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THE EUROPEAN COMMUNITY'S ROAD TO TELECOMMUNICATIONS DEREGULATION

STEVEN DOV LANDO

INTRODUCTION

The availability of dependable, reasonably priced, and technologically advanced telecommunications systems is essential to modern economies and international trade. In European countries, until recently, national monopolies, known as Postal Telegraph and Telecommunications Administrations ("PTT"s),¹ controlled telecommunications. Each country developed its own PTT, which monopolized telecommunications equipment and service provision in its respective country.² Cooperation between the PTTs was poor because of conflicting national standards, incompatible equipment types, and monopoly restrictions.³ As a result, Europe suffered from poor telecommunications quality, prompting the European Community (the "EC")⁴ to consider methods to effect change in the market.

Despite EC efforts over the last decade, international telephone calls

1. The term PTT has become outdated because most European countries have created a separate postal agency and removed the postal aspects from the original authority. The remaining authorities are generally known as Telecommunications Operators. Nevertheless, throughout this Note, the term PTT is used to refer to the European telecommunications establishment.

2. In the United States, AT&T developed similar characteristics. The European PTTs, however, were actual government agencies, whereas AT&T was only a government approved monopoly. See e.g. *The New Boys; High Roads and Low Roads*, The Economist, Oct. 5, 1991, at 12, available in WESTLAW, MAG-ASAP File [hereinafter *The New Boys*] (describing AT&T as "a sort of private-sector PTT"); Paul E. Teske, *After Divestiture 1-2* (1990) (describing AT&T's growth to dominance in American telecommunications). The PTTs' membership in such international organizations as the International Telecommunications Union, its subsidiary organization, the International Telegraph and Telephone Consultative Committee, and the Conference of European Postal and Telecommunications Administrations strengthened their influence. See James Mark Naftel, *The Natural Death of a Natural Monopoly: Competition in EC Telecommunications After the Telecommunications Terminals Judgment*, 6 Emory Int'l. L. Rev. 449, 451 (1992).

3. See Naftel, *supra* note 2, at 451-52.

4. The EC consists of twelve Member States: Belgium, Denmark, France, Germany, Great Britain, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain. See Treaty Between the Member States of the European Communities and the Kingdom of Spain and the Portuguese Republic Concerning the Accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community, 1985 O.J. (L 302) 9. Austria, Finland, Iceland, Liechtenstein, Norway, Sweden, and Switzerland subjected themselves to most EC regulations when they joined with the EC to form the European Economic Area. See Vivienne Robinson, *Recent Developments in the Law of the European Communities*, 2 Duke J. Comp. & Int'l L. 1, 25-26 (1992). More recently, Austria, Finland, and Sweden joined the European Union, which is the umbrella organization over the EC. See *Three Nations Agree to Join EU*, Wall St. J., Mar. 2, 1994, at A6. Although this Note will not discuss the Nordic countries, their membership in the EU subjects them to the same European telecommunications directives as EC Member States. See *infra* note 232.

within the EC are more expensive than intra-American calls over the same distance.⁵ Also, international calls from Europe to the United States are more expensive than the same calls originating in the United States.⁶ Furthermore, there are fewer telephone lines per capita in Europe than in either Japan or the United States.⁷

European users continue to face excessive delays for installation of telephone services. In Spain, the waiting list for phone installation numbers 244,000 orders, and in Greece the list contains over one million requests, some of which will wait more than four years.⁸ Even in Belgium, the home of the EC headquarters, residents are sometimes forced to wait for over six months to have basic service installed.⁹

Over the last decade, most theorists have come to agree that monopolistic control of the telecommunications industry results in lower quality and higher costs.¹⁰ In response, European economists and legislators have been calling for a change from the traditional, monopolistic control of telecommunications services provision to an openly competitive market.¹¹ These theorists argue that Europe must allow the market to regulate itself through open competition in order to prepare the EC for competition in the global telecommunications market.¹² Hoping to advance the quality of European telecommunications, and to assist the economic harmonization of the EC,¹³ policy makers have been calling for re-regulation, liberalization, deregulation, and privatization¹⁴ of the Euro-

5. See Naftel, *supra* note 2, at 452.

6. See Anthony Ramirez, *Hot-Wiring Overseas Telephone Calls*, N.Y. Times, Jan. 9, 1992, at D1 [hereinafter *Hot-Wiring*].

7. See Naftel, *supra* note 2, at 450.

8. See Natasha Constantelou, *Liberalizing Telecommunications Markets*, 1993 Telecommunications Policy 431, 435 (table 2).

9. See Naftel, *supra* note 2, at 452.

10. See Marc T. Austin, *European Telecommunications Policy and Open Network Provision: The Evolution of a Regulatory Methodology*, 17 Fletcher F. World Aff. 97, 99-100 (1993); Naftel, *supra* note 2, at 449.

11. Cf. *Called to Account*, The Economist, April 24, 1993 at 18(2), available in WESTLAW, MAG-ASAP File [hereinafter *Account*] (estimating that open competition between European telecommunications firms would double the growth in demand for telecommunications services over the next twenty years).

12. See *Towards a Dynamic European Economy: Green Paper on the Development of the Common Market for Telecommunications Services and Equipment*, COM(87)290 final § (2)4 [hereinafter *Green Paper*]. The Green Paper is divided into three sections, the first of which is essentially a preamble. Throughout this Note, references to the Green Paper will be classified as § (1), (2), or (3).

13. See *id.* § (2)2. See also Constantelou, *supra* note 8, at 441-42 (referring to the "belief that advanced communication systems can be used as tools to increase the cohesion of the Community by solving social and economic problems and by overcoming geographical inequalities").

14. These words, though often used interchangeably, actually have very distinct meanings. Re-regulation is usually a first step whereby the government attempts to prevent the monopoly provider from abusing its position. This can be achieved by supervising tariffs on private providers and the quality of service provided by the monopolist. The next step, liberalization, is the encouragement of the private sector to compete with the monopolist provider. Eventually this leads to deregulation, which aims to remove all

pean PTTs.

In 1987, the European Commission (the "Commission") drafted the Green Paper on the Development of the Common Market for Telecommunications Services and Equipment (the "Green Paper")¹⁵, which called for deregulation of much of the European telecommunications market.¹⁶ The Green Paper called for the European countries to separate their national service provider from their national policy maker.¹⁷ It also required open competition in both the telecommunications terminal market and the market for non-basic telecommunications services.¹⁸ The EC has made significant movements towards these goals over the last seven years.¹⁹

Despite its deregulatory goals, however, the Green Paper, and the directives that followed it,²⁰ endorsed continued operation of the PTTs in some aspects of the telecommunications market.²¹ Proponents of the PTTs claimed that telecommunications should be considered a public utility, justifying the PTTs' existence as natural monopolies.²² They also claimed that PTTs provided a public service and that, through monopoly control of the network infrastructure, PTTs could offer the public economies of scale that a competitive telecommunications market could not match.²³ Many people, however, disputed these supposed benefits and

governmental control, leaving the open market as the only regulator. Though the term deregulation is used most often, it is a misnomer since true deregulation has not even been achieved in the United States or the United Kingdom and will probably never be achieved. See Constantelou, *supra* note 8, at 433. Though many market analysts believe that the movement towards "deregulation" enhances telecommunications quality, there are some who criticize such a view for its unrealistic simplicity. See *id.* at 434.

Privatization represents a shift of the PTT's management from government control to private ownership. This is usually done to raise capital or to increase operating efficiency and technology. See *id.* at 433-34. Although privatization does represent a loosening of the monopoly held by the PTT, it does not, in itself, induce competition. See *The New Boys, supra* note 2. To effectively open the markets to competition, the national governments must also endorse anti-monopoly legislation.

15. See *supra* note 12.

16. See *infra* notes 96-131 and accompanying text.

17. See *infra* note 114 and accompanying text.

18. See *infra* note 118 and accompanying text.

19. See, e.g., Patrick Oster, *Europe Finds Economic Unity Elusive Dream: Protectionism, Regulation Slow Efforts to Create Single Market*, Wash. Post, Jan. 23, 1994, at H1, available in WESTLAW, PAPERSMJ File (mentioning that the European telecommunications industry is already open to competition in the provision of equipment and most data services).

20. See *infra* notes 132-201 and accompanying text. Directives are important legislative instruments in the telecommunications field that are issued by either the European Commission or the European Council. They are addressed to, and are binding upon, the Member States, and require implementation by national laws. See Treaty establishing the European Economic Community, Mar. 25, 1957, art. 189, reprinted in *Treaties establishing the European Community* 207, 388 (Office for Official Publications of the European Communities, Luxembourg, 1987).

21. See *infra* note 105 and accompanying text.

22. See Austin, *supra* note 10, at 98-99.

23. See *id.* at 99.

began to demand open competition in all aspects of the telecommunication market.²⁴

This Note examines the pressures that forced the PTTs toward deregulation and studies the steps that have been taken to achieve deregulation. In addition, this Note analyzes the present level of deregulation effected by several EC Member States and the prospects for further deregulation. Part I of this Note lists the many forces, both internal and external, that have made impractical continued operation of telecommunication monopolies in Europe. Part II describes the steps taken by the European Commission, the European Council of Telecommunications Ministers (the "Council"), and the European Court of Justice to deregulate telecommunications in the EC. Part III discusses the difficulties that complicated, and continue to disrupt, the deregulation process. In an effort to analyze the multinational deregulation process, Part III also surveys eight individual European nations, grouped by their level of development.²⁵ Finally, this Part examines the forces battling for and against further deregulation and hypothesizes on the future of the PTTs. This Note concludes that the EC has successfully established a trend towards deregulation, exemplified by the recent proposal for deregulation of the voice telephony market,²⁶ and will achieve deregulation of all telecommunications markets in Europe within the decade.

I. THE IMPRACTICALITY OF CONTINUED OPERATION OF THE EUROPEAN PTTs AS REGULATED MONOPOLIES

Despite the long-standing tradition of allowing PTTs to regulate and provide telecommunications in Europe, many industry experts have criticized the PTTs as inefficient and costly. In addition, several experts now contend that the PTT structure is unsuited for global competition. Detractors also point out that PTTs, which are guaranteed monopoly control over their country's market, have no incentive to standardize their systems with other European countries. What follows is an analysis of the factors that have made it difficult for monopolistic PTT operation to satisfy European users or to achieve EC telecommunications goals.

24. See *infra* notes 27-34 and accompanying text.

25. This distinction is important when analyzing telecommunications development and deregulation. The more developed, "northern," countries have national policies that consider competition and liberalization in the telecommunications market as tools for improved industrial performance. In contrast, national policy in the lesser developed, "southern," countries is more conservative in light of moderate domestic industrial performance and national economies based on the activities of small and medium-sized companies. See Constantelou, *supra* note 8, at 442.

26. See *infra* note 201. "Voice Telephony" has been defined as "the commercial provision for the public of the direct transport and switching of speech in real-time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point." Commission Directive 90/388 of 28 June 1990 on Competition in the Markets for Telecommunications Services, 1990 O.J. (L 192) 10, 15 [hereinafter *Services Directive*].

A. Rejection of PTT Advantages

Although PTTs claim that they are best able to provide national telecommunications services, theorists have come to reject claims that monopolistic service benefits from economies of scale.²⁷ Furthermore, these theorists now doubt that PTTs truly serve the public interest.²⁸ Drawing support from the results of American telecommunications deregulation, these theorists argue that the public would benefit from open competition.²⁹

One European analyst claimed that the installation of a greater number of telephone lines in America than in Europe is a direct result of the judicially required deregulation in America.³⁰ Similarly, the United States Federal Communications Commission concluded that "the rise of 1 million in the number of American households with a telephone in 1985-86 suggests that "universal service"[³¹] has not been affected by divestiture."³² In addition, since the early 1980s, deregulation has reduced the cost of American long distance services by forty percent.³³ Based on these facts, many claim that services would similarly improve and prices would drop significantly if European telecommunications were opened to competition.³⁴

B. The EC Standardization Goal

Many policy makers believe that EC deregulation will speed movement towards the standardization of European telecommunications equipment and services.³⁵ When left unregulated, the PTTs of individual

27. See Austin, *supra* note 10, at 99.

28. See *id.*

29. "Recent technological progress and the experience of the United States suggest that the 'natural' justification for upholding monopoly provision of telecommunications, even in basic voice telephone service, is suspect." Naftel, *supra* note 2, at 462. As a result, when examining fair competition cases, some critics in the EC have questioned whether "natural monopoly" is a proper justification for anti-competitive practices. See Case 155/73, Guiseppa Sacchi, 1974 E.C.R. 409, 441.

30. See Austin, *supra* note 10, at 99.

31. The term "universal service" has long been used as an argument against open competition in telecommunications. It represents the theory that telecommunications monopolies are better at providing equal service to all potential users. For a brief history of the term, and an attack on its use to support telecommunications monopolies in the United States, see, generally, Milton Mueller, *Universal Service in Telephone History*, 1993 Telecommunications Policy 352.

32. Austin, *supra* note 10, at 99 (quoting Jill Hills, *Universal Service: Liberalization and Privatization of Telecommunications*, 1989 Telecommunications Policy 129, 137 (citing 1986 FCC figures)).

33. See *The Price of Speech: Time to Bust the Cartel that Keeps International Telephone Charges High*, *The Economist*, July 6, 1991, available in WESTLAW, MAG-ASAP File [hereinafter *Price of Speech*].

34. See Hugo Dixon, *Reconnecting Charges with Costs*, *Fin. Times*, Apr. 3, 1990, at 20 [hereinafter *Reconnecting Charges*]; Hugo Dixon, *Telephone Users Over-Charged by World Cartel Operation*, *Fin. Times*, Apr. 3, 1990, at 1 [hereinafter *Over-Charged by World Cartel*].

35. See Green Paper, *supra* note 12, § (3)189. Through deregulation, the EC can

European nations have established different national standards that prevent cross-European uniformity. The PTTs wanted to retain complete control over their respective country's market, so they purposely created standards different from their neighbors, thus excluding foreign goods from their national market.³⁶ Deregulation rectifies this problem by subjecting the PTTs to EC-wide interests, such as telecommunications standardization.³⁷ Standardization works towards the "full interconnectivity" of European telecommunications systems, which is necessary to establish pan-European networks.³⁸ With unification through standardization, Europe can offer many new services and will also be better equipped to battle non-European companies that try to establish de facto world-wide standards by virtue of market dominance.³⁹

The Council enunciated the important EC goal of establishing "Community-wide network integrity . . . [that] work[s] on the principle of full interconnectivity"⁴⁰ in its directive endorsing the Green Paper. The EC has three primary goals in the development of a European telecommunications network infrastructure: the development of Community-wide "electronic highways," the establishment of pan-European mobile telecommunications systems, and the creation of a new European regulatory framework for satellite communications.⁴¹ These networks are a part of the "trans-European" network infrastructure, the development and interconnection of which has been awarded "special priority" by the Council.⁴²

Two major steps are necessary to establish an international "electronic

establish a central European authority that can control standards throughout Europe and move towards European networks. Cf. Herbert Ungerer & Nicholas P. Costello, *Telecommunications in Europe* 129 (rev. ed. 1990) [hereinafter Ungerer] (discussing the "need for policy formulation at Community level, in order to create a single Europe-wide market").

36. See Naftel, *supra* note 2, at 452.

37. See Green Paper, *supra* note 12, § (3)178.

38. Council Resolution on the Development of the Common Market for Telecommunications Services and Equipment up to 1992, 1988 O.J. (C 257) 1, 2 [hereinafter *Services and Equipment Resolution*]. The EC envisions pan-European networks in numerous telecommunications markets such as Integrated Services Digital Network, Integrated Broadband Communications, mobile telecommunications, and satellite communications. See Christina N. Beaton, *Telecommunications Law in the European Community*, in *European Community Law After 1992: A Practical Guide for Lawyers Outside the Common Market* 683, 687-88 (Ralph H. Folsom *et al.* eds., 1993).

39. See Austin, *supra* note 10, at 102-03. For example, in response to a question regarding the American threat raised at a hearing held by the House of Lords Select Committee in the European Community, one Commission official stated that American standards have often become de facto international standards due to their extensive market power. See *id.*

40. *Services and Equipment Resolution*, *supra* note 38, at 257/2.

41. See Joachim Scherer, *Telecommunications Laws in Europe*, in *Telecommunications Laws in Europe* 1, 5 (Joachim Scherer ed., 1993). For an analysis of the latter two objectives, see *id.* at 6-8.

42. Council Resolution of 22 January 1990 Concerning Trans-European Networks, 1990 O.J. (C 27) 8. A recent paper released by the Industry Commissioner called on the Commission to "mobilise to create pan-European telecommunications . . ." Suzanne

highway.” First, the individual nations must enhance the capacity of their existing network, which requires the digitization⁴³ of their analog lines.⁴⁴ Second, these nations must standardize their networks so that, by interconnecting the national networks, they can achieve a trans-European network.⁴⁵ Once such a network is achieved, the EC hopes to implement Integrated Services Digital Network (“Digital Network”)⁴⁶ technology throughout the system and, eventually, to operate its better and faster successor, Integrated Broadband Communications (“Broadband Communications”).⁴⁷ The main objective of a key program for promoting European network coherence, Research and Development in Advanced Communications Technologies for Europe (“RACE”), is to achieve “Community-wide introduction of [Broadband Communications] by 1995, taking into account the evolving [Digital Network] and national introduction strategies.”⁴⁸

All European countries are already working on implementing plans to adapt their national networks to Digital Network technology.⁴⁹ As of 1991, five Member States were already reported to have introduced commercial Digital Network systems, and five others to have launched experimental systems.⁵⁰ In an attempt to ensure that these developments will eventually lead to a European network, the Council has promulgated legislation to harmonize the Digital Network efforts in all European countries.⁵¹

Perry, *EC Urged to Mobilise on Computerised “Information Space”*, Reuter Eur. Community Rep., Oct. 25, 1993, available in LEXIS, News Library, CURNWS File.

43. Digitization is “the encoding, transformation, and transmission of any information as bits” Ungerer, *supra* note 35, at 35; see also Arval A. Morris, *Germany’s New Telecommunication Law*, 16 *Syracuse J. Int’l L. & Com.* 65, 72 n.19 (1989).

44. See Beaton, *supra* note 38, at 687.

45. See *id.* (describing the need for “a coordinated and interconnected network and consistency in the provision of services and equipment”).

46. “The Integrated Services Digital Network is an advanced, wholly integrated network of digital transmission and switching systems that permits the simultaneous handling of voice, data, and graphics with great speed and accuracy.” Morris, *supra* note 43, at 112 n.128.

47. “The Integrated Broadband Network is [Digital Network] plus broadband and is the ‘superpipe’ specially constructed from fiber-optic cable and connecting every household, farm or business. It will carry a very wide range of television and other entertainment plus all other rapidly expanding telecommunication services. [Digital Network] has a primary access rate [sic] of 1.5 Mbps CTI or DSI rate, but the Broadband [Digital Network] is being developed to carry transmissions of up to 150 Mbps.” *Id.* at 112 n.129. See also Beaton, *supra* note 38, at 687-88 (discussing the EC’s plans for implementation of Digital Network and Broadband Network technology).

48. Ungerer, *supra* note 35, at 153. For a brief description of RACE, see *id.* at 153-57.

49. See Scherer, *supra* note 41, at 5.

50. See *id.* at 6.

51. For some examples of such legislation, see Council Recommendation 86/659 of 22 December 1986 on the Co-ordinated Introduction of the Integrated Services Digital Network in the European Community, 1986 O.J. (L 382) 36; Council Resolution of 18 July 1989 on the Strengthening of the Co-ordination for the Introduction of the Integrated Services Digital Network in the European Community up to 1992 1989 O.J. (C

Deregulation was necessary to establish the EC's authority to control the standards created by the individual European PTTs.⁵² Such control is necessary if the EC hopes to achieve full interconnectivity. Strategists also hope that deregulation will force nations to achieve finite deadlines for the activation of pan-European telecommunications networks.⁵³

C. *New Technologies*

Technological advances have complicated the PTTs' system of strict regulation. Advances have merged historically unregulated computer technology with historically regulated telecommunications technology.⁵⁴ For the most part, regulators have loosened control over telecommunications rather than tightened control over computer regulations.⁵⁵ The PTTs had owned and operated the physical infrastructure of hard-wire lines, access to which was necessary to operate telecommunications services, and the PTTs had easily prevented competition by restricting access to the infrastructure. But technological advancements allowed competitors to bypass parts of the PTTs' hard-wire system, minimizing the PTT advantage.⁵⁶

Cellular technology enabled the PTTs' competitors to provide telecommunications services to users without accessing the hard-wire network. By 1990, Europe had 3.4 million cellular subscribers.⁵⁷ As cellular technology advances, the price of service, relative to the use of monopoly operated service, will drastically decrease, which will increase the number of subscribers.⁵⁸ Similarly, satellite technology allows the

196) 4; Council Resolution of 5 June 1992 on the development of the Integrated Services Digital Network in the Community as an Europe-wide telecommunications infrastructure for 1989 and beyond 1992 O.J. (C 158) 1; and Council Recommendation 92/383 of 5 June 1992 on the Provision of Harmonized Integrated Services Digital Network Access Arrangements and a Minimum set of Integrated Services Digital Network Offerings in Accordance with Open Network Provision ("ONP") Principles 1992 O.J. (L 200) 10.

52. See Perry, *supra* note 42 (referring to the Industry Commissioner's claim that breaking-up state monopolies in telecommunications markets would speed up the process of creating pan-European networks).

53. See *id.*

54. See Green Paper, *supra* note 12, § (2)2.

55. See *id.*

56. Cf. Account, *supra* note 11 ("Telephone firms need to be as lean and competitive as possible if they are to meet the challenge of the coming generation of wireless telephones . . .").

57. See Naftel, *supra* note 2, at 487 n.175.

58. Some estimates claim that mobile services will gain market shares to the point that 20-33% of all telephone calls will originate from mobile devices within 10 years. See Nicholas Higham, *Open Network Provision in the EC: A Step-By-Step Approach to Competition*, 1993 Telecommunications Policy 242, 246. Developments such as the advanced wireless system Personal Communications Network, and the Personal Communications Service, has been providing cellular service to more users in Britain. See Naftel, *supra* note 2, at 487. There are already two million cellular subscribers in Britain, and the latest venture in cellular phone provision, called Mercury One-2-One, has attracted over 40,000 subscribers and plans to expand quickly. See Richard L. Hudson, *Phone Venture is Called Bumpy But Promising*, Wall St. J., Mar. 2, 1994, at A7.

PTTs' competitors to relay telecommunications signals over long distances without accessing the government-owned hard-wire network.⁵⁹ Proposals for satellite personal communications combines both satellite and cellular technology to bypass completely the PTTs.⁶⁰

Other technological developments will create more options that bypass the government-owned infrastructure. The biggest example of this is the advances in packet switching and optical fiber technology, which allow line networks, such as cable, to compete in the telecommunications market.⁶¹ Another potential source of competition comes from a recent invention by Wavephore that allows the use of television bandwidths as informational highways.⁶² The latest development in the United States makes it feasible for even electric lines to carry information, thereby enabling electric companies to compete in the telecommunications market.⁶³

Private services have also adapted technologies to allow users to bypass Europe's high telecommunication services rates.⁶⁴ The most significant such practice is commonly known as "leased lines."⁶⁵ Other

59. See *In Brief*, Ariz. Bus. Gazette, Feb. 4, 1993, at 14, available in LEXIS, News Library, CURNWS File. Motorola Inc. recently

[m]et for the first time with a group of international investors in its \$3.37 billion Iridium project. The project is a global telecommunications network that utilizes wireless telephones and 66 low-earth-orbit satellites. The initial investors include representatives from . . . Europe Together, they have signed non-binding letters of intent to invest an initial \$800 million in the project. Launching of the Iridium satellites is scheduled to begin in 1996, with commercial service anticipated in 1998.

Id.

60. See, e.g., P. Verhoef, *The Introduction of Satellite Personal Communications in the European Community*, 60 Telecommunications J. 391 (1993) (describing various proposals for a technology that allows communications through mobile terminals linked by satellite).

61. Originally, cable networks posed no threat to the PTTs because available technology did not allow such a line network to provide telephone services. But advances in optic fiber and packet switching technology now make it possible for a line network to upgrade and provide such telecommunications services. See Morris, *supra* note 43, at 72-72 n.21; *Report: Towards the Information Superhighway*, 1993 Telecommunications Policy 631 (describing advances in fibre-optics).

62. Though initial plans are limited to transmission from the television stations to their contractors, this could become more widespread. This technology transmits data nearly 40 times faster than standard telephone modems, and a subsidiary of the German electronics conglomerate, Siemens AG, moved immediately to buy exclusive rights to market it in Europe. See Guy Webster, *High-Speed-Data Deal Signed*, Arizona Republic, July 30, 1993, at D6.

63. Electricity is provided through a line system, which could now be upgraded, like cable networks, to provide telecommunications services. See Steven R. Rivkin, *Look Who's Wiring the Home Now*, N.Y. Times, Sept. 26, 1993, (Magazine) at 46-47.

64. See Commission of the EC, *Panorama of EC Industry*, Telecommunications Services NACE 790 25-12, 25-14 [hereinafter *Panorama*] (European users now feel that "[i]f they can't get satisfactory responses from established telecommunications operators, they will increasingly look for alternative answers.").

65. "Leased lines" refers to an arrangement whereby a PTT leases an end-to-end telephone wire connection to a user, usually a business with two major locations that wants

operations such as dial-back allows operators to transmit international long-distance calls through hubs that offer less expensive rates.⁶⁶ In a dial-back operation, a European caller calls the dial-back operator in America but hangs up after one ring. The American operator calls the European caller back and then conferences him with the American party he wants to reach.⁶⁷ This allows the European callers to take advantage of lower U.S. rates, and pierces the monopoly protection around the European providers.

D. Foreign Competition

Free market reforms in other countries have forced Europe to defend itself against aggressive new foreign competitors.⁶⁸ The EC telecommunications market share is worth 80 billion ECUs, almost one quarter of the global market.⁶⁹ Foreign competitors are eager to tap into Europe's tremendous telecommunications market.⁷⁰

Many of the biggest international competitors in the European market are American companies.⁷¹ The 1982 break-up of "Ma Bell" allowed AT&T to compete internationally and increased the number of other companies seeking a share of the European telecommunications market.⁷² In April 1993, AT&T applied to Britain's Department of Trade and Industry for permission to operate a range of telecommunication services in and out of Britain.⁷³ US Sprint International and MCI, two companies created in anticipation of American deregulation, have since become major competitors with AT&T for telecommunications services

to network its entire operation. Due to the potential for "cream skimming," the PTTs established restrictive conditions under which they would lease such lines. See Morris, *supra* note 43, at 103 & n.102. But recent directives have forced the PTTs to offer leased lines at non-discriminatory rates. See Council Directive 92/44 of 5 June 1992 on the Application of Open Network Provision to Leased Lines, 1992 O.J. (L 165). This most recent such directive was essential for many new entrants who could not provide their own fixed networks.

66. See Austin, *supra* note 10, at 102; Matt Moffett, "Callbacks" Cut Telephone Bills of Users Abroad, Wall St. J., June 21, 1994, at B1, B2.

67. See *id.*

68. See *id.* at 101; John Williamson, *Europe 1992: Closer to the Horizon*, 221 Telephony 26, Dec. 2, 1991, available in WESTLAW, MAG-ASAP File. In fact, one British insider claimed to expect foreign competition to have as many deregulatory effects on European telecommunications as all of the EC's deregulatory legislation. See *id.*

69. See Austin, *supra* note 10, at 100 (setting the global market value at 300 billion ECUs at a time when one ECU was valued at \$1.18).

70. Foreign competitors' entry into the market is accelerated since "[s]ignal 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." Austin, *supra* note 10, at 100.

71. See *In Brief*, Ariz. Bus. Gazette, Sept. 9, 1993, available in WESTLAW, PAPERS File ("The US telecommunications industry's penetration of the European market is 'a striking success story' in a part of the world where government owned monopolies control 85 percent of the phone business, says a congressional study.").

72. See Austin, *supra* note 10, at 101.

73. See *Account*, *supra* note 11.

in Europe.⁷⁴ In fact, Sprint even attempted to become one of Britain's basic telecommunication services providers.⁷⁵ Furthermore, the American divestiture created Regional Bell Operating Companies.⁷⁶ These companies have since expanded into international markets, primarily in the fields of fiber-optics, cellular technology, and cable television.⁷⁷

European companies would also stand to benefit if provided a similarly deregulated environment.⁷⁸ Many market analysts feel that Europe must deregulate to strengthen the competitive edge of European companies so that they can compete in a non-restricted trade environment.⁷⁹ In addition, countries that have opened their telecommunications markets to competition, such as the United States and Japan,⁸⁰ have placed political pressure on the EC to do the same.⁸¹

E. Customer and PTT Dissatisfaction

European users, plagued by poor service, have also called for PTT deregulation. Despite the great steps taken towards deregulation since the Green Paper, European users and suppliers are still dissatisfied with the

74. See Austin, *supra* note 10, at 101.

75. See *id.*; Account, *supra* note 11.

76. See Teske, *supra* note 2, at 5 (The AT&T divestiture placed the 22 Bell Operating Companies under the authority of seven Regional Bell Holding Companies.).

77. For example, Pacific Telesis is competing in the German cellular phone market and Bell Atlantic has entered the Italian telecommunications services market. See Patrick Oster, *Dialing for European Phone Dollars Breakup of Overseas Monopolies Could Benefit U.S. Companies and Beleaguered Customers*, Wash. Post, Aug. 9, 1993, available in WESTLAW, PAPERSMJ File. In addition, US West is partners with British, Scandinavian, and French communications companies. See *US West A Leaner Meaner Baby Bell With Global Ties*, Phoenix Gazette, May 18, 1993, available in WESTLAW, PAPERSMJ File; Cynthia Johnson, *Europe Seen Still Contender In Multimedia Race*, Reuters Bus. Rep., Nov. 2, 1993, available in LEXIS, News Library, CURNWS File; Hudson, *supra* note 58, at A7.

78. See Naftel, *supra* note 2, at 450.

79. See Ungerer, *supra* note 35, at 223-24 ("[T]here is no alternative to exposing [European] industry to competition, relying on European ingenuity and competence to confront non-European competitors' " (quoting a speech delivered to the 1987 Financial Times World Telecommunications Conference by Mr. Narjes, Vice-President responsible for telecommunications in the Commission)); Michael Schrage, *Europe Lags in the Race to Develop and Distribute New Technologies*, Wash. Post, July 9, 1993, available in WESTLAW, PAPERS File (discussing the threat of foreign infiltration of European telecommunications markets, stating that "Europe's best hope is in influencing global technology standards, not trying to use them as tools for protectionism"); William Drozdiak, *Europe's Leap Towards Unity in '93 Falls a Bit Short*, Wash. Post, Dec. 31, 1992, available in WESTLAW, PAPERS File. The president of the EC's executive commission, Jacques Delors, insisted that Europe must institute "cross-border mergers and painful restructuring programs" in order to face American and Japanese competition. He also warned that "[i]f [Europe] lapse[s] back into nation-first policies, [it] will become a third-rate power." *Id.*

80. See Green Paper *supra*, note 12, § (3)155 (discussing both the United States and Japanese deregulation). Much has been written about the American divestiture. See, e.g., Teske, *supra* note 2. For a brief discussion of Japan's telecommunications deregulation, see Ungerer, *supra* note 35, at 109-13.

81. See Austin, *supra* note 10, at 102.

present state of the telecommunications market.⁸² One estimate indicates that the incompatible technologies between Member States caused approximately one-fourth of all data traffic sent across Europe to fail to reach its destination.⁸³ That, and the fact that prices for telecommunications in Europe are much higher than in the United States,⁸⁴ has driven European users to demand further deregulation of the PTTs in the hope of obtaining better and more reasonably priced telecommunications services.⁸⁵

Even some PTTs are finally asking for further Europe-wide deregulation. A European Commission study determined that absent further deregulation, the EC market for telecommunications service will grow by only 3-4% a year.⁸⁶ Because this same report calculated that deregulation could lift growth to 6-7% — quadrupling the size of the market over the next 20 years — Spain, Denmark, Holland, and even Germany have joined British telecommunications suppliers in advocating rapid deregulation of voice telephony.⁸⁷

The European Commission has established itself as a primary force in the difficult job of guiding and unifying the deregulation process.⁸⁸ The pressures of competition from new technologies and new competitors assisted the Commission when it began its deregulation efforts seven years ago. The present call for better service lends support to the Commission's continued attempts to open all European telecommunications markets to competition.

II. THE EUROPEAN COMMISSION'S ATTEMPT TO STANDARDIZE TELECOMMUNICATIONS EQUIPMENT AND SERVICES AND TO FOSTER COMPETITION

The Commission has released a significant amount of deregulatory legislation over the past seven years.⁸⁹ It began, in 1987, by releasing the Green Paper on Telecommunications Services and Equipment (the "Green Paper").⁹⁰ Based on authority established in the Green Paper, the Commission subsequently released two major directives: the Termini-

82. One multi-national survey showed satisfaction with existing telecommunications provision to vary from 89% in France, down to 23% in Italy. See *Europe's Companies Back Telecoms Liberalization, Survey Shows*, Reuters European Reports, Sept. 20, 1993, available in LEXIS, News Library, CURNWS File; see also *Panorama*, *supra* note 64, at 25-14 ("European users are now becoming as vocal as their American counterparts about the fact that their needs must be met both functionally and economically.").

83. See Austin, *supra* note 10, at 101.

84. See *Account*, *supra* note 11 (One estimate states that "[c]alls between EC countries cost up to six times as much as long-distance national calls.").

85. See *Still Holding: European Telecoms*, Economist, Mar. 13, 1993, available in WESTLAW, MAG-ASAP File.

86. See *id.*

87. See *id.*

88. See Austin, *supra* note 10, at 103.

89. See *infra* notes 96-158 and accompanying text.

90. See *infra* note 96 and accompanying text.

nal Equipment Directive,⁹¹ and the Telecommunications Services Directive.⁹² In conjunction with the Commission's Telecommunications Services Directive, the European Council released a directive on the implementation of open network provisions (the "ONP Directive")⁹³ that further delineated the deregulation required of the PTTs. To explain what type of inter-company agreements violate competition laws, the Commission released the Guidelines on the Application of Competition Rules (the "Guidelines").⁹⁴ Both the Council and the Commission have continued to endorse further deregulation, most recently with a proposal for open competition in the voice telephony market.⁹⁵

A. *The Green Paper*

In 1987, after studying telecommunications in the EC, the Commission issued the Commission Green Paper on Telecommunications Services and Equipment.⁹⁶ The Green Paper represented the Commission's attempt to balance the Member States' fears of Commission intrusion into regulatory decisions, the PTTs' concerns about losing their protected civil service status, and the industry's demand for more access and fewer restrictions.⁹⁷ Despite its reluctance to attack the PTTs, the Green Paper was the primary instrument for subsequent deregulation.

To ensure further support from Member States, the Commission had to endorse the PTTs, but it attempted to use the Green Paper to establish the process for future deregulation. The Commission understood that it could not imitate the strict deregulation in the United States, but could only hope to accrue enough political concessions from the Member States to begin the "re-regulation" of Europe.⁹⁸ Because the PTTs were actually government agencies, and AT&T had only been a governmentally endorsed monopoly, the PTTs were more entrenched than AT&T had ever been.⁹⁹ In addition, due to the tenuous unification of the European countries, the Commission held less enforcement power over European PTTs than the United States Federal Communications Commission (the

91. See *infra* note 132 and accompanying text.

92. See *infra* note 26 and accompanying text.

93. See *infra* note 162 and accompanying text.

94. See *infra* note 203 and accompanying text.

95. See *infra* note 26 and accompanying text.

96. See Green Paper, *supra* note 12; see also Council Resolution on the Development of the Common Market for Telecommunications Services and Equipment up to 1992, 1988 O.J. (C 257) 1 (expressing support for the objectives outlined in the Green Paper).

97. See Green Paper, *supra* note 12, § (3)49. The Green Paper was based on a delicate balance of divergent interests, as can be seen by contrasting its statement that "the scope for market forces, competition and innovation must be increased," with its claim that "the financial viability of the network infrastructure providers [the PTTs] must be assured . . ." The Green Paper admitted confusion by describing these goals as "two, partially contradictory, conditions." *Id.*

98. See Austin, *supra* note 10, at 103-04. The Green Paper discussed its goal of "start[ing] a common thinking process." See Green Paper, *supra* note 12, § (3)19.

99. See *supra* note 2.

"FCC") had held over AT&T.¹⁰⁰

Because they inhibit the free flow of goods, the Green Paper urged the end of monopolies in the telecommunications market.¹⁰¹ As a major concession, however, it "accept[ed] . . . continued exclusive provision or special rights for the PTTs regarding provision and operation of the network infrastructure."¹⁰² To explain its endorsement of the PTTs, the Green Paper argued that public service goals, economies of scale, and the high cost of building parallel networks justified upholding the monopolies.¹⁰³ In reality, this provision was intended to assure the PTTs that the development of a common policy was not at odds with their interests.¹⁰⁴

The Green Paper called for open competition in all aspects of telecommunications except for basic services, which would remain under the PTTs' monopoly control.¹⁰⁵ It admitted that "the trend towards [network] integration has . . . led to a blurring of traditional boundaries between services [and that] [t]here is at present no agreed definition of 'basic services' within the Community."¹⁰⁶ The Green Paper, however, called for a narrow construction of the definition of basic services to include only voice telephony.¹⁰⁷ Though voice telephony represented 85-90% of the PTTs' annual revenues in 1987,¹⁰⁸ basic services were expected to grow more slowly than value added services,¹⁰⁹ which were projected to grow 36% per year.¹¹⁰ Thus, even the requirement to deregulate non-basic services was very significant. Furthermore, despite its endorsement of the PTTs' control over basic service, the Green Paper

100. See Austin, *supra* note 10, at 112.

101. See Green Paper, *supra* note 12, § (3)10-11. Due to changing technology and market conditions, the Green Paper stated that the EC had to ensure that "the necessary European scale and dimension [were] introduced into the current phase of transformation; [that] no new barriers [were] created within the Community during the adjustment of regulatory conditions; [and that] existing barriers [were] removed in the course of the adjustment." *Id.*

102. Green Paper, *supra* note 12, § (3)72.

103. See Green Paper, *supra* note 12, § (3)49, 72.

104. See Austin, *supra* note 10, § (3)103-04. But eventually, the Green Paper's deregulatory intent did come in direct conflict with PTT interests.

105. See Green Paper, *supra* note 12, § (3)14.

106. See Green Paper, *supra* note 12, at § (3)42. The Green Paper further notes that "by extension there is, at present, no common definition of 'enhanced' or 'value-added' services." *Id.* One analyst has defined basic service to mean "the mere transport of messages from one place to another with the information remaining unchanged" and explained that to qualify as enhanced service, the service "must offer additional features or service attributes." See Wernhard Moschel, *Deregulation in Telecommunication Markets: Theoretical Concepts and Recent Developments in Several Countries*, 9 U. New S. Wales L.J. 79, 91 n.33 (1986).

107. See Green Paper, *supra* note 12, § (3)14.

108. See Austin, *supra* note 10, at 105.

109. See *id.* Value Added Services have been simply defined as "services which are non-reserved according to the EC services Directive." See John M. Wheeler, *Key Issues in Europe's Open Network Provision: the Case of the German VANS Providers*, 1992 Telecommunications Policy 80, 82.

110. See Austin, *supra* note 10, at 105.

called for numerous deregulatory changes in the market.¹¹¹

Traditionally, the PTTs had done more than just provide telecommunications service. They had also set prices and conditions, and granted approval for the provision of service and equipment.¹¹² Even AT&T, at the height of its power, had never operated with this much control, but was always subject to FCC regulations.¹¹³ The Green Paper demanded the separation of regulatory and operational activities of the European PTTs.¹¹⁴ Further, it set as a primary goal the establishment of EC-wide common technical standards in telecommunications terminals.¹¹⁵ Noting the incompatibility of different Member States' telecommunications equipment, the Commission created the European Telecommunications Standards Institute ("ETSI").¹¹⁶

In addition, the Green Paper called for open competition in telecommunications markets. It sought to eliminate the tie between telecommunications service and the provision of telecommunications equipment¹¹⁷ in an effort to achieve open competition in the terminal market.¹¹⁸ It further decided that new services should be completely open to competition,¹¹⁹ and proposed that even basic telephone services for calls crossing national borders should be opened to competition.¹²⁰

Fearing that PTTs might improperly "cross-subsidize" their new

111. See Green Paper, *supra* note 12, § (3)14 (including "phased full opening of the terminal market to competition," "substantial opening of the services market to competition," "separation of the regulatory and operational functions of [PTTs]," "partial opening of the market in satellite ground stations to competition, [and] recognition of the fact that telecommunications tariffs should follow cost trends").

112. See Naftel, *supra* note 2, at 453-54. For this all-encompassing control, the PTTs had often been accused of operating as both the 'referee' and the 'player' in the telecommunications market. See *id.* at 454.

113. See Teske, *supra* note 2, at 2 (mentioning that a 1934 law created the FCC to ensure continued government regulation of the United States telecommunications markets).

114. See Green Paper, *supra* note 12, § (3)185.

115. See Green Paper, *supra* note 12, § (3)5. The Green Paper called for "the creation of a Community-wide market for terminals and equipment . . . [and] the promotion of Europe-wide open standards, in order to give equal opportunity to all market participants" *Id.*

116. See Green Paper, *supra* note 12, § (3)189. ETSI was established in April, 1988. See Williamson, *supra* note 68, at 27.

117. See Green Paper, *supra* note 12, § (3)14 (calling for open competition in the terminal market). For a description of how PTTs can 'tie' equipment provision to service provision, see *supra* note 137 and accompanying text.

118. See Green Paper, *supra* note 12, at Figure 13 (calling for "[f]ree (unrestricted) provision of terminal equipment"). Telecommunications terminals include the basic telephone handset.

119. See *id.* at Figure 13 (calling for "[f]ree (unrestricted) provision of all [non-basic] services ('competitive services', including in particular 'value-added services')"). Services such as videoconferencing are excluded from basic service. See Austin, *supra* note 10 at 105. For further clarification on the classification of services, see also *infra* note 106.

120. See Green Paper, *supra* note 12, § (3)68.

value-added services,¹²¹ and thereby undercut fair competition, the Commission called for a strict accounting system subject to continuous review.¹²² It remained unclear, however, who would provide this continuous review. It would have been problematic for the Member States to do this review, because they would have been merely policing themselves.¹²³ The Commission itself, however, did not have the manpower to review all Member State activity.¹²⁴ Significantly, the Commission did not prohibit the PTTs from competing in any new services,¹²⁵ unlike the American approach, which prohibited AT&T from competing in some markets after its break-up.¹²⁶

A major accomplishment of the Green Paper was the establishment of the Commission's authority to implement the deregulatory goals. Recommendation "H" stated that the Commission was to provide "strict and continuous review of operational [commercial] activities of Telecommunications Administrations according to Articles 85, 86, and 90 [of the] EEC Treaty."¹²⁷ Article 90 was most significant because it empowered the Commission to apply the competition laws of Articles 85 and 86 to public undertakings, such as the PTTs.¹²⁸ More importantly, Article 90(3) allowed the Commission to issue directives implementing these laws without prior Council approval.¹²⁹ Since the Council consists of representatives from the Member States, while the Commission is a more independent body, this provision effectively enabled the Commission to pass directives without Member State consent.

The Green Paper met with widespread approval. Less than a year after its initial release, the Commission published a work program on implementation of the Green Paper's recommendations.¹³⁰ In June 1988, the Member States, through the European Council, passed a resolution accepting the Green Paper's balance between the status quo and

121. See *id.* § (3)77. The PTTs could simply have raised the price of services over which they held a monopoly to cover losses suffered in openly competitive markets.

122. See Green Paper, *supra* note 12, § (3)77-78, 184.

123. See Naftel, *supra* note 2, at 455. Though the United States does police its own telecommunications provisions, competition is assured because the FCC does not have an interest in any one telecommunications provider.

124. See Naftel, *supra* note 2, at 455.

125. See Green Paper, *supra* note 12, § (3)178.

126. See Teske, *supra* note 2, at 5. In a recent development, the United States House Telecommunications Subcommittee recently passed two bills opening the Regional Bell Operating Companies to numerous markets from which they had been prohibited since the AT&T divestiture in 1982. See Mark H. Anderson & Mary Lu Carnevale, *Two Telecommunications Bills Clear House Subcommittee with Rapid Speed*, Wall St. J., Mar. 2, 1994, at A3.

127. Green Paper, *supra* note 12, at Figure 13.

128. See Austin, *supra* note 10, at 106.

129. See Austin, *supra* note 10, at 106.

130. 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.

deregulation.¹³¹

B. *The Terminal Equipment Directive*

The Commission moved quickly to employ its power over the PTTs, as established by the Green Paper. The Commission's first Green Paper initiative was the Terminal Equipment Directive.¹³² This directive required PTTs to separate their regulatory bodies from their commercial distributors.¹³³ This requirement was primarily responding to the concern that such control discouraged inter- and intra-state competition. The Terminal Equipment Directive also required Member States to provide to the Commission, and to publish, a list of all technical specifications of domestically approved terminal equipment.¹³⁴ This ensured that producers in other Member States could compete by producing terminal equipment that met these standards. It also restricted a country's ability to refuse imports due to standards violations.

This directive required Member States to establish a system of open competition in the EC's telecommunications terminal equipment market.¹³⁵ It required the abolition of all special or exclusive rights previously granted to PTTs to import, sell, and lease terminal equipment, to market certain services, or to make connections to the public network and/or maintain terminal equipment.¹³⁶ This directive also prohibited "tying," a process whereby national monopolies would only provide service if the user agreed to purchase telecommunications equipment from the national producer.¹³⁷ But it did allow a PTT either to ban equipment that failed to meet the requirements of directives on harmonization of EC telecommunications equipment,¹³⁸ or alternatively, to have its own non-discriminatory technical requirements.¹³⁹

Several European countries reacted strongly to the Commission's bold move. France, Italy, Belgium, Germany, and Greece challenged the Commission's Terminal Equipment Directive in the European Court of

131. See Council, Services and Equipment Directive, *supra* note 38.

132. Commission Directive 88/301 on Competition on the Markets in Telecommunications Terminal Equipment, 1988 O.J. (L 131) 73 [hereinafter Terminal Equipment Directive]. This was a risky move by the Commission, since this Directive was passed before the Council accepted the Green Paper's proposals.

133. See *id.* at 76, art. 6.

134. See *id.* at 76, art. 5.

135. Terminal Equipment Directive, *supra* note 132. "Terminal Equipment" is defined in Article 1 of the Terminal Equipment Directive. See *id.* at 1, art. 1.

136. See Terminal Equipment Directive, *supra* note 132, at 76, arts. 2-3.

137. See *id.* at 75 (prohibiting PTTs from abusing grants of "special or exclusive rights in regard to the terminal equipment market" which may violate the ECC Treaty requirement "that competition in the common markets [] not [be] distorted").

138. See *id.* at 76, art. 3 ("Member States may . . . refuse to allow terminal equipment to be connected . . . where such equipment does not . . . satisfy the essential requirements laid down in [the Council harmonization directive]"). For a discussion of the EC harmonization directives, see *infra* note 143 and accompanying text.

139. See Terminal Equipment Directive, *supra* note 132, at 76.

Justice.¹⁴⁰ The challenge did not address the substance of the directive so much as it challenged the Commission's authority to pass such a directive.¹⁴¹ Upholding the Commission's authority to force such deregulation on the PTTs, the Court substantially upheld the validity of the directive.¹⁴² Thus, the Commission was empowered to effect change in the European telecommunications establishment.

While the Green Paper and subsequent directives made great strides towards deregulation, true liberalization of the terminal equipment market required the establishment of highly technical standards with which European companies would comply. For this reason, the Council also released directives that established standards so that competing telecommunications equipment producers could achieve mutual recognition.¹⁴³ These standardizing directives were useless until the Commission established its authority to enforce them, in the same way that the Green Paper could not effect standardization without these directives to delineate what the European standards were.

C. *The Services Directive*

The second Commission directive to flow from the Green Paper, the Directive on Competition in the Markets for Telecommunications Services,¹⁴⁴ further advanced open competition in telecommunications.¹⁴⁵

140. Case 202/88, France (Italy, Belgium, Germany and Greece intervening) v. EC Commission, 5 C.M.L.R. 552 (1991).

141. See Austin, *supra* note 10, at 106. The challenging States objected on four grounds: "[t]he distortion of procedure, the incompetence of the Commission, the violation of the principle of proportionality, and the violation of substantial forms. See Naftel, *supra* note 2, at 474-478.

142. See Austin, *supra* note 10, at 106-07. This established the Commission as Europe's telecommunication deregulator and gave it the power to intrude even on national economic decisions. See *id.*; see also *Court Rules in Three Telecoms Cases*, Reuter Eur. Report, Oct. 27, 1993, available in LEXIS, News Library, CURNWS File. The European Court of Justice, however, did overturn Article 7 of the directive, which attempted to require Member States to ensure that their PTTs give customers the opportunity to terminate leasing or maintenance contracts in order to enable consumers to obtain supplies or services elsewhere. The European Court of Justice overturned this portion of the directive because it failed to specify its reference to contracts between monopoly suppliers and end-users, despite the fact that contracts with non-monopolistic suppliers are beyond the reaches of the Commission. See Case 202/88, France (Italy, Belgium, Germany and Greece intervening) v. EC Commission, 5 C.M.L.R. 552 (1991).

143. There were numerous such directives, beginning with Council Directive 86/361 of July 24, 1986 on the Initial Stage of Mutual Recognition of Type Approval for Telecommunications Terminal Equipment, 1985, O.J.(L 217) 21, and most recently with Council Directive 91/263 of April 29, 1991 on the Approximation of the Laws of Member States Concerning Telecommunications Terminal Equipment, Including the Mutual Recognition of their Conformity, 1991 O.J.(L 128) 1. For a brief description of the Telecommunications Terminal Equipment Directive's requirements, see Scherer, *supra* note 41, at 15-17.

144. See Services Directive, *supra* note 26, at 10.

145. See *id.* at 15, art. 2; see generally Beaton, *supra* note 38, at 691; Constantine J. Zepos, *Liberalizing the "Sacred Cows": Telecommunications and Postal Services in the EC*, 3 Duke J. Comp. & Int'l L. 203, 212.

Releasing this directive was a daring act by the Commission because it was done before the Court had even decided on the legitimacy of the Terminal Equipment Directive.¹⁴⁶ The Services Directive addressed the problem of the PTTs' being both referee and player in the telecommunications markets¹⁴⁷ by requiring a body independent of the telecommunications organization to control certain licenses, specifications, frequency allocations, and surveillance of usage conditions.¹⁴⁸ These provisions responded to the concern that PTTs suffered from inherent conflicts of interest, and challenged the long-standing tradition that gave the PTTs free reign in the telecommunications markets.

Calling for open competition in telecommunications services, this directive demanded that Member States "withdraw all special or exclusive rights for the supply of telecommunications services other than voice telephony" and allow private operators to supply such services.¹⁴⁹ Furthermore, this directive required PTTs to provide private operators the opportunity to obtain leased-lines for circuit- or packet-switched data services.¹⁵⁰ This provision was intended to allow private companies to compete in "services designed to improve telecommunications functions, . . . information services providing access to data bases, remote data-processing services, message storing and forwarding services, . . . transaction services, . . . [and] teleaction services."¹⁵¹ Thus, the PTTs were forced to allow competitors to enter the market in numerous non-basic services.

The deregulatory effect of the Services Directive was limited, however. First, its coverage was limited in that it did not apply to "telex, mobile radiotelephony, paging and satellite services."¹⁵² Second, it still allowed Member States to retain monopolies over voice telephony,¹⁵³ for which it has been criticized as being an ineffective instrument of deregulation.¹⁵⁴ This exception presumed voice telephony to represent analog transmissions, as distinguished from data transmissions, and was intended to allow only analog technology to remain under monopoly control.¹⁵⁵ Because digital technology is now used even for telephony, however, this provision allowed PTTs to retain some aspects of digital technology

146. See Austin, *supra* note 10, at 107.

147. See *infra* note 114 and accompanying text.

148. See Services Directive, *supra* note 26, at 16, art. 7.

149. Services Directive, *supra* note 26, at 15, art. 2.

150. See *id.* at 15-16, arts. 3 & 4. For a discussion of the importance of leased lines, see *infra* note 65.

151. *Id.* at 10-11, para. 6.

152. *Id.* at 15, art. 1.

153. See *id.* at 15, art. 2.

154. See W. Scott Blackmer et al., *Brussels Takes Another Step Toward Telecommunications Liberalization*, 7 *The Computer Law* 24 (March 1990) (criticizing the Services Directive as being "beset with compromise," and not effecting liberalization fast enough); cf. Beaton, *supra* note 38, at 698-99 (complaining that although the 1991 Standards Directive approach seems simplistic, it belies the difficulty of its implementation).

155. See Services Directive, *supra* note 26, at 15, art. 2.

under monopoly control too.¹⁵⁶ “[B]y allowing the PTTs to keep control over private lines for voice and also allowing the PTTs to define the scope of that control, the Services Directive [] reinforced a significant barrier to the development of competition even in data.”¹⁵⁷

In light of the competing interests involved in the European telecommunications market, however, many analysts have conceded that this directive might have failed had it been too aggressive. A difficult balance had to be struck between speedy liberalization and slowly building a strong foundation. “A slower pace may [have] yield[ed] a better foundation and structure for the provision of telecommunications products and services which in the long term may [have] be[en] in the best interest of the industry and its customers. On the other hand, if the pace [was] too slow, international telecommunications opportunities may [have] be[en] lost.”¹⁵⁸

Once again, some Member States disapproved of this implementation of Commission power without prior Council approval. Spain, Belgium, and Italy challenged the Services Directive.¹⁵⁹ As it did in the challenge to the Terminal Equipment Directive,¹⁶⁰ the European Court of Justice substantially upheld the Commission’s authority.¹⁶¹ In a continued effort to achieve Member State support, however, the Commission agreed to pass the Services Directive on the same day the Council passed a framework directive for Open Network Provision (“ONP Directive”).¹⁶²

D. *The ONP Directive*

As part of the Commission’s agreement to strengthen support for the Services Directive, the Council passed the ONP Directive.¹⁶³ This directive established its own goals for the industry and empowered its own

156. See Beaton, *supra* note 38, at 692.

157. See *id.*

158. *Id.*

159. See Joined Cases C-271/90, C-281/90 and C-289/90, Spain, Belgium, and Italy v. Commission (May 20, 1992) (Jacobs, A.G.).

160. See *infra* note 142 and accompanying text.

161. See Joined Cases C-271/90, C-281/90 and C-289/90, Spain, Belgium, and Italy v. Commission (May 20, 1992) (Jacobs, A.G.); see also *EC Commission’s Monopoly-Busting Powers Upheld*, Reuter Bus. Rep., Nov. 17, 1992, available in LEXIS, News Library, CURNWS File; Suzanne Perry, *Article 90 Confirmed as Commission Anti-Monopoly Weapon*, Reuter E.C. Rep., Nov. 17, 1992, available in LEXIS, News Library, CURNWS File. Similar to the holding in the Terminal Directive, the European Court of Justice annulled aspects of the directive that might have applied to private contracts, which is beyond the Commission’s authority under the EEC Treaty. See Joined Cases C-271/90, C-281/90 and C-289/90, Spain, Belgium, and Italy v. Commission (May 20, 1992) (Jacobs, A.G.).

162. Council Directive 90/387 on the Establishment of the Internal Market for Telecommunications Services through the Implementation of Open Network Provision, 1990 O.J.(L 192) 1 [hereinafter ONP Directive]. The original ONP Directive is also referred to as the “Framework Directive” because it established the methodology for future directives without making any immediate, specific demands.

163. *Id.*

self-created committees to pass further directives to implement these goals. The ONP Directive was closely modeled after the American Open Network Architecture ("ONA"), which was developed by the FCC in the wake of the AT&T break-up.¹⁶⁴

In 1982, the Third Circuit disbanded the twenty-two Bell Operating Companies of AT&T, forming seven Regional Bell Operating Companies.¹⁶⁵ This decision stifled innovation because each of these companies worked on developing its own basic telecommunications network instead of implementing the latest technologies.¹⁶⁶ The FCC therefore established the ONA in an attempt to eliminate the shortcomings of structural separation.¹⁶⁷ By creating "non-structural safeguards" based on the principle of free access, the FCC hoped to promote technological advancement while retaining open competition.¹⁶⁸ Stressing the unbundling of services to promote competition, "[the] ONA seemed to promise the ideal of a totally free market in telecommunications [in America]: 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."¹⁶⁹

The EC followed the United States' development of the ONA with keen interest. Seeing the ONA as a tool that could work equally well in Europe, the Commission's Senior Officials Group for Telecommunications established the *Groupe Analyse et Prevision* (the "GAP").¹⁷⁰ The GAP studied the ONA and issued a report supporting a comparable European entity.¹⁷¹ After multiple revisions, the GAP proposal was passed as the Council's ONP Directive on June 28, 1990.¹⁷² This directive was intended to balance the Member States' concern with the Services Directive.¹⁷³

The ONP Directive purported to attempt "harmoniz[ation of] conditions for open and efficient access to and use of public telecommunications networks," and to facilitate sufficient access to such networks such that even the PTTs' competitors could use them freely.¹⁷⁴ Though the ONP Directive appeared to promote competition, it actually entrenched

164. See Austin, *supra* note 10, at 109.

165. See Teske, *supra* note 2, at 5.

166. See Austin, *supra* note 10, at 109.

167. See *id.*

168. See *id.*

169. *Id.* at 109.

170. See *id.* at 109-10.

171. See *id.* at 110.

172. See *id.* at 110.

173. See *id.*

174. ONP Directive, *supra* note 162, art. 1, at 2. The ONP Directive initially aimed to harmonize the following areas: leased lines, packet-switched and circuit-switched data services, the Integrated Services Digital Network, and related services such as voice telephony, telex, and access to networks. See *id.* at Annex I, at 1-6; see also Beaton, *supra* note 38, at 695-97.

PTT control and reassured the PTTs of their place in the market. Unlike the ONA, which had not concerned itself with protecting AT&T, the GAP proposals stated that the "ONP should not lead to the gradual erosion of the current position of the Telecommunications Administrations in the overall market place."¹⁷⁵ Furthermore, the ONP Directive guaranteed the PTTs' continued control of basic service by limiting itself from interfering with "restrictions which may be derived from the exercise of special or exclusive rights granted by Member States and which are compatible with Community law."¹⁷⁶

Though the ONP Directive was only intended to stimulate development of nonreserved telecommunications services, it did attempt to promote fair competition between PTTs and private service operators.¹⁷⁷ Thus, there were some deregulatory aspects to the ONP Directive. One major step towards deregulation was the ONP Directive's requirements that tariff principles be "clearly laid down to ensure fair and transparent conditions for all users."¹⁷⁸ Until the ONP Directive, even if the PTTs were required to provide competitors with access to the hard-wire system, they could retain their monopolistic control by imposing arbitrary tariffs on system usage.¹⁷⁹

The drafters of the ONP Directive envisioned "a kind of pan-European motorway system over which any operator . . . could run telecommunication services."¹⁸⁰ To implement this vision, the ONP Directive prohibited tariffs that discriminated against competitors¹⁸¹ whom the PTTs had been over-charging to retain their market control. The ONP Directive required that PTTs treat service providers equally by setting transparent tariffs "sufficiently unbundled" so that users knew what they were paying for.¹⁸² Though the Directive expressed a desire for the tariffs to be based on objective criteria and to be "cost-oriented," it accepted 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."¹⁸³

Regarding the promotion of inter-European standardization, the ONP Directive simply stated that European standards should comply with existing international standards, such as those set by the European Telecommunications Standards Institute and the European Conference of

175. See Austin, *supra* note 10, at 110 (quoting the GAP ONP Report).

176. ONP Directive, *supra* note 162, art. 3, at 4.

177. See Zepos, *supra* note 145, at 213.

178. ONP Directive, *supra* note 162, at 1.

179. See Austin, *supra* note 10, at 111; Beaton, *supra* note 38, at 692 ("[T]he separation of regulation from operations, although recognized as a step in the right direction, cannot by itself safeguard against PTTs' unwarranted control as long as the PTTs can impose tariff restrictions on the purpose for which circuits are used.").

180. Higham, *supra* note 58, at 242.

181. See ONP Directive, *supra* note 162, Annex II, at 8.

182. See *id.*

183. *Id.*

Postal and Telecommunications Administrations ("CEPT").¹⁸⁴ Further, it stated that ETSI was to develop standards for new telecommunications technologies.¹⁸⁵ The ONP Directive clearly prioritized standardization as part of its objective to promote the creation of pan-European networks.¹⁸⁶

The ONP Directive also promoted open competition by requiring the PTTs to set reasonable and transparent usage conditions.¹⁸⁷ It required that the conditions for access to services offered by telecommunications administrations in the Member States be based on objective criteria, be published, and be understandable.¹⁸⁸ This directive also required Member States to guarantee equality of access and act nondiscriminatorily within the parameters of Community law.¹⁸⁹ Further, it prohibited restricted access to public telecommunications networks and/or public services "except for reasons based on essential requirements, within the framework of Community law."¹⁹⁰

To enforce the goals it set forth, the ONP Directive contained a provision for the establishment of an "advisory" committee composed of representatives of the Member States and chaired by a representative of the Commission.¹⁹¹ The ONP Committee's primary task was to consult with

184. See *id.* at 7. These were both standardization administrations which had been created by other European initiatives. See *supra* Ungerer, *supra* note 35, at Box 23 (for a brief history of CEPT); note 116 and accompanying text (discussing ETSI).

185. See ONP Directive, *supra* note 162, art. 4, at 4. Interestingly, ETSI may have gone too far in its fulfillment of this delegation. Recently, there have been charges that the ETSI is abusing its power. AT&T is presently challenging ETSI requirements that may infringe on technical copyrights of companies that compete in the European market. See Computer and Business Equipment Manufacturers Association, Complaint and Request for Interim Measures against European Telecommunications Standards Institute submitted to the Commission of the European Communities Directorate-General for Competition (June 23, 1993) (on file with the *Fordham Law Review*).

186. See ONP Directive, *supra* note 162, at 2 (listing as "one of [its] principal aims[,] . . . the creation of conditions to promote the development of Europe-wide services").

187. See ONP Directive, *supra* note 162, art. 3, at 3 (requiring conditions for network access to be "based on objective criteria," "transparent and published in an appropriate manner," and in accordance with EC law such that they "guarantee equality of access"); see also Austin, *supra* note 10, at 111.

188. See ONP Directive, *supra* note 162, art. 3, at 3.

189. See *id.*

190. *Id.* at art. 3, at 4. The Directive limited such essential requirements to "security of network operations," "maintenance of network integrity," "interoperability of services," and "protection of data." *Id.* Note that "[p]romoting competition while protecting society is the long standing charge of telecommunications regulation." See Beaton, *supra* note 38, at 697. This ideal was discussed in

the 1986 landmark *Carterfone* case before the United States Federal Communications Commission where AT&T unsuccessfully argued that allowing non-AT&T terminal equipment to interconnect with the network would harm the integrity of the network. Although it is generally conceded that AT&T's position in that particular case was untenable, the issues of who, where, and how the network is accessed still raises significant concerns in terms of national security and network integrity.

Id. at 697 n.54.

191. See ONP Directive, *supra* note 162, art. 9, at 5 ("The Commission shall be as-

users, consumers, manufacturers, and service providers, and thus apply the ONP principles to the four key areas of the telecommunications sector:¹⁹² Integrated Services Digital Network ("Digital Network"),¹⁹³ Packet Switched Data Services,¹⁹⁴ leased lines,¹⁹⁵ and voice telephony.¹⁹⁶

Though the ONP Directive eased the Member States' concern over the Services Directive, it may have actually strengthened the Commission's control over telecommunications by entangling it in a process of Europe-wide regulation.¹⁹⁷ Using the established legislation, the Commission and Council have recently released numerous deregulatory proposals under the auspices of the ONP Directive in such areas as Packet Switched Data,¹⁹⁸ leased lines,¹⁹⁹ and Digital Network.²⁰⁰ Significantly, the Council has proposed application of the ONP Directive to voice telephony,²⁰¹ which would signify the end of the PTTs' guaranteed market control. The EC's most recent proposal has been for an ONP Directive

sisted by a committee of a [sic] advisory nature . . ."); see also Commission Decision 90/450 Setting up a Joint Committee on Telecommunications Services, 1990 O.J.(L 230) 25 (which actually created the aforementioned committee).

192. The ONP Directive actually applied to eight telecommunications areas, see ONP Directive, *supra* note 162, Annex I, at 6, but these four were the most significant. See Austin, *supra* note 10, at 112.

193. See *supra* note 46.

194. Packet Switched Data Network is a relatively new type of telecommunications network that transmits data in bursts ('packets'). By routing the data so as to access free network capacity, this type of transmission is very efficient, and thus cheaper than regular networks. For a brief discussion of the development of Packet Switched Data technology, see Ungerer, *supra* note 35, at 114 (Box 18); see also *supra* note 61 (discussing how Packet Switch Data technology advances created a threat to the PTTs' market control).

195. See *supra* note 65.

196. See *supra* note 26 (defining telephony).

197. See Austin, *supra* note 10, at 108-09.

198. See Council Recommendation 92/382 of 5 June 1992 on the Harmonization provision of a Minimum set of Packet-Switched Data Services in accordance with Open Network Provision (ONP) Principles, 1992 O.J. (L 200). The Council was not prepared to release mandatory requirements for this technology due to wide divergences within the EC in the availability of more advanced data and digital services. For that reason, this is merely a 'recommendation,' and thus is not binding on Member States. See Higham, *supra* note 58, at 244.

199. See Council Directive 92/44 of 5 June 1992 on the Application of Open Network Provision to Leased Lines, 1992 O.J. (L 165). This directive was essential for many new entrants who could not provide their own fixed networks. See Higham, *supra* note 58, at 243-44.

200. See Council Recommendation 92/388 of 5 June 1992 on the Provision of Harmonized Integrated Services Digital Network Access Arrangements and a Minimum Set of Integrated Services Digital Network Offerings in Accordance with Open Network Provision (ONP) Principles, 1992 O.J.(L 200).

201. See Commission Revised Proposal for a Council Directive on the Applications of Open Network Provision (ONP) to Voice Telephony, COM(92)247 final and Commission Amended Proposal for a Council Directive on the Application to Open Network Provision (ONP) to Voice Telephony COM(93)82 final. The goals of these proposals are "to establish the rights of users to voice services [and] to improve access to the [public switched networks] for all users." Higham, *supra* note 58, at 244. See *id.* for a brief description of the provisions called for in this proposed directive.

on mobile (cellular) services.²⁰²

E. *The Guidelines*

The Commission understood that the interests of "full interconnectivity" through standardization often require PTTs to enter agreements that conflict with the requirements of open competition. In an attempt to clarify which agreements between PTTs are acceptable under EC competition rules and which type of agreements are prohibited, the Commission released Guidelines for the PTTs.²⁰³ Though these Guidelines did not create enforceable rights, they were based on an analysis of European Court holdings and did indicate how the European Court of Justice (the "ECJ") would enforce competition laws in the telecommunications sector.²⁰⁴ The Guidelines attempted to balance the EC goal of promoting competition between PTTs with the reality that sometimes technological advances and further standardization require agreements between PTTs.

In some ways, the Guidelines reinforced the PTTs' control by tacitly accepting the notion that only PTTs provide telecommunications facilities. The Guidelines themselves claimed to "govern the way [PTTs] can provide those facilities to the service providers" which "must" access them.²⁰⁵ This represented "a bias towards the status quo and a failure to recognize the full opportunity for competition in the telecommunications industry."²⁰⁶ But the Guidelines did achieve some measure of deregulation. They listed the types of agreements which will be subject to scrutiny to help companies avoid violating antitrust laws.²⁰⁷ Thus, the Guidelines clearly established that some types of anti-competitive activity are considered "undesirable collusion,"²⁰⁸ and, as such, are subject to

202. See Higham, *supra* note 58, at 245-46.

203. Commission Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector, 1991 O.J. (C 233) 2 [hereinafter Guidelines].

204. Guidelines, *supra* note 203, at 4. The Guidelines were based on the Green Paper's establishment that PTTs are subject to the full range of the EC's competition rules according to the EEC Treaty, Articles 85 and 86. See Foslom, *supra* note 38, at 692 n.40. They called for a continuous review of telecommunications administrators. See Guidelines, *supra* note 203, at 2; see generally Richard Wiley et al., *Telecommunications Policy and Regulation 1991: The Year Ahead, Congress, The FCC and Judge Greene's Court, in International Overview (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 599, 1991)*, available in WESTLAW, TP-ALL File; Robinson, *supra* note 4, at 22 (discussing the Commission's adoption of Directorate General IV's Guidelines for competition rules on July 26, 1991).

205. Beaton, *supra* note 38, at 694.

206. *Id.*

207. See Guidelines, *supra* note 203, at 10-16. The Guidelines use the following general categories for suspect PTT activity: "horizontal agreements concerning the provision of terrestrial facilities and reserved services," "agreements concerning the provision of non-reserved services and terminal equipment," and "agreements on research and development." *Id.* The Guidelines further state that a PTT is in violation if "(i) the undertaking concerned holds an individual or joint dominant position; (ii) it commits an abuse of that dominant position; and (iii) the abuse may affect trade between Member States." *Id.*

208. *Id.* at 2.

disciplinary action.²⁰⁹

The Commission has entrenched itself in the European telecommunications markets as the primary regulator of the PTTs. Beginning with the Green Paper, and continuing through subsequent directives, the Commission has forced tremendous reforms on the monopoly operators. The Council has assisted the deregulatory process by supporting Commission efforts and by passing its own legislation to govern the PTTs, most significantly, the ONP Directive.²¹⁰ Bolstered by ECJ endorsement and Council reinforcement, the Commission has successfully opened many telecommunications markets to competition and it will continue to do the same in other telecommunications markets.

III. HURDLES IN THE ATTEMPT TO ENFORCE THE DEREGULATORY GOALS OF THE GREEN PAPER

The Commission faced numerous hurdles in enforcing the Green Paper's deregulating goals. European countries did not want the EC Commission to control their economic decisions.²¹¹ Therefore, some countries challenged Commission directives even when they approved of the directives' goals.²¹² Though the ECJ substantially upheld the Commission's legislative authority, these challenges, which represented a lack of support for the Commission, slowed the deregulatory process.²¹³

In addition, many countries disapproved of the theories behind the deregulating efforts. The more technologically advanced countries had already provided basic service to their residents and wished to further develop their value-added services. Some of these advanced countries believed that enhanced services could best be developed by strong government involvement. The most extreme example of this attitude existed in France, where the government pioneered the Minitel to provide a two-way text-link in three million homes.²¹⁴

209. See *id.* at 4 ("[t]he Commission will apply these principles"); see also Beaton, *supra* note 38, at 693 (explaining that the Guidelines clarify how the Commission intends to enforce competition rules in the telecommunications sector).

210. See *supra* notes 162-202 and accompanying text.

211. See Austin, *supra* note 10, at 106-07.

212. See Case 202/88, France (Italy, Belgium, Germany and Greece intervening) v. EC Commission, 5 C.M.L.R. 552 (1991) (in which France, Italy, Belgium, Germany, and Greece challenged the Commission's Terminal Equipment Directive); Joined Cases C-271/90, C-281/90, C-289-90, Spain, Belgium, and Italy v. Commission (May 20, 1992) (in which Spain, Belgium, and Italy challenged the Services Directive); see also *supra* notes 140-42, 159, 161 and accompanying text. In both cases, the challenge did not battle the substance of the directive as much as it challenged the Commission's authority to pass such a directive.

213. See Austin, *supra* note 10, at 106-07 (discussing how the challenge to the Terminal Equipment Directive slowed its implementation by three years); Hilary Clarke, *Survey of International Telecommunications*, Financial Times, Oct. 15, 1992, available in LEXIS, News Library, CURNWS File (describing that private sector investors were hesitant to enter the markets while the cases were pending).

214. See Ungerer, *supra* note 35, at 56-57 (Box 7); *The New Boys*, *supra* note 2; see also *infra* note 267 and accompanying text.

Most of the developed countries, however, agreed that open competition was the best way to achieve greater enhanced services. But many lesser developed countries, which were more concerned with supplying basic service to their residents, believed that a national monopoly would best accomplish this goal. These countries feared that if they allowed open competition, most companies would focus their energies on the more profitable enterprise of enhancing service on the existing hard-wire lines. By neglecting the less profitable laying of more wires, these companies would be leaving some residents with no service at all.²¹⁵

Other complications restricted the Commission's efforts. Europe was replete with unknown telecommunications needs among Member States and evolving international and national laws and policies.²¹⁶ In addition, the absence of a single authority meant that the regulatory process was highly susceptible to Europe's volatile political climate.²¹⁷

The delayed progress of the Maastricht Treaty²¹⁸ and the limited application of the Uruguay round of the GATT talks²¹⁹ have exposed a lack of European unity. Furthermore, the multiplicity of agreements that continually redefine the balance of power, such as the International Telecommunications Union,²²⁰ the International Consultative Committees, the International Telephone and Telegraph Consultative Committee,²²¹ and the International Radio Consultative Committee, have made market definition and competitive positions difficult to predict or to quantify.²²² In addition, explosive developments in telecommunication technology sometimes wreak havoc with traditional notions of telecom-

215. See, e.g., Constantelou, *supra* note 8, at 437 ("It can be argued that the EC's initial approach to creating a pan-European policy framework did not fully consider the different circumstances and the particular problems some less-developed regions face . . .").

216. See Beaton, *supra* note 38, at 690.

217. See Austin, *supra* note 10, at 115.

218. Even though Germany's recent approval finally completed the Maastricht Treaty's ratification process, see Oster, *supra* note 19 (referring to the "newly ratified Maastricht Treaty"), it failed to meet expectations. See Hobart Rowen, *Germany: High-Tech Laggard*, Wash. Post, July 8, 1993, available in LEXIS, News Library, CURNWS File ("The high hopes for European political and social unity under the Maastricht Treaty are all but forgotten."); see also George B. Hefferan, III & Joanne Katsantonis, *Movement Towards an Internal Market in 1993: An Overview of Current Legal Developments in the European Community*, 3 Duke J. Comp. & Int'l L. 1, 5-7; Editorial, *Bumps on the Road to European Utopia*, L.A. Times, Aug. 8, 1993, available in LEXIS, News Library, CURNWS File.

219. See Marcellus S. Snow, *Trade in Information Services in Asia, ASEAN, and the Pacific: Conceptual Issues and Policy Examples*, 28 Cal. W. L. Rev. 329, 340 (1992); *International Trade, U.S. Official Criticizes EC Position in GATT Talks*, Daily Report for Executives (BNA), available in LEXIS, News Library, CURNWS File (despite hopes to harmonize telecommunications regulation through the GATT process, it was recently removed from the GATT agenda). See generally Beaton, *supra* note 38, at 701-02.

220. See *id.* at 336; see generally Ungerer, *supra* note 35, at 101-03.

221. See Adriane C. M. Nugter & Jan M. Smits, *The Regulation of International Telecommunication Services: A New Approach*, 14 N.C.J. Intl. L. & Com. Reg. 191, 197 n.29 (1989).

222. See Beaton, *supra* note 38, at 690.

munications and monopoly-based services.²²³

Another complication arose from the European interest in standardization.²²⁴ When attempting to standardize telecommunications, it is easier to deal with only one provider from each nation than to attempt agreement between multiple operators from each country. This is one reason that the Commission endorsed continued PTT operation in all but its most recent legislative efforts.²²⁵

The enormous power held by the PTTs was another reason the Commission was forced to endorse PTT control.²²⁶ The governments of the Member States were reluctant to forgo the profits obtained through control of a telecommunications monopoly.²²⁷ Presumably, their sub-contractors also favored the status quo out of a fear that any industry changes would cost them work. Even labor groups favored PTT operation because telecommunications workers were loath to relinquish the benefits of being civil servants.²²⁸ Finally, European anti-monopoly efforts have been complicated by the reality that individual nations have reacted differently to deregulating legislation.²²⁹

223. *Id.* A good example of this was described earlier in the discussion of how advances in optic fibre and packet switching technology allowed the cable network to compete with the PTTs. *See supra* note 61.

224. *See infra* notes 35-53 and accompanying text.

225. The interest in standardization may have severely restricted international competition. Some non-EC countries fear that the EC will use the intense standardization requirements of establishing a digital network as a weapon to create trade barriers. *See Snow, supra* note 219, at 340.

226. *Cf. Beaton, supra* note 38, at 690 (opining that the PTTs themselves have slowed the deregulation process).

227. Analysts have estimated that telecommunications will account for approximately 6% of the EC's GDP by the year 2000, so it is not surprising that those who control these "cash cows" are reluctant to give them up. *See Clarke, supra* note 213; *see, e.g., Constantelou, supra* note 8, at 437 (describing the Greek government's view of its PTT as a "cash flow machine").

228. *See Andrew Adonis, Survey of International Telecommunications*, *Fin. Times*, Oct. 18, 1993, available in LEXIS, News Library, CURNWS File (mentioning the problems arising from "guarantees of employee rights"); *see, e.g., Ariane Genillard, Deutsche Telekom Hangs on for Sell-Off Call: The German Group's Privatization Faces Political Hurdles*, *Fin. Times*, Oct. 26, 1993, available in LEXIS, News Library, CURNWS File (describing the barrier to German privatization because the Trade Union fears that telecommunications employees may lose their "privileged status of German civil servants").

229. *Cf. Williamson, supra* note 68 (mentioning the complications that result from "[t]he fact that the scope of deregulation and competitive opportunity continues to differ from country to country across [Europe]").

Many countries have utilized three stages in their deregulation process. In the first stage, the State ran the PTTs, and all decisions were made by government ministers. Increasingly, countries granted their PTT corporate status and gave it operational independence. During this second stage, the state served as a major, or complete, shareholder, and government ministers still appointed the board members. Finally, in the third stage, some countries fully privatized their PTTs and removed all government involvement.

Within two years, according to one estimate, only Austria, Norway, Luxembourg, and Switzerland will remain at the first stage of the development process. Those countries at the second stage include, or will soon include, Belgium, Finland, France, Ireland, and

Despite all of these complications, the Commission has been substantially successful in enforcing its directives and in integrating market deregulation. According to the latest Commission Report, only Belgium and Spain have failed to apply the Terminal Equipment Directive properly, and only Greece has yet to satisfactorily implement the Services Directive.²³⁰ In addition, only Greece and Italy have not succeeded in adopting the policies espoused in the ONP Directive.²³¹

To appreciate truly the deregulation progress, it is necessary to analyze the changes that have been implemented in individual European nations. This analysis examines the PTTs in individual European countries, grouped by their level of economic development. This Note discusses each country's separation of telecommunications regulatory control from its national service provider. Also discussed are national movements toward open competition in the telecommunication terminals market, and similar movements toward open competition in the telecommunications services market.²³²

A. *The Most Developed Countries*

1. The United Kingdom

The United Kingdom ("UK") serves as the model for European telecommunications deregulation. The deregulation process began in 1984, when the Thatcher Government passed the Telecommunications Act,²³³ which privatized British Telecommunications ("BT"), the UK's PTT,²³⁴ and established the government's intent to "dissolve" BT's monopoly.²³⁵ The government then created a duopoly in the telecommunications market and, from 1984 to 1990, allowed Mercury Communications to compete with BT.²³⁶

Sweden, the first four of which will soon move towards the third stage—complete privatization. The other European countries have already reached the third stage by fully privatizing their PTTs. See Adonis, *supra* note 228.

230. Commission Tenth Annual Report on the Monitoring of the Application of Community Law, COM(93)320 final at 40-42, 332,369.

231. *Id.* at 40, 369.

232. This section does not discuss any of the Nordic countries (Denmark, Finland, Norway, and Sweden), since the EFTA countries declined entrance into the EC. However, since these countries have now joined the EU, they are now subject to EC telecommunications deregulation law. See *supra* note 4. Therefore, for a brief analysis of the level of deregulation in these countries, see Jurgen Muller et al., *Telecommunications Liberalization in the Nordic Countries*, 1993 Telecommunications Policy 623 (1993).

233. See Peter Strivens & Vicki Sinden, *Telecommunications Law in the United Kingdom*, in *Telecommunications Laws in Europe* 129, 129-30 (Joachim Scherer ed., 1993) (discussing the Telecommunications Act of 1984).

234. See Naftel, *supra* note 2, at 452; *The New Boys*, *supra* note 2. Originally, the government retained 49% control, but it gradually sold its shares until 1993, when the government sold its last shares and BT became completely privatized. See Adonis, *supra* note 228.

235. See Strivens & Sinden, *supra* note 233, at 129-30 (discussing the Broadcasting Act of 1990).

236. When BT purchased Mitel of Canada, the Mergers & Monopolies Commission

In 1990, a six-month review of the duopoly market culminated in a white paper that called for free and unfettered competition in all facets of telecommunications.²³⁷ Since that time, the government's Department of Trade & Industry, acting in collaboration with an independent regulatory body known as OFTEL, has regulated the market and endorsed open competition in all British telecommunications markets.²³⁸ In subsequent licensing decisions, the UK established a trend towards relatively unrestricted competition between the network and private providers.²³⁹ Without additional primary legislation, the UK succeeded in substantially subjecting telecommunications to open competition.²⁴⁰

The UK's deregulation is evident in all of its telecommunications markets. Provision of leased lines has grown from three networks to over 700 lines, provided by nearly 120 firms.²⁴¹ The government has licensed private providers of mobile radio, paging, cable television, and value-added network services.²⁴² The UK has also endorsed open competition in the terminal equipment market. Though the 1984 Act required terminal equipment providers to obtain operation licenses to ensure compliance with technical standards, it clearly encouraged competition.²⁴³ Since that time, the licensing process has been well-organized, and it has even been legal to sell unlicensed, non-standard equipment.²⁴⁴

Despite these advances, some analysts point out the difficulties that result from such an unregulated environment, such as the need for increased government supervision.²⁴⁵ In addition, some still claim that, despite appearances, the UK is not truly deregulated.²⁴⁶ One recent report claimed that a long distance call from the UK to the United States

intervened, to prevent wiping Mercury out of market, and limited the total number of PBX's that BT could sell in the UK. *See generally* The Monopolies and Mergers Commission, *British Telecommunications PLC and Mitel Corporation: A Report on the Proposed Merger* (1986); *Crossed Lines for BT and Mitel*, *The Economist*, Feb. 1, 1986, available in LEXIS, News Library, CURNWS File.

237. *See* Naftel, *supra* note 2, at 452.

238. *See* Strivens & Sinden, *supra* note 233, at 129.

239. *See id.* at 129.

240. Britain has, at most, required a new provider to obtain a license as provided in the Telecommunications Act of 1984. *See id.* at 130-31.

241. *See* Moschel, *supra* note 106, at 91.

242. *See* Morris, *supra* note 43, at 89. The UK's Department of Trade & Industry chose to allow Self-Provision Licenses for private land networks and Satellite Class Licenses for private satellite networks. This permits companies to set up private telecommunications systems without relying on either BT's or another major provider's network. *See generally* Strivens & Sinden, *supra* note 233, at 138-39.

243. *See* Strivens & Sinden, *supra* note 233, at 130.

244. *See id.* at 130-31.

245. *See, e.g.,* *The New Boys*, *supra* note 2 (describing the large amount of monitoring facing Britain's telecommunications reformers).

246. *See* Scott Gibson & Saul Goldstein, *The Plane Truth: How European Deals are Killing U.S. Jobs*, *Wash. Post*, Oct. 10, 1993, available in LEXIS, News Library, CURNWS File (claiming that "if British long-distance lines were open to international competition, U.S. firms would do well. It costs British TELECOM more to place your call than it costs AT&T, MCI, or Sprint.").

costs five times as much as it should.²⁴⁷ Most legislators, however, are satisfied with the level of telecommunications technology in the UK and envision such achievements across Europe.²⁴⁸

In contrast, despite one analyst's claim that Ireland has one of Europe's most modern telecommunications systems,²⁴⁹ Ireland has been granted an extended deadline for telecommunications deregulation. Telecom Eireann is a State-owned company that controls Irish telecommunications and is subject to intense governmental control.²⁵⁰ In an attempt to optimize the network potential, Telecom Eireann is considering an alliance with the British telecommunications provider, Cable and Wireless. Such an alliance would eventually lead towards privatization and deregulation.

2. France

France exemplifies the technologically advanced country that desires high quality telecommunications but believes that government regulation is a valid means to attain that goal. Recently, however, France has effected some deregulation to comply with Commission directive. French telecommunications laws are governed by the *Code des Postes et Télécommunications* (the "Code"), which integrates legislative and regulatory acts relating to the market.²⁵¹ In May 1989, French law separated the telecommunication regulation authority from the entrepreneurial body of its PTT, *France Télécom*.²⁵² Since that time, the Code has incorporated many deregulatory laws in the telecommunications market to comply with EC requirements.²⁵³

France Télécom has two principal areas of responsibility: network and services provision, and entrepreneurial activities (e.g., providing cus-

247. See Hugo Dixon, *Telephone Users Over-charged by World Cartel Operation*, *Fin. Times*, Apr. 3, 1990, available in LEXIS, News Library, CURNWS File (claiming that a call from the UK to the United States costs five times as much as a long distance call within the UK, even though it should cost the same amount).

248. Cf. Naftel, *supra* note 2, at 452-53 (using the UK as the exemplifications of privatization efforts in Europe); *Panorama*, *supra* note 64, at 25-18 (listing the UK as the only exception to the Europe-wide trend that telecommunications services are still mainly controlled by the PTTs).

249. See William Flannery, *A Wee Bit of Prospecting Irish Minister Uses Visit to Look for Investors*, *St. Louis Post Dispatch*, Mar. 22, 1993, available in LEXIS, News Library, CURNWS File. The Irish telecommunications market is valued at over \$364 million, with a projected average annual growth of 10% over the next three years. According to Seamus Brennan, Ireland's Minister for Commerce and Technology, "[Ireland] has invested extremely heavily in telecommunications," and has a telecommunications system second only to France. See *id.*

250. See Ungerer, *supra* note 35, at 27.

251. See Monique Nion & François Bloch, *Telecommunications Law in France*, in *Telecommunications Laws in Europe* 51, 51 (Joachim Scherer ed., 1993).

252. See Nion & Bloch, *supra* note 251, at 51 (discussing the *Direction de la Réglementation Générale des Postes et Télécommunications*).

253. See *id.* at 52-57 (discussing the Code's deregulatory requirements in the markets of private networks, mobile telecommunications, services other than telephone and telex, and terminal equipment).

tomers premises equipment and advanced services).²⁵⁴ France has moved quickly to open competition in its terminals market. At the same time, it has also attempted to regulate the standards of the manufactured terminals by introducing the Telecommunications Terminal Equipment Directive²⁵⁵ into national law, even before the November 1992 deadline.²⁵⁶ Therefore, though the French Code allows open competition in the terminal equipment supply market,²⁵⁷ there are strict approval requirements before competitors can use, sell, or connect their terminals to the network.²⁵⁸

France Télécom retains a strong monopoly in many areas, and has made only minimal allowances of open competition to comply with EC directives. For example, *France Télécom* holds a monopoly over the public switched network, though the Minister of Telecommunications may grant a license to other users when it does not interfere with the PTT's monopoly.²⁵⁹ In addition, both telephone and telex services can only be provided by *France Télécom*.²⁶⁰ The enhanced service provision market is an exception to France's strict regulation of its telecommunications markets. Though such providers must be licensed by the Telecommunications Minister, such licenses are given freely, and that market has been fully open to competition since January 1993.²⁶¹

In 1991, public law privatized *France Télécom*.²⁶² But despite some signs of liberalization,²⁶³ France has tried to deregulate as little as it can under EC law.²⁶⁴ One author, discussing the recent French Privatization Program, noted that "[u]nlike Thatcher's move, the French plan will leave untouched the country's state-run . . . telecommunications services, considered among the most advanced in Europe."²⁶⁵

In contrast with the UK's leaps toward competition, France improved its once primitive telecommunications system by intense government in-

254. See Ungerer, *supra* note 35, at 27.

255. Council Directive 91/263, *supra* note 143.

256. See Nion & Bloch, *supra* note 251, at 56.

257. See *id.*

258. Violators of these laws can suffer FF 1,300 to FF 3,000 in fines and seizure of the equipment. See *id.* at 57. For a description of the conformity requirements, see *id.* at 56-57.

259. See *id.* at 51-52.

260. See *id.* at 55.

261. See *id.*

262. The privatization transformed *France Télécom* from a public administration into an institution. See Rudolf Pospischil, *Reorganization of European telecommunications*, 1993 Telecommunications Policy 603, 605.

263. For example, *France Télécom*, which had held a monopoly over cordless telecommunications, has recently allowed Bouygues to enter market. See *France: Bouygues May Enter Mobile Telephone sector*, Le Figaro, Sept. 30, 1993, available in LEXIS, News Library, CURNWS File.

264. See Nion & Bloch, *supra* note 251, at 59.

265. William Drozdiak, *France to Sell Its Control of 21 Key Firms*, Wash. Post, May 27, 1993, available in WESTLAW, PAPERSMJ File.

volvement.²⁶⁶ The French PTT also created telecommunications terminals, called Minitels, available at little or no cost, and has played an active role in administering the network.²⁶⁷ Therefore, developments in France constitute a strong argument against the claim that open competition is necessary to develop advanced technology.²⁶⁸

Some critics have pointed out that France's intense governmental involvement has weakened its position in some telecommunications markets.²⁶⁹ Critics of the French methodology claim that state control has resulted in the development of fewer services, which will result in less business in the long run.²⁷⁰ In sum, although substantially complying with EC directives to avoid retribution for violations, France has deregulated as little as possible.²⁷¹

3. Germany

Germany was a long-time traditionalist, relying on government-owned monopoly providers for telecommunications services.²⁷² Until 1988, telecommunications was a government responsibility.²⁷³ The *Deutsche Bundespost*, which was headed by the Federal Minister of Posts and Telecommunications ("MPT"), acted as Germany's PTT and was not subject to any regulatory body.²⁷⁴ Beginning in 1985, however, the German government established a commission of politicians, academics, and others (including labor, producer, and consumer representatives)²⁷⁵ to "develop [] proposals for the reform of the telecommunications sector."²⁷⁶

266. See Morris, *supra* note 43, at 89-90.

267. A Minitel terminal is a specialized terminal equipped with screen and keyboard. The French government originally provided them at no cost, in place of paper telephone directories, thus allowing the public to become acquainted with the system very quickly. For a brief description of the Minitel, see Ungerer, *supra* note 35, at 56, Box 7.

268. See Morris, *supra* note 43, at 89-90.

269. See *The New Boys*, *supra* note 2 (claiming that excessive government involvement in cellular and fax technologies may have weakened France's competitive position internationally).

270. Some critics claim that the French PTT "has been slow to exploit its potential as an operator of both telephone and cable networks." Peter Gumbel, *France Steers Towards 'Superhighway' With TV-Industry Mergers, a New Law*, Wall St. J., Feb. 25, 1994, at A9.

271. See Nion & Bloch, *supra* note 251, at 59.

272. See Moschel, *supra* note 106, at 96. In fact, Germany even tried to extend its monopolistic control over cordless telephones and modems but was forced by the Commission to abandon these attempts. See Naftel, *supra* note 2, at 470; see also Morris, *supra* note 43, at 95 n.71 (discussing the *Cordless Telephone* decision).

273. See Joachim Scherer, *Telecommunications Law in Germany*, in *Telecommunications Laws in Europe* 61, 63 (Joachim Scherer ed., 1993) (describing how the 1989 reform "replaced the formerly sweeping monopoly rights of the German Federal Post Office").

274. See Morris, *supra* note 43, at 94 (explaining that the German dogma had been such that no additional direct regulation was necessary, since public enterprises under direct political control are part of the government themselves).

275. See Moschel, *supra* note 106, at 97.

276. See *id.* at 100. The Commission's report formed the basis of the law eventually enacted in 1989. See Morris, *supra* note 43, at 96 n.76.

Finally, in 1989, German legislators passed the Postal Constitution Act (the "Act"), which required structural and regulatory changes in the telecommunications market.²⁷⁷ The Act separated regulatory responsibility from the *Deutsche Bundespost* and gave it to the MPT.²⁷⁸ It also separated telecommunication from postal operation, and vested telecommunications enterprises in DBP Telekom.²⁷⁹

The Act has completely opened terminal equipment to competition.²⁸⁰ Providers need now only show that the new equipment will not harm any person or DBP Telekom's transmission lines.²⁸¹ In addition, the equipment is subject to type-approval by the Federal Office for Telecommunications Approvals to ensure compliance with standardization requirements.²⁸²

Despite the new law, DBP Telekom still holds some monopolies in telecommunications services, such as a limited network monopoly (restricting the right to set up and operate telecommunications transmission lines and their associated networks)²⁸³ and a radio monopoly.²⁸⁴ While the Act also permits DBP Telekom to continue its monopoly over the provision of voice telephony, the Act opens all other services to competition without requiring governmental licensing.²⁸⁵

Though the Act has advanced deregulatory efforts, some users complain that German telecommunications laws fail to clearly establish what activities are permitted, complicating the operation of private providers who do not wish to violate any laws.²⁸⁶ Furthermore, DBP Telekom has yet to be privatized, and remains a public administration.²⁸⁷ Many forces within Germany are pushing towards privatization²⁸⁸ and the German

277. See Joachim Scherer, *Telecommunications Law in Germany*, in *Telecommunications Laws in Europe* 61, 61 & n.1 (Joachim Scherer ed., 1993). The Act's provisions are analyzed in some detail in Morris, *supra* note 43, at 96-117.

278. See Morris, *supra* note 43, at 96-97, 101-02.

279. See *id.* at 96-97.

280. See Morris, *supra* note 43, at 125.

281. See Scherer, *supra* note 277, at 125.

282. See *id.* at 72-73.

283. See *id.* at 65-66 ("Transmission lines are cable and radio communications installations together with their transmission equipment [which can] establish point-to-point or point-to-multipoint connections.").

284. See *id.* at 66-67. This gives the German government the exclusive right to set up and operate radio installations. See *id.*

285. See *id.* at 72.

286. See Schrage, *supra* note 79 (Confusion arises if an American company "[w]ant[s] to install a telecommunications switch using [Digital Network technology in its] local branch [in Germany] . . . There's even some uncertainty over whether it's technically legal to plug a U.S.-made laptop into the telephone lines without Bundespost approval."); see also Laurent Belsie, *European Phone Fight on Hold*, *The Christian Sci. Monitor*, Aug. 10, 1993, available in WESTLAW, NEWSPAPERS File (illustrating difficulties users have encountered under the new laws).

287. Rudolf Pospischil, *Reorganization of European Telecommunications*, 1993 *Telecommunications Policy* 603, 605.

288. See Ariane Genillard, *Deutsche Telekom Hangs on for Sell-Off Call*, *Fin. Times*, Oct. 26, 1993, available in LEXIS, News Library, CURNWS File (discussing how even

Parliament is finally introducing the necessary constitutional amendments to privatize the German PTT,²⁸⁹ but the move has been delayed by political debate.²⁹⁰ In addition, some say that delays in Germany's movements towards deregulation are justified due to Germany's preoccupation with modernizing telecommunications provision in East Germany.²⁹¹

4. Italy

Italy is the least developed of the countries in this category and is also disadvantaged by its unusual system of telecommunications provision. The Ministry for Post and Telecommunications has remained responsible for national telecommunications, controlling the State Agency for Telephone Services ("ASST"), a public body that provides some basic services.²⁹² The ASST, in turn, licenses out the rights to provide the remaining services to three other companies: SIP, ITALCABLE, and TELESPAZIO.²⁹³ In reality, however, the state owns all of these companies through public financial entities.²⁹⁴

Despite minor legislative changes in 1984,²⁹⁵ the still-in-force 1973 Postal and Telecommunications Code²⁹⁶ subjected all telecommunications markets to control by a public monopoly. Recently, however, the Italian Parliament began to implement legislation to reform the Italian telecommunications system.²⁹⁷ As envisioned in the 1992 law, Italy soon hopes to bring all the telecommunications licensees together to form a single company, provisionally named Telecom Italia.²⁹⁸

the chief executive of the German PTT considers privatization inevitable, and wants to get the 'trauma' over with and hopes that privatization will bring more capital, make it easier to forge international alliances, and make it easier to implement cost-cutting measures).

289. See Adonis, *supra* note 228.

290. See Genillard, *supra* note 288. The government agreed to create a holding company, in which it will hold a majority stake, until it can effect privatization of the German PTT. But disagreements over the holding company's managerial control has delayed the privatization process. See *Id.*

291. See *Europe Anxious About Information Superhighway*, Chi. Trib., Nov. 8, 1993, available in WESTLAW, PAPERS File (describing how Germany's "efforts to push through privatization plans and the need for massive financing to upgrade antiquated East German phone networks are occupying much of its attention"); see also Howard Rowen, *Germany: High-Tech Laggard*, Wash. Post, July 8, 1993, available in WESTLAW, PAPERS File (mentioning Bonn's recent decision to spend sixty five billion dollars on raising the quality of life in East Germany).

292. See G. Franco Macconi & Raffaele Giarda, *Telecommunications Law in Italy*, in *Telecommunications Laws in Europe* 83, 83 (Joachim Scherer ed., 1993).

293. See *id.*

294. See *id.*

295. See *id.* (discussing Presidential Decree No. 523 of Aug. 13, 1984).

296. See *id.* (discussing the *Codice Postale e delle Telecomunicazioni*, enacted by Presidential Decree DPR No. 156 of 29 March, 1973).

297. See *id.* (discussing Law No. 58 of Jan. 29, 1992, on the reorganization of the telecommunications sector).

298. See Adonis, *supra* note 228; *Italy: Stet—Telecom Italia Project Conforms to EC*

Italy has substantially succeeded in opening its terminal equipment market to competition. But this seems to be the only area in which Italy has complied with EC policy.²⁹⁹ Italy has largely failed to open telecommunications services to competition. Basic, and even enhanced, services are still controlled by a state monopoly. Only newly developed services, classified as value-added services, are fully liberalized.³⁰⁰ To comply with EC pressure, Italy is currently trying to open some telecommunications markets to competition.³⁰¹

B. *Lesser Developed Countries That Were Granted an Extended Deregulation Deadline*³⁰²

1. Spain

ITT and the Spanish government created the Spanish PTT, *Telefonica De Espana* ("Telefonica"), in 1924.³⁰³ Though legally a private company, 32.28% of Telefonica's shares are still held by the government.³⁰⁴ The legislation policing the telecommunications market was very disorganized until the Spanish Parliament passed the Telecommunications Act (the "Act") in 1987.³⁰⁵ But the Act did little to deregulate the market.

The Act did separate the regulatory functions of the government from the operations of the monopoly provider,³⁰⁶ but Spain has been slow to open its equipment market to competition. Only in 1991 did a law allowing free sale of a basic telephone come into effect.³⁰⁷ Furthermore, the Commission has expressed concern about the monopolization of terminal equipment provision.³⁰⁸

Regulations, Reuter Textline, Sept. 14, 1993, available in LEXIS, News Library, CURNWS File (announcing that the proposed merger, which includes SIP, Italcable, Telespazio, Sirm, and Iritel, conforms to EC competition regulations).

299. See Macconi & Giarda, *supra* note 292, at 90.

300. See *id.* at 89.

301. For example, Maurizio Pagani, the Posts and Telecommunication minister, wrote to the EC that SIP's monopoly over GSM, the European radio-based mobile telephony system, will cease at the end of April, 1993. See *Italy: SIP's monopoly over GSM Mobile Phones System to Cease*, Reuters Textline, Oct. 7, 1993, available in LEXIS, News Library, CURNWS File; Belgium to examine EC demand to end GSM telephone monopoly, Oct. 1, 1993. Though this billion dollar industry has yet to be opened to competition, the process is in motion. See Lisa Bannon, *Battle for Italy's Cellular-Phone Market Pits Top Industrialist in Personal Feud*, Wall St. J., Feb. 25, 1994, at A9B.

302. See *infra* note 332 and accompanying text.

303. See José Ma. Delgado, *Telecommunications Law in Spain*, in *Telecommunications Laws in Europe* 111, 114-15 (Joachim Scherer ed., 1993); see also *Telefonica De Espana*, Hoover's Handbook of World Business, Dec. 31, 1993, available in LEXIS, News Library, CURNWS File.

304. See Delgado, *supra* note 303, at 114-115 n.13.

305. See *id.* at 111 n.1.

306. See *id.* at 112.

307. See *id.* at 117.

308. In 1991, the French company, Alcatel, sought to acquire control over its competitor in the terminal equipment market, the Italian company, Telettra. Both of these companies competed in Spain's terminal equipment market and, combined, they held 80% of

For the most part, the Act and subsequent legislation have yet to open services to competition.³⁰⁹ The Act created classifications for different services. It required basic services, such as basic telephony, telex, and telegraph to be provided by Telefonica on a monopoly basis.³¹⁰ One class of services, carrier services, was originally retained by the monopoly provider, but was to be fully liberalized by January 1993.³¹¹ The Act did open most value-added services to competition, requiring entrants only to comply with standardization and authorization requirements.³¹² But the Act reserved even some value-added services for monopoly control.³¹³ Spain needs time to first organize control over its market, but it should soon be prepared to work towards open competition.

Similarly, the Portuguese government is especially reluctant to remove its monopolistic control over telecommunications provision because, as of 1990, of all EC countries, it has the least number of telecommunications lines per inhabitant.³¹⁴ Thus the government fears that open competition will leave many inhabitants with no service at all.³¹⁵ The Portuguese PTT ("CTT") was a public company under the political authority of the Ministry.³¹⁶ CTT provided almost all postal services and telecommunications services. Only two other carriers were able to obtain government concessions to provide services. The first was *Telefones de Lisboa e Porto*, a public company which provided telephony in Lisbon and Oporto. The second was *Companhia Portuguesa Radio Marconi*, which provided intercontinental telephone and telex services, international telegraphy (apart from Spain), and intercontinental links for new services such as the data network. These two companies share a board of directors, whose members are nominated by the government. Portugal

the market. The Commission was concerned that this merger would end competition in the Spanish terminal equipment market. Though Telefonica did not object to the merger, other suppliers did, and claimed that Telefonica was biased because it held shares in both companies. These shares, they claimed, protected Telefonica and created a barrier to market entry. The EC eventually allowed the merger when Telefonica sold its shares in the two companies, and agreed to make diverse purchases, thus ensuring competitors a place in the market. See Wayne D. Collins, *The Coming of Age of EC Competition Policy*, 17 Yale J. Int'l L. 249, 289 (1992) (reviewing Sir Leon Brittan, *Competition Policy and Merger Control in the Single European Market* (1991)); *The Commission Imposes Strict Obligations in its Approval to the Alcatel/Telettra Merger*, IP Press Release, Apr. 12, 1991, available in LEXIS, News Library, CURNWS File.

309. See Delgado, *supra* note 303, at 112-13.

310. See *id.* at 113.

311. See *id.* at 113-15.

312. See *id.* at 113. The definition of value added services ("VAS") varies in each country, complicating efforts to arrive at a uniform definition. In Spain, VAS are defined as services, other than broadcasting, which use basic or enhanced services but add other facilities such as data processing, access, storage, or retrieval, to satisfy additional telecommunications requirements. See *id.* at 116.

313. See *id.* at 117. Value added services that require the installation and use of a network are not opened to competition. *Id.*

314. See Constantelou, *supra* note 8, at 442 (table 5).

315. See *supra* note 215.

316. See Ungerer, *supra* note 35, at 26-28.

plans a consolidation of its separate operators, similar to Italy's plan.³¹⁷

2. Greece

Greece has been the slowest EC country to develop its telecommunications markets.³¹⁸ Greece is disadvantaged due to infrastructural, organizational, and political problems.³¹⁹ Nevertheless, Greece has attempted to implement laws to increase telecommunications competition.³²⁰

Until recently, Greek telecommunications were controlled by the Hellenic Telecommunications Organization SA, which was publicly owned, but financially autonomous, as required by statute.³²¹ Greece's first step towards deregulation was a 1990 law that granted private entities the right to compete in mobile and value-added services markets.³²² In addition, on July 31, 1992, Greece enacted a law calling for a separation between the telecommunications regulator and the telecommunications provider.³²³ It also called for partial privatization of the Greek PTT.³²⁴ Recently, a political shift slowed Greek deregulation,³²⁵ but much of the PTT is already privately owned.³²⁶ Due to Greece's particular problems, it probably will not achieve open competition in its telecommunications markets in the near future, but may be able to break its telecommunications monopoly into a private oligopoly.³²⁷

C. *The Current State of Telecommunications and Prospects for the Future*

It is difficult to quantify the present level of telecommunications deregulation in the EC. In some ways, much deregulation remains to be implemented before European telecommunications are truly open to competition.³²⁸ State owned monopolies still control the majority of EC

317. See Adonis, *supra* note 228.

318. See Constantelou, *supra* note 8, at 435 ("Until August 1992 Greece had been the only EC member state without a restructured institutional framework for the development of the telecommunication sector.").

319. See *id.* at 443.

320. See *id.* at 443-45.

321. See Constantelou, *supra* note 8, at 435.

322. See Constantelou, *supra* note 8, at 436. Constantelou refers to Article 93 of Law 1892 of 31 July 1990 which has been translated as stating that

[u]nder Presidential decree, and after a proposal submitted by the Minister of Transport and Communications after consultation with the Administrative Council of [the Greek PTT], it is possible for other public or private bodies to undertake the organization and use of mobile communications services and value-added services by having access to the existing [telecommunications] network.

Id.

323. See Constantelou, *supra* note 8, at 440-41 (translating and interpreting the new law).

324. See *id.* at 441.

325. See Adonis, *supra* note 228.

326. See Constantelou, *supra* note 8, at 441.

327. See *id.* at 444.

328. See Oster, *supra* note 19 (noting that, despite open competition in some telecommunications markets, "[t]he telephone industry . . . will not be deregulated until 1998").

telephone services,³²⁹ and each EC Member State (except for Britain) still offers "exclusive rights" to a single telecommunications company.³³⁰ But much has been opened to competition and there are strong movements for even more deregulatory legislation.

Most market analysts believe that the balance within Europe is tipping in favor of liberalization, especially considering the latest proposals for full liberalization of all voice telephony in the EC, to be phased in over a number of years.³³¹ In a recent display of optimism, telecommunications ministers from all European nations agreed that most EC countries should end monopolies over telephone calls by 1998, giving Greece, Ireland, Portugal, and Spain until 2003.³³² In addition, most European countries have attempted to create open competition in the cellular phone market, despite the fact that they could legally allow monopoly control.³³³ Furthermore, the Commission has established its intention to fully liberalize satellite communications in the near future.³³⁴

Though most analysts now agree that the monopolistic control by PTTs does not benefit telecommunications users,³³⁵ some countries still oppose open competition. Belgacom, Belgium's PTT, and *France Télécom* (described by a Brussels insider as "a bank that happens to run telecoms services"³³⁶) are the staunchest opponents to deregulation. Even the Competition Commissioner, Belgian Socialist Karl van Miert, is less enamored with the free market than his predecessor, Sir Leon Brittan.³³⁷ Furthermore, Jacques Delors, the Commission's president, was hesitant to implement any controversial EC measure before Germany, Denmark, and Britain ratified the Maastricht Treaty.³³⁸ This was pointed to as an indication that he is unlikely to endorse any radical legislation against Member States' wishes.

Critics of deregulation point out that open competition may result in

329. See Hilary Clarke, *Survey of International Telecommunications*, *Fin. Times*, Oct. 15, 1992, at III.

330. See Suzanne Perry, *Article 90 Confirmed as Commission Anti-Monopoly Weapon*, *Reuter Eur. Community Rep.*, Nov. 17, 1992; *EC Commission's Monopoly-Busting Powers Upheld*, *Reuter Asia-Pac. Bus. Rep.*, Nov. 17, 1992.

331. See *Still Holding: European Telecoms*, *supra* note 85.

332. See *Europe's Companies Back Telecoms Liberalization, Survey Shows*, *Reuter Eur. Community*, Sept. 20, 1993.

333. See Andrew Adonis & Nikki Tait, *Mobiles break into the big time: Can cellular communications replace traditional networks*, *Fin. Times*, Aug. 19, 1993, at 15.

334. See Scherer, *supra* note 41, at 7-8. For an analysis of the steps taken to deregulate satellite services, see generally Oliver Stehman, *Facility-Base Competition in Europe: The Case for a Separate Satellite System*, 1992 *Telecommunications Policy* 135 (charting the effects of technological progress on the relationship between terrestrial and satellite telecommunication networks).

335. See Beaton, *supra* note 38, at 689 ("there is no need to maintain the core monopoly[,] and . . . service, quality and price opportunities are best achieved by competition in basic and enhanced services").

336. See *Still Holding: European Telecoms*, *supra* note 85.

337. See *id.*

338. See *id.* The Maastricht Treaty was recently adopted under the German constitution, which completed its ratification process. See *supra* note 218.

short-term dangers to consumers.³³⁹ For example, while monopolies over voice telephony are still allowed, the PTTs might increase the price of basic service to compensate for loss of revenues in other markets.³⁴⁰ In addition, the quality of the networks that PTTs still operate might drop due to restricted budgets resulting from losses in competitive markets.³⁴¹ Others have criticized the EC's deregulation attempts, claiming that "EC policy [is] unclear," and that it has impeded the efforts of European companies attempting to achieve global competitiveness.³⁴² But most analysts have accepted the reality that deregulation is coming, though it will still take a lot of work.³⁴³

CONCLUSION

Over the last six years, the Commission has made strong advances towards the deregulation of European telecommunications, most importantly by establishing its authority over the Member States' PTTs. In light of the recent proposal to deregulate even voice telephony,³⁴⁴ it seems that the PTTs are destined to disintegrate. Enough businessmen and politicians now understand the need for open competition in telecommunications that even if the voice telephony proposal is rejected, complete deregulation is still inevitable.

The road ahead, however, remains long and complicated. Though some countries have approached their goal of full deregulation, others are more entrenched in their traditional, monopolistic, telecommunications organizations. Despite these difficulties, recent developments have indicated that all European telecommunications markets will be deregulated within the decade.

339. See Naftel, *supra* note 2, at 488-91.

340. See *id.*

341. See *id.* at 489-90.

342. See Williamson, *supra* note 68; Austin, *supra* note 10, at 112 (noting that some criticize the ONP Directive 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."). Another criticism aimed at the ONP Directive is that it leaves unresolved the issue of which services it applies to. See Higham, *supra* note 58, at 247-49 (discussing the options for how to proceed with the ONP process); John M. Wheeler, *Key Issues in Europe's Open Network Provision: The Case of the German VANS Providers*, 1992 Telecommunications Policy 80, 83-87 (discussing the options on which markets to apply ONP, and explaining who supports the different options).

343. See, e.g., Austin, *supra* note 10, at 117 (concluding that the attention devoted to European liberalization "gives reason for optimism that freer markets in Europe will be the ultimate destination of the ONP process"); Beaton, *supra* note 38, at 702-03 (predicting a future in which "[t]raditional notions of monopoly-based products and services will be gone"); Josephine Ludolph, *The EC's accomplishments in and prospects for a single market in services*, Business America, available in LEXIS, News Library, CURNWS File, Mar. 8, 1993 ("The market-integrating laws are in place. However, all of the EC Member States still have work ahead of them.").

344. See *supra* note 26.