LIBERALIZING THE "SACRED COWS": TELECOMMUNICATIONS AND POSTAL SERVICES IN THE EC

I. INTRODUCTION

A telephone call from Spain to Britain costs twice as much as a call in the opposite direction,[1] and it takes an average of four months to have a telephone installed in Brussels, Belgium.[2] The average delivery time of a letter mailed from Italy to Ireland is 5.6 days, compared with 9.2 days for a letter sent in the opposite direction.[3] These examples emphasize the inefficiencies that have resulted from the lack of competition in both the telecommunications and postal sectors in most European countries.[4] This lack of competition presents a challenge to the European Community (EC) because efficient postal and telecommunications services are essential to the success of the Single European Act. Postal services and telecommunications account for 3 percent of Community Gross Domestic Product (GDP) and employ more that 2.5 million people.[5] It is predicted that "[t]elecommunications alone are set to account for around 6 percent of the EC's GDP by the year 2000."[6] Furthermore, "[i]t is estimated that more than half of EC jobs depend on information and communication technology."[7]

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1. Towards Cost Orientation and the Adjustment of Pricing Structures: Telecommunications Tariffs in the Community, Annex, SEC(92)1050 final at Exhibit 6 [hereinafter Towards Cost Orientation].

2. Tim Jackson, *Brussels Rings in the Changes*, THE INDEPENDENT, Oct. 23, 1992, at 26.

3. Green Paper on the Development of the Single Market for Postal Services, COM(91)476 final, Table 14, at 90.

4. Sir Leon Brittan, Competition Policy and Post and Telecommunications, at the Centre for European Policy Studies (CEPS) (May 19, 1992), *available in* LEXIS, Europe Library, RAPID File [hereinafter Speech of Sir Leon Brittan]. There are European Community (EC) member states that do not fit this stereotype. For example, the United Kingdom has liberalized its telecommunications. *See* REFERENCE SERVICES, CENTRAL OFFICE OF INFORMATION, LONDON, TELECOMMUNICATIONS SERVICES IN BRITAIN, NO. 182/88, at 1 (1988). Britain might soon deregulate or privatize its post office. *See* Roland Rudd, *A Sale that Promises to Deliver*, FIN. TIMES, Aug. 10, 1992, at 11.

5. Speech of Sir Leon Brittan, *supra* note 4.

6. Hilary Clarke, *Resistance in Europe*, FIN. TIMES, Oct. 15, 1992, § III, at 2.

7. *Id.*

In Europe, the telecommunications sector developed out of the postal services.[8] Both telecommunications and postal services have traditionally been controlled by the same institutions, the government administrations of post, telephone, and telegraph (PTTs).[9] Thus, it is not a coincidence that the same Directorate General[10] in the Commission of the European Commission (Commission) oversees both telecommunications and postal services. The cross-subsidization of funds from the usually profitable telecommunications sector to the usually unprofitable postal sector[11] provides further evidence of the bond between the two sectors. Telecommunications and postal services in Europe have been regulated as natural monopolies[12] and, for the most part, have not been widely exposed to effective competition.[13] The recognition of the importance of efficient telecommunications and postal services to the integration of the EC, however, have led to a campaign to liberalize these sectors.

The Commission has stated that liberalization in both the telecommunications and postal services sectors is to be achieved in accordance with the competition rules provided for under the Treaty Establishing the European Economic Community (EEC Treaty).[14]

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8. *See* ELI NOAM, TELECOMMUNICATIONS IN EUROPE 7–13 (1992). The model for later European collaboration on telegraphs and telephones began with the creation of a regional postal union in 1850 that expanded to include telegraphs. *See id.* at 13.

9. *Id.* at 7.

10. The Directorate General for Telecommunications, Information Industries and Innovation (DGXIII).

11. In 1988 ten out of the twelve member states' postal administrations (the United Kingdom and the Netherlands being the exceptions) had a deficit. *See* Green Paper on the Development of the Single Market for Postal Services, *supra* note 3, Table 3, at 115.

12. A natural monopoly "arises under conditions of pervasive economies of scale or scope, such that the most efficient way of organizing production in an industry is through a single integrated firm." PAUL A. SAMUELSON & WILLIAM D. NORHAUS, ECONOMICS 522–25 (12th ed. 1985).

13. *See, e.g.*, *Telecommunications: What Is at Stake for Europe?*, JUSLETTER BULL., Apr. 1989, at 5 [hereinafter *Stake for Europe*] (discussing competition in the telecommunications area).

14. Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector, 1991 O.J. (C 233) 2, 2 [hereinafter Competition Rules Guidelines]. The competition policy of the Community is based on Article 3(f) and Articles 85–94. *See* EEC TREATY arts. 3(f), 85–94. Article 3(f) of the EEC Treaty requires "the institution of a system ensuring that competition in the common market is not distorted . . . ." *Id.* art. 3(f). Articles 85 and 86 apply to all companies whether private or public (at least in the telecommunications sector). *See id.* arts. 85–86 (Article 85 applies to restrictive agreements and practices and Article 86 applies to abuse of a dominant position); Competition Rules Guidelines, *supra*, at 6. In addition, Article 90 of the EEC Treaty prevents governments from forcing or allowing such companies to infringe on the rules contained in Articles 85 and 86. EEC TREATY art. 90(1). Thus, if anticompetitive activities are undertaken voluntarily by a company, the Commission will apply Articles 85 and 86 to prevent such activities. If the anticompetitive activities are imposed on the company by the

The competition rules allow the Commission to prevent companies from pursuing voluntary anticompetitive activities. Article 90 of the EEC Treaty allows the Commission to prevent anticompetitive activities from being imposed on companies by member states and Article 90(1) of the EEC Treaty recognizes that member states may grant special or exclusive rights to public undertakings.[15] Article 90(1), however, also provides that such exclusive rights may be granted only insofar as these undertakings respect other EEC Treaty rules, especially those concerning competition.[16] This reinforces the obligation imposed on member states by Article 5 not to hinder the achievement of the objectives outlined in the EEC Treaty.[17] Finally, Article 90(3) enables the Commission to "address appropriate directives or decisions to member states" in order to ensure that undertakings falling under Article 90(1) and 90(2) act in conformity with the EEC Treaty.[18] By introducing directives through Article 90, the Commission can adopt legislation without the formal consent of the European Council of Ministers (Council).[19] This greatly expedites the directive implementation process, minimizes the degree of compromise, and removes the uncertainties attendant in the process of EC legislative enactment. Nevertheless, this use of Article 90 to address directives to the member states in order to expedite liberalization is one of the most controversial uses of the competition rules.[20]

This Note examines developments in the liberalization of telecommunications and postal services in the EC and argues that further policies designed to promote competition need to be introduced. Part II examines the effect of certain directives on telecommunication terminal equipment and services. Part III analyzes the provisions of the Green Paper for the liberalization of postal services,

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state authorities, the Commission will prevent such imposition using Article 90.

15. *Id.* art. 90(1).

16. *Id.* art. 90(1)-(2).

17. *See id.* art. 5.

18. *Id.* art. 90(3).

19. In contrast to the other articles of the EEC Treaty that enable the Council to enact implementing legislation (Articles 87 and 94), Article 90(3) specifies that the Commission may address appropriate directives or decisions to member states. *See id.* arts. 87, 90(3), 94.

20. *See generally* Leigh Hancher & Piet Jan Slot, *Article 90*, 1 EUR. COMPETITION L. REV. 35, 35-39 (1990) (discussing the mechanics and complexities of Article 90); Aurelio Pappalardo, *State Measures and Public Undertakings: Article 90 of the EEC Treaty Revisited*, 1 EUR. COMPETITION L. REV. 29, 34-36 (1991) (discussing difficulties and peculiarities in interpreting Article 90); Koen Platteau, *Article 90 EEC Treaty after the Court Judgment in the Telecommunications Terminal Equipment Case*, 3 EUR. COMPETITION L. REV. 105, 110-12 (1991) (discussing Article 90 in the context of the Telecommunications Terminal Equipment Case).

examines the potential effects of the document, briefly examines some actions of the Commission against postal administrations, and discusses reforms in the private and public postal services.

II. TELECOMMUNICATIONS

The telecommunications sector plays an important role in the development of the EC economy.[21] Technological development, globalization, and the growing significance of services have spurred the growth of the telecommunications sector in the EC.[22] The rapid pace of technological change in the sector is leading the way for promoting market growth and productivity throughout the EC economy.[23] Thus, the telecommunications sector poses an important challenge to the goal of completion of the single European market.[24] The importance of the sector in various aspects of human activity, including trade and social interaction, is evident and likely to increase.

The EC has undertaken a telecommunications deregulation effort which has been influenced by deregulation elsewhere. Deregulation of the United States' telecommunications industry in the 1980s begain global deregulation of telecommunication monopolies.[25] In addition, the British initiatives opening the telecommunications sector to competition set the pace for similar reform in Europe. The telecommunications legislation implemented by Britain in 1984 reflected what the Commission later prescribed for the entire EC in 1987, and the British approach to controlling telecommunications monopolies became "a prototype [for] the Community's later liberalisation model."[26]

Recognizing that developing European telecommunications would enhance the benefits of the single market and increase the Community's global competitiveness, the Commission has devoted considerable attention to the sector.[27] In fact, the Commission has estimated that more than half of the jobs in Europe currently depend

21. *See supra* notes 5–7 and accompanying text.

22. Commission of the European Communities, *Telecommunications: The New Highways for the Single European Market*, EUR. FILE, Oct. 1988, at 4 [hereinafter *New Highways*]; *Stake for Europe*, *supra* note 13, at 2.

23. *See generally New Highways*, *supra* note 22, at 4–6 (discussing technological improvements in telecommunications and the implications for the Community economy).

24. *Id.* at 3.

25. *See* Hugo Dixon, *Freeing the Markets*, FIN. TIMES, Apr. 19, 1990, § III, at 1.

26. Colin Long, *United Kingdom Special Report*, *in* GETTING THE MESSAGE: A GUIDE TO INTERNATIONAL TELECOMMUNICATIONS 73 (INT'L FIN. L. REV. Spec. Supp. 1992).

27. Clarke, *supra* note 6, at 2.

on information and communication technology.[28] It has also been estimated that by the end of the century, telecommunications will account for about 7 percent of the GDP of the EC, compared with 3 percent at present.[29]

Since 1984 when the Community began to design and implement a European telecommunications policy, Commission initiatives, legislation, and programs have provided a framework for development in the sector, yielding guidance to network operators, the manufacturing industry, and telecommunications users.[30] A key document setting forth EC telecommunications strategy was the Green Paper on the Development of the Common Market for Telecommunications Services and Equipment (Green Paper) published in 1987.[31] The aim of the Green Paper was to improve the variety, quality, and cost efficiency of telecommunications in the EC, thereby strengthening the telecommunications sector.[32] The liberalization process includes opening the markets for terminal equipment and telecommunications services to competition.[33] In order to harmonize the liberalization process among the member states, the Green Paper introduces the concept of the Open Network Provision (ONP) which will accelerate the transition to a competitive EC telecommunications market.[34]

A. Terminal Equipment

The European market for telecommunications equipment traditionally has been largely dependent upon the national telecommunications administrations of the member states. These administrations have monopolized the importation and supply of terminals[35] and have occasionally attempted to bring new technologies into the scope of administration control. For example, in 1985 the German Bundepost

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28. *Id.*

29. *New Highways*, *supra* note 22, at 4–5.

30. *See* COMMISSION OF THE EUROPEAN COMMUNITIES, OFFICIAL DOCUMENTS OF COMMUNITY TELECOMMUNICATIONS POLICY *passim* (1991) (reprinting telecommunications measures published in the Official Journal from 1984 until 1991).

31. *See* Towards a Dynamic European Economy: Green Paper on the Development of the Common Market for Telecommunications Services and Equipment, COM(87)290 final [hereinafter Green Paper on Telecommunications]. Satellite communications and mobile telephony are beyond the scope of this Note. EC telecommunications policy treats them as specific sectors, and each was excluded from the 1987 Green Paper on telecommunications. *Id.*

32. *See id.*, Summary report, at 3.

33. *See id.* at 184–86.

34. *Id.* at 69.

35. *See* HERBERT UNGERER & NICHOLAS P. COSTELLO, TELECOMMUNICATIONS IN EUROPE 194 (1990).

tried to extend its monopoly to modems.[36] After intervention by the Commission pursuant to the EC competition rules, however, the German government dropped its plans to extend the Bundespost's monopoly to this area.[37] Other member states, including Italy and Belgium, have attempted to extend the monopolies of their telecommunications administrations to modems and telex equipment.[38]

1. *The Terminal Equipment Directive.* To ensure the complete opening of the terminal equipment market in the EC, the Commission adopted a Terminal Equipment Directive on May 16, 1988 which requires member states to establish a system of free competition in the EC market for telecommunications terminal equipment.[39] The equipment covered includes telephone sets, modems, and telex terminals.[40]

The Terminal Equipment Directive requires the abolition of all special or exclusive rights previously granted to telecommunications administrations to import, sell, and lease terminal equipment, to market certain services, and to make connections to the public network and/or maintain terminal equipment.[41] In addition, because the technical specifications and the procedures through which new terminal equipment receives governmental approval vary among the members states, the Terminal Equipment Directive requires the member states to provide a list of all technical specifications of domestically approved terminal equipment to the Commission and to publish them[42] so that producers in other member states can adapt their terminal equipment to the existing telecommunications network. To avoid conflicts of

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36. *See* COMMISSION OF THE EUROPEAN COMMUNITIES, FIFTEENTH REPORT ON COMPETITION POLICY 205 (1985) [hereinafter FIFTEENTH REPORT ON COMPETITION POLICY].

37. *Id.*

38. *Id.* at 206.

39. Commission Directive 88/301 of 16 May 1988 on Competition in the Markets in Telecommunications Terminal Equipment, 1988 O.J. (L 131) 73 [hereinafter Terminal Equipment Directive]. "Terminal equipment" is defined in Article 1 of the Terminal Equipment Directive. *Id.* art. 1.

40. *See id.*, Annex I, at 77. Prior to issuing the Terminal Equipment Directive, which ruled on the applicability of Articles 30, 37, 59, 60 and 90 of the EEC Treaty on a community-wide basis and for all terminal equipment products as a group, the Commission had proceeded successfully against individual member states with respect to specific products—primarily modems and telex terminals. *See* COMMISSION OF THE EUROPEAN COMMUNITIES, SIXTEENTH REPORT ON COMPETITION POLICY 199–200, points 294–95 (1987); FIFTEENTH REPORT ON COMPETITION POLICY, *supra* note 36, at 205–06, points 260–61.

41. *See* Terminal Equipment Directive, *supra* note 39, arts. 2–3.

42. *See id.* art. 5.

interest, the Terminal Equipment Directive prohibits telecommunications operators from serving as both regulatory bodies and commercial distributors.[43] This requirement is designed to prevent telecommunications authorities from keeping competing products away from the market. Finally, the Terminal Equipment Directive requires member states to ensure that their national telecommunications administrations give their customers the opportunity to terminate leasing or maintenance contracts in order to enable consumers to obtain supplies or service elsewhere if they wish.[44]

2. *The Terminal Equipment Case.* The Terminal Equipment Directive was subsequently the subject of a complaint put forward by a number of member states in 1988.[45] The main concern of the member states was that they would be excluded from future discussions on the abolition of their national telephone monopolies. In particular, the French Government, supported by the governments of Belgium, Greece, Italy, and Germany, challenged the right of the Commission to issue such a Directive under Article 90(3) of the EEC Treaty before the European Court of Justice (ECJ).[46] These governments claimed that the matter fell under the legislative powers of the Council pursuant to Article 100 and was outside the scope of the Commission's authority.[47] In addition, the complaint requested the annulment of several provisions of the Terminal Equipment Directive.[48]

In *France v. Commission* the ECJ held on March 19, 1991 that the Commission had the power, under Article 90, to enact a directive abolishing special and exclusive rights of importation, of commercialization, of link-up servicing, or over the upkeep of terminal equipment.[49] The ECJ held that the Commission's duty of surveillance over expanded undertakings required by Article 90 did not infringe on the Council's power under Article 100(a).[50] The ECJ made it clear that Article 90(3) conferred on the Commission power to lay down the

43. *See id.* art. 6.

44. *See id.* art. 7.

45. *See* Action Brought on 22 July 1988 by the French Republic against the Commission, Case 202/88, 1988 O.J. (C 216) 6 [hereinafter Action Brought by French Republic].

46. Case 202/88, France v. Commission, slip op. at 6–7 (Court of Justice, Mar. 19, 1991).

47. *Id.* at 6–7.

48. *See id.*

49. *Id.* at 10–12, paras. 19–27.

50. *Id.* at 12, para. 25 (Article 100(A) gives the Council the authority to enact legislation harmonizing member states' laws which affect the establishment of the internal market).

general rules specifying the obligations of member states under the EEC Treaty with regard to the undertakings referred to in Article 90(1) and (2).[51]

However, the ECJ annulled Article 2 of the Terminal Equipment Directive requiring the abolition of "special and exclusive rights." The ECJ struck down Article 2 on the basis that neither the preamble nor the operative part of the Terminal Equipment Directive made it clear what "special and exclusive rights" were envisaged nor how such rights might be contrary to the EEC Treaty.[52] The ECJ also annulled Article 7 of the Terminal Equipment Directive which would have required member states to take necessary measures to facilitate the annulment of long-term terminal equipment contracts subject to exclusive and special rights.[53] The ECJ struck down Article 7 reasoning that Article 90 only confers power on the Commission with respect to actions of member state governments and not with respect to purely private corporate contracts.[54] Thus, Article 7, which did not refer to government induced contracts, was void. The ECJ also annulled Article 9 of the Terminal Equipment Directive, which required member states to provide the Commission with a yearly report allowing it to monitor compliance with the provisions of the Directive.[55]

3. *Assessment.* The decision of the ECJ in the terminal equipment case (*France v. Commission*) tested and proved the legitimacy of the Commission's use of Article 90 to implement the Terminal Equipment Directive. The ECJ decision confirmed the wide scope of the Commission's independent legal powers to eliminate distortions to competition. The implications of that decision can be significant, short of setting a legal precedent,[56] for future Commission directives adopted under Article 90.

The propensity in the EC has been toward fully opening the terminal equipment market to competition.[57] In spite of the ECJ's nullification of some provisions, the Terminal Equipment Directive has

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51. *Id.* at 8, para. 14.
52. *Id.* at 17, para. 45.
53. *Id.* at 21, para. 56.
54. *Id.*
55. *Id.*, para. 58.
56. The ECJ seeks to achieve consistent judgments, but its precedents are not binding in the sense that the ECJ always remains free to deviate from previous decisions in light of new factual scenarios. JOSEPHINE STEINER, TEXTBOOK ON EEC LAW 15 (2d ed. 1990).
57. UNGERER & COSTELLO, *supra* note 35, at 194.

succesfully liberalized the terminal equipment market. In 1988 when the Directive was adopted, there were thirty-five exclusive rights granted to public telecommunications organizations in the Community.[58] By the end of 1991 all member states had abolished these exclusive rights except for Italy, which maintained exclusive rights with respect to teleprinters.[59] The liberalization of terminal equipment in the EC has also provided foreign manufacturers with a more accesible export market.[60]

4. *Mutual Recognition of Type-Approval Procedure.* To fully establish a single market for telecommunications equipment, the Community has taken steps towards making the member states' laws concerning mutual recognition identical. In 1986 a directive on the intial stage of the mutual recognition of type approval for telecommunications equipment was first adopted by the Council.[61] The Directive required the Commission to list international telecommunications norms and technical specificiations to be standardized.[62] According to the Directive, member states are not to carry out further tests for a particular type of termial equipment if the results of tests carried out in other member states are pursuant to "common conformity specifications."[63]

The Council adopted a second directive to further the establishment of an open and unified market in telecommunications terminal equipment.[64] This Directive prescribed a mechanism for mutual recognition of approval procedures for terminal equipment for the purposes of marketing such equipment and connecting it to public networks.[65]

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58. COMMISSION OF THE EUROPEAN COMMUNITIES, TWENTY-FIRST REPORT ON COMPETITION POLICY 3.I.B. § 1.2 (forthcoming 1992).

59. *Id.*

60. *See* Greg O'Connor, *EC Develops Plan to Liberalize Its Telecommunications Market*, BUS. AM., Oct. 7, 1991, at 12.

61. Council Directive 86/361 of July 24, 1986 on the Initial Stage of the Mutual Recognition of Type Approval for Telecommunciations Terminal Equipment, 1991 O.J. (L 217) 21.

62. *Id.* art. 4.

63. *Id.* art. 6.

64. Council Directive 91/263 of April 29, 1991 on the Approximation of the Laws of the Member States Concerning Telecommunications Terminal Equipment, Including the Mutual Recognition of their Conformity, pmbl., 1991 O.J. (L 128) 1, 1.

65. *See id.* arts. 3–10.

B. The Telecommunications Services Directive

The majority of EC telephone services is still under the control of state owned monopolies.[66] On June 28, 1990 the Commission issued the Telecommunications Services Directive[67] which was designed to ensure that member states "withdraw all special or exclusive rights for the supply of telecommunications services other than voice telephony . . ." and to allow private operators to supply such services.[68] Thus, private companies will be able to offer services in competition with previously monopolistic suppliers in the EC. The Telecommunications Services Directive covers "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 . . . ."[69]

As with the Terminal Equipment Directive, the Commission chose Article 90 of the EEC Treaty as a legal basis for the Telecommunications Services Directive.[70] Spain, Belgium, and Italy have challenged the Commission's right to implement the Telecommunications Services Directive before the ECJ.[71] On November 17, 1992 the ECJ upheld the right of the Commission to use Article 90(3) of the EEC Treaty to open the telecommunications market to greater competition.[72] The ECJ found that Article 90 did not restrict the authority of the Commission merely to overseeing how existing Community rules are applied. Rather, the Commission had a general right under the EEC Treaty to implement new measures such as those that were challenged. The fact that such a measure could have been implemented by the Council did not affect the competence of the Commission to act.[73] Moreover, the ECJ stated that the simple act by the Commission of creating a "dominant position" through the bestowal of "exclusive

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66. Clarke, *supra* note 6, at 2.

67. Commission Directive 90/388 of 28 June 1990 on Competition in the Markets for Telecommunications Services, 1990 O.J. (L 192) 10 [hereinafter Telecommunications Services Directive].

68. *Id.* art. 2.

69. *See id.* pmbl., para. 6. The Telecommunications Services Directive does "not apply to telex, mobile radiotelephony, paging and satellite services." *Id.* art. 1(2).

70. *See* Action Brought by French Republic, *supra* note 45, at 6–7.

71. Joined Cases C-271/90, C-281/90 and C-289/90, Spain, Belgium and Italy v. Commission, at 1 (May 20, 1992) (Jacobs, A.G.).

72. Joined Cases C-271/90, C-281/90, C-289/90, slip op. (Court of Justice, Nov. 17, 1992).

73. *See id.* at 7, para. 14.

rights" under Article 90 is not imcompatible with Article 86 of the EEC Treaty.[74]

The ECJ did, however, annul two parts of the services legislation. First, the ECJ canceled all provisions of the Telecommunications Services Directive as they related to special rights.[75] The ECJ found that the legal basis for abolishing special rights is not clearly stated in Article 1 of the Services Directive, which failed to set forth precisely what type of rights were being targeted and whether the existence of the rights would breach the provisions of the EEC Treaty.[76] Second, the ECJ annuled Article 8 of the Services Directive, which required members states to ensure that long-term supply contracts could be terminated when the Directive came into force.[77]

The ECJ ruling means that private companies should now be able to offer telecommunications services—such as facsimile, data transmission, and private networks—which, until now, were offered exclusively by state-controlled companies.[78] The rules upheld by the ECJ, however, do not cover regular telephone calls (voice telephony). Nevertheless, the ruling should give the Commission expanded power and increased confidence to break up other monopolies in the future, and voice telephony might yet be liberalized.

C. The Open Network Provision

In 1990 the Council adopted a framework directive designed to harmonize the conditions for access to the telecommunication services offered by the telecommunication administrations in the member states.[79] The aims of the Open Network Provision Directive (ONP) are to stimulate the development of nonreserved telecommunications services and to promote fair competition between the public telecommunications administrations and the private service operators.[80] The

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74. *Id.* at 12, paras. 33–35.

75. *Id.* at 11, para. 32.

76. *Id.*, para. 31.

77. *Id.* at 10, paras. 23–27.

78. Each EC member state (except the United Kingdom) offers "exclusive rights" to a single telecommunications company. *EC Commission's Monopoly-Busting Powers Upheld*, Reuter Bus. Rep., Nov. 17, 1992, *available in* LEXIS, Europe Library, AllEur File.

79. Council Directive 90/387 of 28 June 1990 on the Establishment of the Internal Market for Telecommunications Services Through the Implementation of Open Network Provision, art. 1, 1990 O.J. (L 192) 1, 2 [hereinafter Open Network Provision Directive].

80. Peter Alexiadis, *EC Regulation*, *in* GETTING THE MESSAGE: A GUIDE TO INTERNATIONAL TELECOMMUNICATIONS REGULATION 43, 48 (INT'L FIN. L. REV. Special Supp. 1992). The ONP initially aims to harmonize the following areas: leased lines, packet-switched and circuit-

provisions of the ONP state that the conditions for access to services offered by telecommunications administrations in the member states must be based on objective criteria, must be published and understandable, must guarantee equality of access and be nondiscriminatory within the parameters of Community law, and must not restrict access to the public telecommunications network and/or public services "except for reasons based on essential requirements, within the framework of Community law . . . ."[81]

Current telecommunications operators have a monopoly over infrastructure, and they control access to that infrastructure by users and private service operators. Under the conditions of the ONP, telecommunications operators will retain their monopolies on the network infrastructure and on services provided.[82] However, a series of directives will require telecommunications administations to offer access to services across the Community pursuant to the conditions set forth in the ONP.[83] The latest directives and proposed directives covered under the ONP Directive are discussed below:

1. *The ONP and Leased Lines.* The term "leased lines" refers to the telecommunications line systems "provided in the context of the establishment, development and operation of [a] public telecommunications network . . . ."[84] For example, when a telephone call is made from Paris to Brussels, a telephone line is being leased from a telecommunications organization for the duration of the call. Companies which have to make frequent calls to the same subscribers would find it cheaper to lease by the year instead of by the minute. The lack of competition in leased lines, however, has resulted in services that are expensive and inflexible.[85] For example, leased lines in Europe cost up to ten times more than they do in the United

switched data services, the Integrated Services Digital Network (ISDN), and related services such as voice telephony, telex, and access to networks. *See* Open Network Provision Directive, *supra* note 79, Annex I, at 6.

81. *Id.* art. 3.

82. *See* Alexiadis, *supra* note 80, at 48.

83. *See* Green Paper on Telecommunications, *supra* note 31, at 69.

84. Council Directive 92/44 of 5 June 1991 on the Application of Open Network Provision to Leased Lines, art. 2(2), 1992 O.J. (L 165) 27, 29 [hereinafter Leased Lines Directive].

85. Inflexible controls over leased lines include forbidding the connection of leased lines with public networks, the carrying of third party traffic, and reselling or sharing leased line capacity. *See* Mark Newman, *Reliability is Crucial Consideration—Telecommunications Services Analyzed*, FIN. TIMES, July 4, 1991, § III, at 3, 4.

States.[86] In 1987 domestic leased lines in Germany cost up to fifteen times more than in the United Kingdom.[87] Opening leased lines to competition should reduce charges and cost disparities. In the United States increased competition has lowered charges for leased lines close to cost.[88] In Japan, where the former telecommunications monopoly NTT has been partially privatized, leased lines now cost two-thirds less than prior to privatization.[89]

In June 1992 the Council responded and adopted the first individual Directive applying the ONP to leased lines.[90] This Leased Lines Directive aims to make it easier for companies to lease telephone lines from public networks across the EC on an open and nondiscriminatory basis.[91] The Leased Lines Directive requires telecommunications administrations to make leased lines available to providers of those services which are targeted for competition in the Telecommunications Services Directive.[92] Services not covered by the Telecommunications Services Directive, such as mobile telephone services and satellite services, are not covered by the Leased Line Directive.[93]

The Leased Lines Directive requires that conditions and tariffs on leased lines be published[94] and that the Commission be notified of any changes to these conditions or tariffs in advance.[95] The Commission will then publish that information for users.[96] In order to guarantee open access for all users, the Leased Lines Directive calls for member states to harmonize technical standards.[97] Technical restrictions will not be permitted to impede the process of linking

86. *The Fruitful, Tangled Trees of Knowledge*, THE ECONOMIST, June 20, 1992, at 88. Connection and rental charges for leased lines have generally declined in real terms from 1980 to 1991. Towards Cost Orientation, *supra* note 1, Annex, at Exhibit 4.

87. *Continental Divide*, THE ECONOMIST, Oct. 17, 1987, at 25. The German Telekom Infrastructure Council agreed to reduce their leased lines charges by 54 percent. David Goodhart, *"End Soon" for German Telephone Monopoly*, FIN. TIMES, Oct. 7, 1991, at 3.

88. *Land of the Free*, THE ECONOMIST, Oct. 17, 1987, Survey, at 13.

89. *See* Steven Butler, *The Genies of Privatisation—Profile, Japan's Ministry*, FIN. TIMES, Oct. 7, 1991, § III, at 6.

90. *See* Leased Lines Directive, *supra* note 84.

91. *See id.* pmbl., para. 17.

92. *See id.*, para. 8.

93. *See id.* (indicating that member states shall withdraw all special or exclusive rights in accordance with the Telecommunications Services Directive).

94. *Id.* art. 3.

95. *Id.*

96. *Id.* art. 3(2).

97. *Id.* art. 7.

leased lines together.[98] Finally, the telecommunications organizations must use transparent cost accounting systems suitable to "ensure that tariffs for leased lines follow the basic principles of cost orientation and transparency."[99]

The liberalization of leased lines should assist in the growth and development of value added services. In addition, "[t]he leased line directive should prove particularly valuable to a number of service providers such as cellular telephone operators that rely on private circuits for building their infrastructure."[100] Finally, the competitiveness of large international companies should also be enhanced. This is imperative for them because "[t]hey need to integrate the most advanced technologies into their business networks to stay internationally competitive."[101]

2. *The ONP Directive and Voice Telephony Services.* The deregulation of voice telephone services within the EC is controversial because "[v]oice telephony is the biggest and most economically important service operated by telecommunications administrations and is a vital service for both consumer and business users."[102] Voice telephone services account for about 90 percent of telephone companies' business.[103] Yet the present situation in Europe is unsatisfactory when compared to that in the United States and Japan.[104] "A three minute call from Boston to Washington, D.C., a distance of 650 kilometers, costs one-third of the equivalent distance call in Europe from Paris to Milan .... Phoning Milan from Brussels, again the same distance, costs four times as much."[105] In addition,

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98. *See id.* art. 6.

99. *Id.* art. 10.

100. *EC: Telecommunications Ministers Open up Supply of Leased Lines Within Community*, Reuter Textline Computergram, June 17, 1992, *available in* LEXIS, Europe Library, AllEur File.

101. David Buchan, *EC Plan for Telecoms Leasing*, FIN. TIMES, Feb. 21, 1991, at 4 (citing the Commission on the advantages of leased line liberalization to international companies).

102. Proposal for a Council Directive on the Application of Open Network Provision (ONP) to Voice Telephony, COM(92)247 final at 6 [hereinafter Proposed Voice Telephony Directive].

103. *A Definite Article of Dissent: The EC's New Programme for Reform is Already Looking Doubtful*, FIN. TIMES, Apr. 19, 1990, § III, at 3.

104. *European Strategy Report Nears Completion*, TELECOM MARKETS, June 27, 1991, at 7 (discussing an Arthur D. Little report "Telecommunications Issues and Options 1992—2010", which argues that some well-developed markets in the United States and Japan such as toll-free calling, customer calling services, audiotext and direct dial, are "practically nonexistent" in Europe).

105. *Competition: EEC Commissioner Warns Telephone Monopolies*, EUR. REP., No. 1741, Feb. 5, 1992, § III, at 1.

the prices of identical international calls between member states can vary considerably depending on the origin of the call. For instance, "a five minute telephone call made from Dublin to Bonn costs one-third less to telephone than the call [made] in the opposite direction."[106] Installing a telephone is seven times more expensive in Denmark than in Germany, "while monthly subscription charges in Ireland are almost four times higher than in Greece . . . ."[107] Finally, only three EC countries use itemized billing, and only two countries have set up independent bodies to arbitrate disputes between consumers and telephone companies.[108]

Consumers and providers alike should benefit from the deregulation of voice telephone services in the EC. Public operators should profit from an expanding market and receive revenues from private firms that will lease services from the public networks.[109] European companies would also benefit from cheaper long-distance telephone costs in the EC, new services, and operator choices.[110] In addition, consumers would benefit from cheaper long-distance telephone calls without compromising the cost of local telephone service.[111]

Public telephone companies argue that to fulfill their public service duties they need to maintain their monopolies.[112] According to this argument, the deregulation of telephone services will encourage preexisting monopolies and new providers of services to confine themselves to the most lucrative services and to neglect users in peripheral areas. One solution to this problem is to require providers of services to comply with certain minimum service requirements relating to peripheral users.[113]

The Commission has proposed a directive which applies the principles of the ONP to voice telephone service and networks.[114]

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106. *Telephone Services: BEUC Study Shows up Wide Disparities in the EEC*, EUR. REP., No. 1744, Feb. 15, 1992, § III, at 5.

107. *Id.*

108. *Id.*

109. *Telecommunications: Forward Towards Gradual Deregulation of Telephone Services*, EUR. REP., No. 1780, June 27, 1992, § IV, at 14, 15 (predicting market growth of 6–7 percent).

110. *Id.* at 15.

111. *Id.* However, the European Bureau of Consumers' Unions (BEUC) argues that the whole reduction in international charges is more of a benefit to businesses rather than to consumers, because consumers generally make local calls. *See Telephone Services: BEUC Study Shows up Wide Disparities in the EEC*, *supra* note 106, at 5.

112. *Telecoms Regulation: The Last Stand*, THE ECONOMIST, Feb. 22, 1992, at 65.

113. *Telecommunications: Brittan Seeks to Phase out Telephone Monopolies*, EUR. REP., No. 1763, Apr. 25, 1992, § III, at 8.

114. Proposed Voice Telephony Directive, *supra* note 102, at 6.

This Proposed Voice Telephony Directive aims to provide for a minimal harmonization of the quality of telecommunications services and to define the rights of users of such services. The proposal has three basic goals. First, it will establish the rights of public telephone network users when dealing with telecommunications organizations by setting minimum quality standards to be enforced by member states.[115] Second, it will expand access to the public telephone infrastructure for service providers and other telecommunications operators, including mobile phone services, on a fair and nondiscriminatory basis.[116] Finally, it will enhance community-wide access to voice telephone services.[117] The means for achieving these goals would include establishing common technical specifications for such equipment as sockets and terminals[118] and aiming to harmonize phone numbers on a community-wide basis.[119] The Proposed Voice Telephony Directive is a good step towards improving the quality of voice telephone services, but is neutral towards deregulation of this telecommunications subsector.

In October 1992 the Commission launched a review of the telecommunications services sector.[120] This review was required by both the Telecommunications Services Directive, which allowed monopolies on voice telephony to continue, subject to a reconsideration by the Commission in 1992, and the ONP Directive, which also provided for a 1992 progress review.[121] From among several options, ranging from preserving the status quo to completely liberalizing voice telephone services, the Commission decided to recommend the introduction of competition for telephone calls between member states only.[122] Thus, international calls directed outside of the Community will remain under monopoly. The Commission's telecommunications policy of introducing competition gradually[123] does not fully explain the reason for the Commission's compromise decision. It is thus necessary to look at the political factors involved to determine the reasons behind this policy.

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115. *Id.* at 9.
116. *Id.*
117. *Id.*
118. *Id.* art. 19.
119. *Id.* art. 20.
120. *Commission Launches Review of the Telecommunications Services Sector* (Press Release, IP837) (Oct. 21, 1992).
121. *Id.*
122. *Id.*
123. *Id.*

On the Community level the recent Danish rejection and the narrow approval by the French of the Maastricht Treaty have provided added incentive for compromise on the part of the Commission.[124] Furthermore, voice telephone services are very sensitive politically. National administrations, particularly in France,[125] have strongly opposed deregulation of voice telephone services because of its importance for revenue generation and the maintenance of universal service through cross-subsidization. These administrations believe that Europe will only be able to fight off American and Japanese "infiltration" of the EC voice telephone market by retaining large monopolies.[126] The concerns of the telecommunications administrations, however, appear to be overstated. The deregulation of intracommunity voice telephone services should have a limited impact on the income of public telecommunications administrations because calls between Community countries account for only 4 to 5 percent of their revenues.[127]

Even if the Commission liberalizes only intracommunity voice telephone services, however, the state monopolies will still feel the pressure of competition in the area of international calls. United States discount telephone companies can take advantage of the price disparities with the EC and offer citizens more competitive rates. One technique offered by private international telephone companies known as "ring-back" permits European callers to take advantage of cheaper one-way telephone rates for calls coming from the United States by connecting them to a computerized switch in the United States which, when triggered, automatically calls them back and puts them through to their American destination.[128] A second technique, known as "third-country calling," consists of routing international calls through the United States to take advantage of lower United States telephone rates.[129] Inevitably, these tactics should contribute to forcing European telecommunications administrations to lower their charges.[130]

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124. *See Brussels Tamed*, THE ECONOMIST, July 18, 1992, at 29.

125. *See id.* (noting that France Telecom profits nicely from its monopoly over cross-border calls from France to other member states).

126. Clarke, *supra* note 6, at 2.

127. *Telecommunications: Telephone Deregulation Under Commission Microscope*, EUR. REP., No. 1774, June 6, 1992, § III, at 6.

128. *International Telephone Calls: The Privateers*, THE ECONOMIST, Sept. 12, 1992, at 79.

129. *Id.*

130. Some EC countries have recently lowered their transantlatic rates. For example, France Telecom has cut the price of peak time calls to Asia and America by 18 percent. *See Telecoms Regulation: The Last Stand*, *supra* note 112, at 65. In January 1992, Deutsche Telekom,

3. *Other Initiatives Related to the ONP.* In June 1992 the Council adopted a Recommendation for harmonization of a minimum set of Packet-Switched Data Services (PSDS) in accordance with the provisions of the ONP.[131] The PSDS calls for the harmonization of standards, usage conditions, supply conditions, and tariff principles relating to a minimum set of packet switched public data services.[132] In June 1992 the Council also adopted a Recommendation for harmonizing access arrangements relating to the Integrated Services Digital Network (ISDN) that lists a minimum set of ISDN offerings in accordance with principles set forth in the Open Network Provision Directive.[133] ISDN is a collection of technical standards which describe how an advanced network should be arranged.[134] ISDN provides the infrastructure upon which voice, data, text, and simple video communication can be transmitted on the existing network.[135] In July 1992 the Commission proposed a directive with the goals of establishing a single market in telecommunications services by establishing a procedure for the mutual recognition of licenses throughout the Community and of authorizing the provision of telecommunications services issued by any member states.[136] The proposal also created a new committee, the Community Telecommunications Committee, to assist the Commission in the implementation procedure.[137]

In order to remain competitive in the EC single market, the achievement of faster communication methods and easier access to the

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the German state telecommunications monopoly, said it would cut transantlatic call charges by up to 37 percent, and investigate its entire tariff structure. *See* Quentin Peel, *Germany Cuts Transantlatic Phone Charges*, FIN. TIMES, Feb. 17, 1992, at 3. Most German telecommunications services, except basic phone service, were liberalized in 1989. Goodhart, *supra* note 87, at 3.

131. Council Recommendation 92/382 of 5 June 1992 on the Harmonized Provision of a Minimum Set of Packet-Switched Data Services (PSDS) in Accordance with Open Network Provision (ONP) Principles, 1992 O.J. (L 200) 1.

132. *Id.* at 2–4.

133. Council Recommendation 92/383 of 5 June 1992 on the Provision of Harmonized Integrated Services Digital Network (ISDN) Access Arrangements and a Minimum Set of ISDN Offerings in Accordance with Open Network Provision (ONP) Principles, 1992 O.J. (L 200) 10 [hereinafter ISDN Recommendation].

134. *Buy a Gee-Whizz-O-Bang, Please*, THE ECONOMIST, Mar. 10, 1990, Survey, at 25.

135. ISDN Recommendation, *supra* note 133, pmbl., para. 6; *see* Green Paper on Telecommunications, *supra* note 31, at 117–18.

136. Commission Proposal for a Council Directive on the Mutual Recognition of Licences and Other National Authorizations to Operate Telecommunciations Services, Including the Establishment of a Single Community Telecommunications License and the Setting up of a Community Telecommunications Committee (CTC), art. 1, COM(92)254 final-SYN 438 at 17.

137. *Id.* arts. 20–21.

wider European market will increasingly become essential. On the global scale, the availability of advanced telecommunications services will help EC companies to remain competitive on world markets. The challenge will be to achieve a community-wide telecommunications network which provides better integration and compatibility of telecommunications equipment and services. This will be crucial for the competitiveness of the European telecommunications sector and for the achievement of a common market in goods and services beyond 1992.

III. POSTAL SERVICES

Postal services are of great importance to the proper functioning of the internal market of the EC and to the growth of both intracommunity and international trade.[138] The postal services sector contributed nearly 1.3 percent of the Community's GDP in 1989 and presently employs 1.7 million workers.[139] In addition, the mail order and direct mail industries, which are inextricably linked to the postal services, contribute 0.8 percent to the Community GDP.[140] Thus, postal services significantly contribute, directly and indirectly, to the wealth of the Community.

Postal administrations within the member states provide services in three product areas: letters, express mail, and parcels. For the most part, the letter services remain subject to the exclusive rights of domestic postal administrations.[141] Private operators mainly engage in the delivery of parcels and express documents.[142] Such operators also offer some cross-border letter delivery services,[143] which at times appear to be in contravention of national postal laws.

The performance of the postal services throughout the EC is highly inconsistent and irregular. Delivery of a letter may take between a day and a week, which creates a "distortion to the European market and [is] a serious handicap for businesses and

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138. *See* Green Paper on the Development of the Single Market for Postal Services, *supra* note 3, at 29–33.

139. *Id.* at 1, 31. Currently, the public postal administrations in the EC employ 1.35 million people, and private operators employ an additional 0.35 million people. *Id.* at 36.

140. *Id.* at 31.

141. *Id.* at 75.

142. *Id.*, Table 6, at 74.

143. *Id.* at 75.

consumers in those countries with poor postal administrations."[144] One of the reasons for this inconsistency is that some member state regulations prevent postal authorities from increasing their prices to raise enough money to invest in service improvements.[145] The lack of harmonization causes significant problems for mail passing from one member state to another.[146] Because of the different measurement systems used, it is difficult to compare service performance among the member states. It is apparent, however, that service performance varies significantly among the member states.[147] Capital investment in postal services and facilities also differs widely throughout the EC.[148] For example, the postal administration networks in Greece have neither mechanized sorting offices nor automated post offices compared to 100 percent and 99 percent, respectively, for The Netherlands.[149] These problems, together with the importance of the postal sector to the integration of Europe, have motivated the Commission to take steps towards liberalization which include the establishment of a uniform postal policy through the introduction of a green paper for the liberalization of postal services.[150]

A. The Green Paper for the Liberalization of Postal Services (Green Paper)

On May 13, 1992 the Commission adopted its Green Paper on the development of the single market for postal services.[151] The delay in adopting the Green Paper, which was originally due at the end of 1990,[152] resulted from disagreements within the Commission on the extent to which postal services should be regulated. The final draft is

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144. *Opening Up the Post*, FIN. TIMES, May 14, 1992, at 18; *see* Philip Hastings, *Postal Harmony: Can the Community Deliver?*, ACCOUNTANCY., Feb. 1992, at 66.

145. *See* Hastings, *supra* note 144, at 66.

146. *See* Green Paper on the Development of the Single Market for Postal Services, *supra* note 3, at 183–84.

147. *Id.* at 180 (stating that service performance ranges from 15 to 99 percent for national services).

148. *See id.* at 155.

149. *Id.* Results of such investment have been mixed, however, both in terms of cost reduction and improvement of services. *Id.* at 137.

150. *See generally Opening Up the Post, supra* note 144, at 12 (arguing that the Green Paper is a strong initial step toward privatization, but that more needs to be done).

151. *See Postal Services: Green Paper Balances Market and Universal Service Principles*, EUR. REP., No. 1796, May 16, 1992, § III, at 1.

152. *Postal Services: Express Operators Voice Qualified Welcome for Draft Green Paper*, EUR. REP., No. 1738, Jan. 25, 1992, § III, at 10.

a "compromise between the interests of the private sector operators and the large state monopolies."[153]

The Green Paper is a "discussion document" which aims to stimulate detailed discussion with governments, users, operators, employees, and other interested parties in order to shape policies which will ensure that all customers throughout the EC receive satisfactory postal services at affordable prices.[154] Following this period of discussion, the Commission will formulate conclusions and propose the actions deemed necessary to improve postal services.[155] If appropriate, the Commission will then draw up draft directives.[156]

The Green Paper lists five reasons why the Community should be concerned with improving the present conditions of the EC postal services. First, the Green Paper cites the lack of harmonization that can delay the delivery of mail between member states.[157] The source of this problem is that the operations providing universal service in each member state have evolved independently.[158] Because universal service is defined differently in different member states, customers sometimes cannot post similar items in each member state.[159] Second, variations in service performance among member state postal administrations for universal service have significant implications for the single market. In some member states "next day delivery performance reaches the generally accepted target of 90 percent . . . ."[160] In others, performance is as low as 15 percent.[161] For cross-border mail, the generally accepted service target is delivery within three working days.[162] Although this target is not very demanding, performance currently covers only about 40 percent "with large variations between different postal administrations."[163] Third, the Green Paper cites problems with the cross-border services in the Community. As noted above, service performance currently averages

153. *Id.*; *see also Postal Services: Green Paper Balances Market and Universal Service Principles*, *supra* note 152, at 1 (reporting the content of the Green Paper).

154. *See* Green Paper on the Development of the Single Market for Postal Services, *supra* note 3, at 29.

155. *See id.*

156. *See id.*

157. *Id.* at 183.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 184.

only 40 percent of performance goals.[164] Given the increased importance of cross-border communications, this performance likely falls short of customer expectations and should be a source of concern to the Community.[165] Fourth, the Green Paper lists the wide divergences of reliability existing in the postal sector which disadvantage individuals and businesses in certain areas of the EC.[166] Finally, the Green Paper notes the potential for market distortion when the scope of the exclusive rights is larger than needed to ensure universal service.[167] These variations adversely impact industries within the Community that are heavily dependent upon postal services.[168] As a result, businesses and consumers suffer.[169]

The Green Paper considers four general options as possible solutions to the problems and challenges identified above. These include: (1) complete liberalization; (2) complete harmonization; (3) preserving the status quo; or (4) achieving equilibrium between a further opening of the market and increasing the strength of universal service.[170] According to the Green Paper, the first option, complete liberalization, would result in the loss of universal service to all customers because no private operator would be interested in providing a standard letter service to all parts of any national territory.[171] The second option, complete harmonization, would likely require the establishment of a single postal administration and the application of a common tariff throughout the EC.[172] Such a reform would cause overwhelming problems. A single postal administration would likely be unable adequately to address or respond to unique local conditions within member states when formulating various policies.[173] It would also mean costly additional overhead.[174] Further, the application of a uniform tariff would lead to massive cross-subsidies because tariffs presently vary by as much as a factor of three.[175] The third option, preserving the status quo,

164. *Id.*
165. *Id.* at 185.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 234–37.
171. *Id.* at 234.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*

would further widen the gap between already very positions. This would lead to a "two-speed Europe" in the postal services.[176]

The Commission has concluded that the fourth option, striking an equilibrium between opening up the market and strengthening universal service, would better suit the needs of the Community than the other three options.[177] To strengthen universal service for all customers a set of "reserved services" that confer special and exclusive rights on national postal administrations would be established.[178] In the interest of opening the market, however, the class of reserved services would be no larger than necessary to meet the universal service objective.[179]

The fourth option provides guidelines which would enable postal administrations to fulfill their public obligation to provide a good quality, affordable, and accessible postal service for all citizens and businesses both within each country and across borders.[180] "Reserved" services could include personal and business correspondence, but clear limits indicating the precise scope of the reserved area would be established and defined in terms of weight and price.[181] The scope of the area reserved from full competition should vary in proportion to the need to maintain a particular universal service.[182] Other postal services would be outside the reserved area in order to ensure further free competition. This arrangement should increase freedom of choice once the universal service objective is achieved.[183] If this plan were implemented, a number of services previously offered only by the post offices could then be offered by other companies from the public or private sectors. The Green Paper advocates that express mail and the mailing of publications should be excluded from the reserved sectors, if they are not already liberalized in member states.[184]

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176. *Id.* at 235.

177. *Id.* at 237.

178. *Id.* at 234–37. The Green Paper defines "reserved service" as "[a] service the provision of which is obliged to an operator (in fact always the postal administration, in the case of postal services) who in turn is granted some special and exclusive rights. These rights almost always state that this operator has the sole right to provide the services in the territory to which the reservation applies." *Id.* at 369.

179. *Id.*

180. *Id.* at 233, 235–37.

181. *Id.* at 236.

182. *See id.*

183. *See id.* at 237.

184. *Id.* at 235.

The Commission will effect the liberalization of direct mail only after a detailed economic analysis.[185] Postal monopolies strongly oppose the liberalization of direct and cross-border mail because these areas are profitable and expanding,[186] which benefit the postal administrations. Direct mail consists of advertising messages sent in bulk, typically by the publishing, insurance, financial services, and mail-order industries.[187] Direct mail accounts for approximately 20 percent of all Community postal deliveries[188] and it is regarded as a sector with great potential as studies show that the average EC citizen receives only one-fourth of the direct mail of a citizen of the United States.[189] The Commission plans to liberalize the direct mail sector because currently the majority of Community postal administrations do not provide the quality, choice, and value of services that businesses desire.[190] Allowing competition in the direct mail sector will benefit companies that are established in poorly served areas as well as smaller companies that wish to enter new markets, to target new customers, and to compete against more firmly established brands.[191] Direct mail also is an effective marketing tool that contributes to competition and ultimately benefits consumers. Nevertheless, some postal administrations have reservations about competition in the profitable direct mail business, not only because it will reduce the postal administrations' income,[192] but also because of fears that the liberalization of direct mail will make it difficult to check whether businesses were actually sending advertising instead of bills and estimates.[193]

Cross-border mail accounts for approximately 7 percent of all EC deliveries in terms of volume[194] and it is another controversial subsector in the postal liberalization process.[195] Postal monopolies

185. *Id.* at 235–36.

186. *See Postal Services: Hopes Raised for Breakthrough on Green Paper*, EUR. REP., No. 1758, Apr. 4, 1992, § III, at 5; *Postal Services: Monopolies Lobby Hard in Advance of Long-Awaited Green Paper*, EUR. REP., No. 1748, Feb. 29, 1992, § III, at 5–6.

187. Speech of Sir Leon Brittan, *supra* note 4.

188. *Postal Services: Hopes Raised for Breakthrough on Green Paper*, *supra* note 186, at 5.

189. *Id.*

190. Speech of Sir Leon Brittan, *supra* note 4.

191. *Postal Services: Hopes Raised for Breakthrough on Green Paper*, *supra* note 186, at 5.

192. *See generally id.* (direct mail comprises 20 percent of Community postal deliveries).

193. *See, e.g.*, *French Reserves on Commission Postal Services Green Paper*, EUR. REP., No. 1803, Oct. 14, 1992, § III, at 8.

194. *See Postal Services: Green Paper Set for Adoption on May 13*, EUR. REP., No. 1768, May 13, 1992, § III, at 1–2.

195. *Id.*

fear that their private sector competitors would select and serve the more lucrative EC city-to-city routes and leave them with less profitable rural deliveries if ordinary cross-border mail operations were liberalized.[196] Because only 4 percent of intracommunity postal services are cross-border,[197] the impact of liberalizing this sector will not be substantial on a community-wide level. On a national level, however, certain post offices have more to lose. For example, the intracommunity mail of Luxembourg and Ireland are approximately 35 percent and 25 percent, respectively.[198] On the other hand, Germany's intracommunity mail is less than 2 percent.[199] Therefore, the financial impact of liberalizing cross-border mail will differ greatly among the member states.

Remail is a cross-border letter mail service provided by private companies, usually in conjunction with a postal administration,[200] which provides delivery of bulk business mail.[201] The term "remail" describes the process by which direct mail is collected in one country, taken to another, placed in the local mail system, and ultimately distributed in that country, in the country of origin, or in a third country.[202] In a complaint lodged by the International Express Couriers Conference against the Community postal authorities, remail operators contested that some postal administrations hinder their business by agreeing to raise terminal dues and by enforcing provisions

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196. *Postal Service: Hopes Raised for Breakthrough on Green Paper*, *supra* note 186, at 5.

197. Green Paper on the Development of the Single Market for Postal Services, *supra* note 3, Table 7, at 275. "7% of letter mail is cross-border traffic, 4% being 'intra-community' and 3% being 'extra-Community' mail. In revenue terms, the cross-border share is slightly higher—about 10% of letter revenue. For parcels and express services, the cross-border mail is worth about 11% of revenue." *Id.* at 274.

198. *Id.*, Table 7, at 275.

199. *Id.*

200. *Id.* at 369.

201. *See Europe's Postal Monopolies: Neither Snow Nor Rain, Nor Fax . . .*, THE ECONOMIST, Sept. 29, 1990, at 83.

202. "There are three different sorts of remail operation. A-B-C remail involves mail being collected in the country of the customer (A), freighted to a second country (B) where it is posted into the international mail system for onward transmission to (and delivery in) a third country (C). A-B-B remail involves collection in the country of the customer (A), freighting to the country of delivery (B) and delivering to the addressee there (B), usually by posting with the postal administration there. A-B-A remail involves domestic mail being taken from the country of the customer (A) to a second country (B) for mailing back to the first country (A)." Green Paper on the Development of the Single Market for Postal Services, *supra* note 3, at 369.

of the Universal Postal Union (UPU) Convention which allows them to obstruct remail.[203]

To avert the risk of a "two-speed" postal service which would reduce benefits to customers and businesses of the Single European Market, the Green Paper aims to improve the level of harmonization between the member states.[204] The Green Paper prescribes that rules of access to the national postal networks should be the same in each country so that the postal administrations or private operators wishing to exercise their right to use the networks to provide their services will not be hindered by regulatory or technical barriers. In addition, common performance standards for Community postal services should be set, with the results being published. The Green Paper also suggests that tariffs should reflect the average cost of each service.[205] Finally, the Green Paper states that in order to ensure impartial treatment of all operators, the body regulating postal services in each member state should be separate from the service providers.[206]

B. Actions by the European Commission Against Postal Service Monopolies

Private courier companies play an important role in integrating the European economy.[207] In order to ensure that such companies are adequately protected, the Commission has investigated several complaints concerning postal services and has taken actions under the EEC Treaty against Governments that have imposed constraints on private international courier services or considered these services to be part of their postal administration's reserved area. In 1985 the Commission discovered that the German Post Office (Bundepost) had attempted to apply its monopoly rights over the transport of mail to a whole range of its own services, including its own express service, Datapost.[208] Following the Commission's intervention, the

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203. Speech by Sir Leon Brittan, *supra* note 4. Terminal dues are the amount paid by one postal service administration to another if it sends more international mail than it receives. Green Paper on the Development of the Single Market for Postal Services, *supra* note 3, at 370; Speech by Sir Leon Brittan, *supra*.

204. *See* Green Paper on the Development of the Single Market for Postal Services, *supra* note 3, at 253–54.

205. *Id.* at 249–50.

206. *Id.* at 247–48.

207. FIFTEENTH REPORT ON COMPETITION POLICY, *supra* note 36, at 202.

208. *Id.*; *see also European Commission Decisions*, 6 EUR. COMPETITION L. REV. 10 (1985) (summarizing information from a January 18, 1985 press release on German Data Post).

Bundepost assured the Commission that it would accept competition from private courier services and would not charge below cost for deliveries in order to dominate the market.[209] The same year a similar action was taken against the French post office after private couriers had been taxed and limited to the Paris area.[210] In 1989 the Italian government was forced to remove its prior constraints on private courier services which required the private services to put post office stamps on all packages, even if the Italian post office provided no actual service.[211]

In December 1989 the Commission demanded that the government of The Netherlands revise a new postal law which obliged all private courier companies to register domestic and international service tariffs with the national post office[212] and prohibited the couriers from undercutting the national post office's minimum tariff level. Responding to an appeal by The Netherlands to the ECJ,[213] the ECJ voiced no objection to the substance of the Commission's case, but ruled against the Commission because it had not followed proper procedures in applying Article 90 of the EEC Treaty.[214] The ECJ held that the Commission had not allowed the Dutch postal monopoly to defend itself against the allegation that the new Dutch postal law placed the national post office in a dominant position which it could abuse at the expense of private express mail operators.[215]

In August 1990 the Commission issued a decision concerning Spanish legislation which prohibited all institutions other than the Spanish post office from collecting, transporting, or distributing letters and documents weighing under two kilograms.[216] This legislation prevented private express international courier services from compet-

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209. *European Commission Decisions*, *supra* note 208, at 10.

210. FIFTEENTH REPORT ON COMPETITION POLICY, *supra* note 36, at 203.

211. *European Commission Decisions*, 1 EUR. COMPETITION L. REV. R-10 (1990) (summarizing information from a September 1, 1989 press release on Italian International Courier Companies).

212. Commission Decision 90/16 of 20 December 1989 Concerning the Provision in the Netherlands of Express Delivery Services, arts. 1-2, 1989 O.J. (L 10) 47, 47; COMMISSION OF THE EUROPEAN COMMUNITIES, NINETEENTH REPORT ON COMPETITION POLICY 201, point 19 (1990).

213. Action Brought on 15 March 1990 by Koninklijke PTT Nederland NV and PTT Post BV against the Commission (Case C-66/90), 1990 O.J. (C 132) 9.

214. Joined Cases C-48/90 and C-66/90, Netherlands, Koninklijke PTT Nederland NV & PTT Post BV v. Commission, slip op. at 15-18 (Court of Justice, Feb. 12, 1992).

215. *Id.*

216. Commission Decision 90/456 of 1 August 1990 Concerning the Provision in Spain of International Express Courier Services, 1990 O.J. (L 233) 19.

ing in Spain.[217] The Commission alleged that the Spanish post office had abused its dominant position[218] within the meaning of Article 86 because the legislative limits on couriers affected trade between member states.[219] The Commission rejected the arguments of Spanish post office that their exclusive monopoly over international express courier services was justified to preserve "the financial equilibrium of the Post Office."[220] The Commission concluded that the international express courier market was only of "secondary importance" for the Spanish post office, and therefore there was no reason that competition should be eliminated.[221] Spain has contested the Commission's decision in an appeal to the ECJ.[222]

After receiving a formal complaint from the Commission, the Danish government undertook legislative changes which removed the Danish post office's exclusive rights to collect, forward, and deliver mail and permitted the operation of private courier services.[223] Thus, following intervention from the Commission, the governments of Germany, Belgium, France, Italy, and Denmark allowed private express courier services to compete with the national postal monopolies.[224]

C. Reforms in the Private and Public Postal Services

The current internationalization and increasing liberalization of the EC postal services sector has prompted adjustments by some

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217. *See id.*

218. *Id.* at 22. The Post Office holds a dominant position because "it has been granted the exclusive right to collect, transport and distribute letters and postcards from one place to another, to install post boxes and issue postage stamps, within the territory of Spain . . . ." *Id.* at 21.

219. *See id.* at 19, 21. The Commission's decision set forth the following principle:

> An abuse of a dominant position within the meaning of Article 86 is committed where an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group, without any objective necessity, an ancillary activity which might be carried out by another undertaking as part of its activities on neighboring but separate markets, with the possibility of eliminating all competition from such an undertaking.

Id. at 21.

220. *Id.* at 22.

221. *See id.*

222. *Postal Services: EEC Court Backs Dutch Challenge Against EEC Action on Courier Monopolies*, EUR. REP., No. 1744, Feb. 15, 1992, § III, at 2.

223. COMMISSION OF THE EUROPEAN COMMUNITIES, TWENTIETH REPORT ON COMPETITION POLICY 207, para. 356 (1991).

224. FIFTEENTH REPORT ON COMPETITION POLICY, *supra* note 36, at 202–03. "The Commission is still discussing the Posts Act of 1983 with the Danish Government, however, as it also prevents private couriers from providing a remailing service in Denmark." TWENTY-FIRST REPORT ON COMPETITION POLICY, *supra* note 58, at 3.I.B § 2.2.

private courier companies and national postal authorities.[225] For example, TNT Express Worldwide (TNT) has agreed to create a 50/50 joint venture with GD Net—which consists of national postal organizations in Germany, France, The Netherlands, Sweden, and Canada—in order to strengthen its position in the European market.[226] This agreement provides for establishment of an international courier and express parcel organization offering international express delivery services.[227] TNT expects the undertaking to lead to economies of scale, to reduce unit costs, and to "provide a solid base for the future expansion of the Joint Venture."[228] The Commission's decision to permit the joint venture subject to certain conditions demonstrates its determination to introduce competition into the postal and courier delivery sector.

As there appears to be room for only a small number of global express transport companies,[229] the next few years should see further examples of postal organizations working with private sector companies as partners to develop similar integration strategies. The burden of large and costly infrastructure requirements faced by private express transport companies seeking to succeed globally but lacking sufficiently profitable volumes has led to some poor financial results. Federal Express, the United States postal carrier, appeared to confirm this assessment through its decision to terminate all intra-European activities in 1992.[230] Unless synergies can be realized by the marriage of formally competitive forces, some groups may have difficulty in carving out the large niche required to survive in a competive global market.

Several of the national European postal services have begun to prepare for the liberalization of some of their services. Of these postal services, the British Royal Mail is one of Europe's most efficient and

225. Philip Hastings, *Packaged for More Profits*, FIN. TIMES, May 20, 1992, § IV, at 1.

226. *TNT Ltd and Five Post Offices to Join Forces in an International Express and Courier Organization* (TNT Ltd, Press Release) (July 29, 1991) [hereinafter TNT Press Release]; Janina Walker, *Monopoly Likely to End Soon*, FIN. TIMES, May 20, 1992, § IV, at 2; Catherine Gautier, *La Poste dans la cour des grands*, LA POSTE REFÉRÉNCES, May-June 1992, 22, 23.

227. TNT Press Release, *supra* note 226.

228. *Id.*

229. Hastings, *supra* note 226, at 1 (citing John Mullen, chief executive of GD Express Worldwide, TNT's joint venture).

230. Charles Goldsmith, *Life after Federal Express: European Couriers Hope for an End to Price-Cutting*, INT'L HERALD TRIB., Mar. 19, 1992, Bus./Finance, 1, 14. "Federal Express will maintain service to and from Europe and the United States but will serve only 16 European cities directly." *Id.* at 14.

profitable postal offices.[231] The British government has indicated that it will consider breaking up its national post office or selling it as an entity to a single buyer.[232] The United Kingdom is also studying a plan to allow private postal operators to bid for licenses to compete with its national post office in different regions.[233]

IV. CONCLUSION

The exchange of information through the telecommunications and postal networks is vital to the creation of a single European market. The liberalization of the two sectors will enable European businesses to become more efficient and competitive. Nevertheless, there are potential obstacles which must be overcome if effective liberalization is to be achieved. Deregulation of postal services could increase prices in certain member states. In addition, countries like the United Kingdom which have an efficient and inexpensive postal service would not want to risk losing the benefits of their existing domestic system. Thus, liberalization and privatization need to be carefully monitored and administered so that service improves rather than deteriorates.

One of the most important aspects of the liberalization of both telecommunications and postal services is the perceived need to separate the regulatory and operational functions of the national administrations. In essence, the Commission seeks to ensure that no single body serves as both the referee and the player in a competitive environment. There is also the fear that liberalization will encourage "cream skimming," in which the private sector concentrates on the most profitable services, leaving the rest to the existing administrations. A solution to these problems would be to offer direct subsidies to connect disadvantaged groups on a competitive basis as incentives for firms to provide the service in question.[234] Another solution is to require private companies to provide certain services.

The experience gained from the competition policy which has been implemented in the telecommunications sector of the EC will influence efforts to liberalize Community postal services. Moreover, the recent ECJ decision upholding the liberalization of telecommunications services under Article 90 has given the Commision the affirma-

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231. Rudd, *supra* note 4, at 11.

232. *Id.*

233. *Id.* at 6 (qualifying that the "licenses plan is the most radical [part of the government's review] under consideration").

234. Sir Leon Brittan, European Policy on Competition, Address to the Friedrich-Ebert-Stiftung, Bonn (June 25, 1992), *available in* LEXIS, Europe Library, Rapid File.

tion it needed to proceed in liberalization efforts. In continuing to liberalize the telecommunications sector and commencing liberalization of postal services, it is critical that a fair balance between liberalization and harmonization be maintained. The current liberalization effort appears promising, but much remains to be done if this balance between liberalization and harmonization is to remain secure. Once liberalization is achieved, however, the story will be far from over. Instead, a new chapter will begin where the Commission's role will be to ensure that competition in these sectors is maintained so that the benefits from liberalization become truly sustainable.

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