation would also promote efficiency through technical integration of basic and enhanced services and preserve competition by stressing the unbundling of services so that anti-competitive behavior could be avoided.⁴⁸ Appealing especially to the deregulatory tendencies of many FCC economists, it has been noted, "ONA seemed to promise the ideal of a totally free market in telecommunications: a perfect market in which every service could be broken down into its constituent parts and priced according to some marginal cost principle, and in which the benefits of integration could be reconciled with total competition."⁴⁹

In response to these developments in America, the Commission's Senior Officials Group for Telecommunications established the *Groupe Analyse et Prevision* (GAP) (Analysis and Forecasting Group) in 1986 to study the im-

48. *Groupe Analyse et Prevision* (GAP) (The Analysis and Forecasting Group) study of the US experiment in Open Network Architecture (ONA) is especially useful for the period before actual ONA proposal had been submitted to the FCC. *Groupe Analyse et Prevision* (GAP) (Analysis and Forecasting Group), *Report on Open Network Provision (ONP) in the Community*, (Brussels, 20 January 1988), Annex 2.

49. Geoff Mulgan, "Open Network Provision and the Future of Regulation in Europe," in *The Single European Market and the Information and Communication Technologies*, ed. Gareth Locksely (London: Belhaven Press, 1990), 91.

plications of the American ONA plans and its applicability to European policy in telecommunications. On 20 January 1988, the GAP issued its long awaited *Report on Open Network Provision in the Community*. According to the report, the overarching aim of the ONP mechanism is twofold: first "to stimulate the development of non-reserved services, provided both by the Telecommunications Administrations and by Private Service Operators" and second, "to promote fair competition between Telecommunications Administration and Private Service Operators in the market of non-reserved services" by establishing non-discriminatory access to public network resources.⁵⁰

This approach differs from the American concept of ONA for the simple reason that it focuses particularly on non-reserved services, but it also goes even farther, emphasizing PTTs' participation in this aspect of telecommunications service. In contrast, the American ONA proposals have been used by the FCC as a means of preventing the RBOCs from entering markets which could be easily dominated given their considerable resources in relation to European PTTs.

The difference between the European and American approach to telecommunications regulation is made especially clear by the GAP Report on ONP. Following the two overall ONP objectives of liberalizing and stimulating services, the report presents what might be considered a third condition, stating that "ONP should not lead to the gradual erosion of the current position of the Telecommunications Administrations in the overall market place."⁵¹ Clearly the American deregulatory attitude has never viewed ONA as a way to protect monopoly interests. While ONA has been used to generate greater competition through the development of "non-structural safeguards," Europe's approach since the 1987 *Green Paper* continues to be marked by a curious balance, seeking to level the playing field while at the same time ensuring the continuation of the PTTs' protected, monopoly status.

The Framework Directive

The ideas emanating from the 1988 GAP report were finally realized by the Council's ONP Directive, adopted on 28 June 1990, and commonly referred to as the ONP Framework Directive. While establishing a common market in telecommunications services is clearly one of the principle aims of ONP, the Framework Directive is more concerned with establishing a set of principles for guiding the sector's diverse interests towards that goal, as well as maintaining the careful balancing of interests started in 1987 with the *Green Paper*. The two basic principles outlined in Article 3 of the Directive include transparency, non-discrimination, and objectivity, which are seen as essential for ensuring that the liberalization and harmonization of telecommunication services develop in line with the process of European integration and the 1992 program.

50. GAP ONP Report, 7.

51. *Ibid*, 7.

Based on these "basic principles," the Framework Directive outlines a trilogy of more specific conditions which include common standards, usage conditions and tariff principles. Increased competition and harmonization may be the ONP's ultimate aim, but the approach of reaching agreement on a common set of operating principles reflects the traditional European Community policy style of creating a framework and methodology, rather than centralizing authority and prescribing a specific policy outcome.

The development of common standards for technical interfaces between the wide range of telecommunications systems throughout Europe is essential to promoting the ONP principle of non-discrimination. Without harmonized standards, new entrants are excluded from the European market due to the cost and technical complexity of accommodating a multitude of standards rather than a single set. This is a major reason why AT&T, for example, has found it difficult to enter the European market.⁵² The Framework Directive simply says that European standards should comply with existing international standards (CEPT and CCITT) to ensure transfrontier services, and that when new technology requires new standards, they are to be developed by the recently created European Telecommunications Standards Institute (ETSI).⁵³

The second element of the ONP framework, usage conditions, refers to both the supply and use of services in the open network. In line with the ONP principle of transparency (which means well-published and available to the public), the Framework Directive states that the PTT should be required to publish the basic conditions upon which service is supplied and permitted to be utilized by the network's users. Without such safeguards, PTTs would be able to discriminate against service providers engaged in competitive activities. Supply conditions include, for example, maximum delivery period, quality of transmission, and maintenance and fault reporting arrangements. Usage conditions include conditions of resale capacity, conditions for shared use, and conditions for interconnection with public and private networks. These conditions are limited only by "essential requirements," which permit a Member State to restrict access to networks or public services in the case of a specific threat to the network operation or for other public interest concerns such as the protection of data.

The third and final principle outlined by the Framework Directive concerns tariffs, the charges collected from users for access to the infrastructure. The problem has been that among Member States, these tariffs are neither based solely on cost nor are they uniform. This could have the effect of excluding new service providers from participating in the market through such an arbitrary rate system.

Because of substantial PTT resistance to Community influence over their own pricing controls, the Framework Directive merely demands that tariffs be non-discriminatory and guarantee equality of treatment. However, it also re-

52. David Manasia & Rose Darby, "AT&T Down But Not Out in Europe," *International Management* (UK), Vol. 42, No. 10, (October 1987): 62-64.

53. ETSI was established in 1988.

quires that they be transparent and "sufficiently" unbundled so that users know what they are paying for. The Directive states that tariffs should be based on objective criteria or be "cost-oriented," but it concedes that "the fixing of the actual tariff level will continue to be the province of national legislation and is not the subject of open network provision conditions."⁵⁴ Although ONP will establish the principles for Member States to uphold, as a policy methodology or framework, it is not in a strong enough position to dictate specific tariff levels.

Having established agreement on the principles and conditions that provide the regulatory basis of the Framework Directive, the next task was to apply the ONP principles to four key areas of the telecommunications sector. These include ISDN, Packet Switched Data Services (PSDS), leased lines and voice telephony. Clearly the process of reaching agreement on common principles is one thing, but ensuring that they are applied and the agreement is kept is quite another.

For this reason, the Framework Directive includes a provision for the establishment of an "advisory" committee composed of representatives of the Member States and chaired by a representative of the Commission.⁵⁵ The task of the ONP Committee is primarily to consult with users, consumers, manufacturers and service providers on the process of applying ONP principles to the telecommunications sector.

While it is true that the Committee has encouraged dialogue and has sponsored critical sector studies on the application of ONP, it has no regulatory authority comparable to the United States Federal Communications Commission or the British Oftel. Its primary purpose is to provide a way for the Commission to inform Member States of proposals it intends to submit to the Council with the express purpose of streamlining the legislative process by providing an opportunity for problems to be resolved before actual Council debate. Despite its good intentions, many have criticized the ONP Committee as merely adding another cumbersome procedure to an already lengthy process. Since many of the Members of the ONP Committee are the same individuals who serve on the Council working groups, debate tends merely to be shifted from one Committee to the next. On the other hand, the ONP Committee arrangement has given the Commission a way to solidify agreements or "side-deals" prior to losing control of the debate once the proposal has gone to the Council.

As with the process of European integration in general, under ONP, efficiency has been sacrificed in favor of non-prescriptive policy-making, whereby underlying principles and legislative consensus are established to provide a framework of regulation. Indeed, despite its cumbersome structure, this process has produced agreement on three of the four telecommunications sectors targeted for the application of ONP.

In the areas of ISDN and PSDS, the Council has recently issued two recom-

54. ONP Framework Directive, Annex II.

55. Commission, *Decision Setting up a Joint Committee on Telecommunications Services*, 90/450/EEC, O.J. L 230 24/8/90, (30 July 1990).

recommendations on the provision of harmonized ISDN access arrangements and a minimum set of ISDN offerings, as well as a minimum set of PSDS in accordance with ONP principles.⁵⁶ Both provide supply and usage conditions, harmonization of technical interface standards, and tariff transparency. While it is true that both are Recommendations (a legally weaker instrument than a Directive), Member State compliance has been high since the Commission published a reference list of standards in the Official Journal (O.J.) in 1990.

The ONP process has also produced a proposal for a voice telephony Directive that has already gone to the ONP Committee for review.⁵⁷ The proposed Directive seeks to harmonize the provision of voice telephony throughout the Community, but the liberalization of the market is not one of its explicit aims. Nevertheless, the fact that this Directive has an impact on such a large segment of the telecommunications sector has generated hesitations, particularly in light of recent debate surrounding the Maastricht Treaty and concern over increasing the depth of European integration. As a result of pressure from the Member States, the Commission has postponed its submission of the proposed Voice Telephony Directive to the Council until later this year.

Perhaps the most significant application of ONP has been in the area of leased lines.⁵⁸ After years of debate and discussion the Council has finally adopted the *Directive on the Application of Open Network Provision to Leased Lines*.⁵⁹ This is the first Directive to come from the ONP process, representing a substantial step forward and giving substance to ONP.

The Leased Lines Directive also provides a useful look at how ONP will be applied to future telecommunications policy debates and gives a better idea of how the future open network will take shape. Leased lines refer to circuits or lines leased by PTTs to private service operators who are then able to provide enhanced services to end users. One example of such services is Telenet, the Value Added Network (VAN) which leases lines from European PTTs (amongst others) in order to provide its customers with inexpensive connections to data base and other private services. The proposed directive for leased lines is designed to govern the way in which PTTs provide leased lines, and to establish the rules guiding private service operators under the conditions outlined by ONP.

Leased lines have been controversial for some time. The problem stems from the fact that once a line has been leased, services on that line can then be resold to users wishing to bypass the more expensive PTT services. The Commission's

56. Council, *Recommendation on the Harmonized Provision of Integrated Services Digital Network (ISDN) Access Arrangements and a Minimum Set of ISDN Offerings in Accordance with Open Network Provision (ONP) Principles*, 92/383/EEC, O.J. L 200/10, (5 June 1992); and Council, *Recommendation on the Harmonized Provision of a Minimum Set of Packet-Switched Data Services (PSDS) in Accordance with Open Network Provision (ONP) Principles*, 92/382/EEC, O.J. L 200/1, (5 June 1992)

57. See National Economic Research Associates (NERA), *Study of the Application of the ONP Concept to Voice Telephone Services*, (Brussels, July 1991).

58. Referred to as "private lines" in the United States.

59. Council, *Directive on the Application of Open Network Provision to Leased Lines*, 92/44/EEC, O.J. L 165/27, (5 June 1992).

proposed Directive, as explained above, had to ensure that it not lead "to the gradual erosion of the current position of the telecommunications authority in the overall market place" (the first *Green Paper* concession). This has been accomplished largely by limiting the Directive to a specific and basic type of leased line referred to as point-to-point, fixed destination line, in which the user has no ability to route a connection through a public switched network.⁶⁰ This provision is acceptable to the PTTs, as it still permits them to lease non-ONP lines at higher rates and with fewer restrictions.

Despite these limitations, the Directive does provide for a substantial number of user interests. It introduces the idea of a "common ordering procedure" — "one-stop-shopping" — through which users are able to deal with a single PTT when ordering and maintaining an intra-Community ONP leased line, rather than developing agreements with multiple PTTs. The Directive similarly proposes "one-stop-billing" as well. The Directive also applies specific regulations concerning how quickly PTTs must be able to repair faulty lines, and even guides the publication of a PTT refund policy in case of customer dissatisfaction. Finally, PTTs must guarantee to maintain a minimum number of lines leased under ONP conditions. Despite the fact that all of these ONP conditions are subject to implementation and supervision by the national regulatory authorities, a grievance procedure is also provided, to be presided over by the ONP Committee.

As the increasingly technical nature of the Leased Lines Directive shows, the ONP process is moving from the level of generalized principles to one of increasingly specific rules and regulations, illustrating a remarkable evolution in Europe's telecommunications policy. In a matter of only six years, a policy which began as a "common thinking process" initiated by the *Green Paper* has led to the development of technical standards and supply conditions for leased lines on a Community-wide basis. Moreover, these policy outcomes have been established in the absence of a single regulatory authority. As with the development of the European Community, telecommunications policy can be seen to have evolved in a non-prescriptive way, relying on a regulatory methodology based on common principles rather than a formalistic blueprint for its development.

Conclusion

Clearly there are weaknesses in ONP's non-prescriptive approach. Efficiency has certainly been sacrificed in the interest of consensus. In the absence of a single regulatory authority, the length of time it takes to reach consensus and then achieve implementation of ONP is considerable. This absence of regulatory authority has also created problems of fairness. National control over tariff

60. *Groupe Analysis et Prevision (GAP) (Analysis and Forecasting Group), Proposal on Open Network Provision (ONP) for Leased Lines in the Community*, (Brussels, 11 January 1989), 11. The Proposal lists 5 other types of leased lines not covered by the Directive on leased lines.

levels, PTT dominance of the grievance process established by the Framework Directive, and the Directive's concern with maintaining the PTTs' monopoly, all support the notion that although ONP initially sought to stimulate innovation and promote fair competition, in the end it has actually done very little for the user.

Criticism of ONP has been leveled particularly at the degree of influence maintained by the PTTs during the regulatory process. A comprehensive report on the development of ONP, published by a British consulting firm specializing in telecommunications economics, focused particularly on the role played by the *Groupe Analyse et Prevision* (GAP) (Analysis and Forecasting Group) in forming ONP and the degree to which it has ignored the needs of users.⁶¹ The report points out that while numerous user groups are listed as participants in the GAP process,⁶² the actual GAP members list is clearly dominated by PTTs, with the UK and Denmark being the only Member States to include major service providers.⁶³ Even Dr. Herbert Ungerer, the chief architect of the *Green Paper* and ONP, once admitted "we have been criticized during the whole of last year [1988], particularly in ONP, that the process was not open enough. I believe that part of that criticism was certainly justified."⁶⁴

Since Dr. Ungerer's comments, however, the Commission has played an active role in trying to incorporate users into the ONP process. In particular, the Commission has supported the creation of a User Round Table on ONP through the European Community Telecommunications Users Association (ECTUA), by supplying facilities and travel expenses for participants. Moreover, two months after the adoption of the Framework Directive, the Commission announced the creation of the ONP Forum (now referred to as the ONP-CCP Platform) to be comprised of representatives from the telecommunications industry and to be completely independent from Community or national regulators.⁶⁵ While it is true that users have had some impact on the direction of Community policy,⁶⁶ overall, users are still merely a peripheral concern to the policy process. For the moment, Open Network Provision remains in the domain of the network providers, who must first solve their differences before the multitude of users are allowed to clutter the regulatory landscape.

The absence of a single authority has also meant that the regulatory process is highly susceptible to Europe's volatile political climate. The recent debate over the Maastricht Treaty has proven to be the most significant obstacle to the development of a common telecommunications policy since the ONP process

61. Analysys Ltd., *Briefing Report Series: European Telecommunications-1; Standards and ONP—Keys to the Open Market* (London: Analysys Ltd., 1989).

62. GAP ONP Report, Annex I.

63. The UK contingent also included private concerns, British Telecom and Mercury, who accompanied the Ministry for Trade in Industry along with Ofel.

64. Analysys Ltd., citing Herbert Ungerer speaking at a European Community Telecommunications Users Association (ECTUA) Conference, (Brussels, 20 January 1989), 62.

65. See Commission, *Open Network Provision Information Sheet #3*, Directorate General XIII/d/2, (December 1990).

66. Marc Austin, "The ONP Bargain: What's in it for the User?" Paper presented at *Centre de Recherches Informatique et Droit* (30 June 1992, Namur, Belgium).

began. Both the ONP Directive and Service Directive were to undergo significant reviews this year under the auspices of the Directorate General XIII (DG XIII, for Telecommunications, Information Industries and Innovation) and Directorate General IV (DG IV, for Competition). In particular, these reviews were to discuss the right of PTTs to continue to function as monopoly powers in contradiction to single market principles and anti-trust law. However, concern raised particularly by France over the implications of Commission overzealousness in light of the Maastricht debate has delayed these reviews until late this year.

Keohane and Hoffmann's analysis of European integration is particularly appropriate in evaluating the evolution of Community telecommunications policy and the ONP methodology.⁶⁷ They note that Community policy does not develop in a linear progression, but rather it evolves through the interaction of diverse interests. Thus it is not surprising that ONP has also evolved in fits and starts. In a network of interests where individual units are defined not by themselves but in relation to others,⁶⁸ the resulting interaction tends not to be the sole product of a collectively constructed policy, but is uneven and responsive to a variety of interests. Keohane and Hoffmann also suggest that the reason for this uneven development is that in a network system, "when conditions are propitious and leadership strategies appropriate...the political style of supranationality enables connections to be made between points in the network, and allows an expanded conception of tasks. When conditions are less benign or strategies inappropriate, the results are policy stagnation and separation of policy spheres."⁶⁹ Thus, the success of policy in a network of diversity depends as much on "propitious" conditions, as on concerted action. For this reason, policy in the European Community is most successful when it seeks to develop the parameters of a framework in which convergence is allowed to develop, guiding the dynamic rather than dictating the outcome.

Such an approach is particularly important for the telecommunications sector where the motivation to integrate requires less of a push from the Community, than providing the means for directing the evolution of integration. This task is made difficult primarily because the telecommunications industry in Europe still lies somewhere between a public utility and a commercial enterprise. For this reason, as well as others, the Commission's only course of action has been to increasingly define the parameters of the emerging commercial side of telecommunications, in the hopes that technological advances and increased service demand themselves will work to erode the "natural" barriers to competition.

One way for the ONP process to promote liberalization of the telecommunications establishment may be to focus on issue areas that are at the heart of competition. In the United States, liberalization was fostered by concerns sur-

67. Robert Keohane & Stanley Hoffmann, "Conclusions: Community Politics and Institutional Change," in *The Dynamics of European Integration*, ed. William Wallace (London: RIIA, 1990).

68. *Ibid.*, 282.

69. *Ibid.*

rounding the monopolistic nature of the long distance market in the 1980s. A related debate which is more appropriate to the European context would be the discussion of community-wide licensing for value-added and mobile communications, or an EC policy of interconnection. In fact, discussion of these issues has already begun. A proposal for a Single Community Telecommunications License was presented to the ONP Committee in December of 1991, a Green Paper on liberalizing mobile communications has recently been issued, and interconnection has become the center of controversy in the proposed Voice Telephony Directive which will soon go to the Council.

The fact that so much attention is being devoted to the idea of liberalizing telecommunications in Europe gives some reason for optimism that freer markets in Europe will be the ultimate destination of the ONP process. However, despite ONP's potential, compliance with and implementation of Community policy still rest with the European telecommunications establishment.

Absolute compliance seems likely to occur only with the establishment of an independent regulatory authority designed to enforce the principles of transparency, non-discrimination and objectivity embodied by ONP. However, the Community's rejection of independent authorities for promoting increased integration goes as far back as the Treaty of Rome; recent opposition to the expansion of European institutions called for by the Maastricht Treaty is yet another expression of this reluctance. For this reason, the policy process can only continue to encourage the development of "propitious" conditions which will gradually lead to convergence. This will be done, however, through a regulatory framework that has largely been put into place.



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