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Staying at university to write a thesis on telecommunications law might seem like a strange idea at a time when telecommunications lawyers are in demand in the private sector. Nevertheless, I felt that this area of law deserved to be dealt with from a more academic perspective as well, since the numerous practical questions that were debated during the liberalization process in the 1990s gave rise to a number of fundamental issues of great interest, as regards the scope and the use of the various powers put at the disposal of the Community in the EC Treaty. The prospect of those issues remaining unaddressed as the focus of regulation would shift from liberalization to the management of a competitive market also called for investigation. I have tried to remain close to practice by relying on concrete examples to support my arguments whenever possible, while adding some economic or comparative analysis where I thought that EC law was lacking points of reference.

This doctorate thesis was written on the basis of experience gained since 1993 while in private practice (where I was involved in the *Atlas* and *Phoenix/GlobalOne* cases) and later on at the University of Maastricht. Telecommunications are a fascinating field of study in no small part because they are moving so fast. The accelerating rate of technological change since the 1980s is now accompanied by equally rapid commercial and economic evolution, with which the law is also striving to keep pace. Accordingly, it is fairly difficult to keep abreast of all developments long enough to complete a larger piece such as this. The present work is up to date until 1 September 1999, and I have sought to incorporate a number of subsequent events. The 1999 Communications Review\(^1\) ended up falling within the set of subsequent events. This work was written with the 1999 Review in mind, with the aim of contributing to the discussion on a number of issues which could be expected to figure therein. As it turned out, the 1999 Review was released on 10 November 1999, as I was in the finishing stages of drafting. Instead of introducing references to the 1999 Review here and there, I thought that it would be preferable to deal with it in a separate postscript.

By way of guidance to the reader, please note that the four chapters are autonomous documents. Cross-references from one chapter to the other are

indicated by mentioning the chapter number (eg Chapter One) before the heading number (eg IV.D.1.). References to heading numbers without chapter numbers are to the same chapter. Similarly, footnotes are numbered for each chapter separately; there are no cross-references to footnotes from another chapter. A number of materials, essentially EC legislative instruments and textbooks, are referred to in shorthand form throughout the text; a table of such frequently cited materials is included right after this foreword. Moreover, the meaning of abbreviations is usually set out in the text when they are first used; a table of abbreviations has also been prepared for the convenience of the reader. References to Internet addresses were accurate as of 1 September 1999. Since a number of frequently accessed sites are redesigned regularly, I have chosen to point the reader not to the actual address where a document appeared, but rather to the welcome page of the site where it is found, trusting that from there it would be possible to retrieve the document in question, even if its precise location would have been modified in the meantime.

In closing, I wish to express my warm gratitude to all those who encouraged me throughout the preparation of this thesis, including my two supervisors, Professors Walter van Gerven and Bruno de Witte, who took care to keep my attention focused on moving ahead rapidly and efficiently, as well as all my colleagues at the Universiteit Maastricht, where I found a very friendly and welcoming environment. Professor van Gerven, in particular, made it possible for me to carry out this research by letting me join the Ius Commune Casebook Project at the University. On the personal side, I want to thank my parents and in-laws, and above all my wife Ruth, who trusted me with this foray into academia and gave me her constant and unwavering support and understanding.
# TABLE OF FREQUENTLY CITED MATERIALS

## Monographs

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## EC instruments and documents

- **1987 Green Paper**
  - Towards a dynamic European economy - Green Paper on the development of the common market for telecommunications services and equipment, COM(87)290final (30 June 1987)

- **1991 Guidelines**

- **1998 Access Notice**

- **MCR**

The following instruments (in chronological order) are referred to by number only throughout the text (references are always presumed to include subsequent amendments):


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<td>3rd Generation</td>
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<td>3rd Generation Partnership Project</td>
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<td>ABl</td>
<td>Amtsblatt</td>
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<tr>
<td>ADSL</td>
<td>Asymmetric Digital Subscriber Line</td>
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<td>AJDA</td>
<td>L'actualité juridique — Droit administratif</td>
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<tr>
<td>Antitrust LJ</td>
<td>Antitrust Law Journal</td>
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<td>API</td>
<td>Application programming interface</td>
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<td>ART</td>
<td>Autorité de régulation des télécommunications (France)</td>
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<td>ATM</td>
<td>Asynchronous Transfer Mode</td>
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<tr>
<td>Berkeley Tech LJ</td>
<td>Berkeley Technology Law Journal</td>
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<td>BGB</td>
<td>Bürgerliches Gesetzbuch (Germany)</td>
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<td>BGBL</td>
<td>Bundesgesetzblatt (Germany)</td>
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<td>BOC</td>
<td>Bell Operating Company</td>
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<td>BT</td>
<td>British Telecom</td>
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<td>CCITT</td>
<td>now ITU-T (see below)</td>
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<td>CDE</td>
<td>Conseils de droit européens</td>
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<td>CDMA</td>
<td>Code Division Multiple Access</td>
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<tr>
<td>CEPS</td>
<td>Centre for European Policy Studies</td>
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<tr>
<td>CEPT</td>
<td>European Conference of Postal and Telecommunications Administrations</td>
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<tr>
<td>CFI</td>
<td>Court of First Instance (Court of Justice of the European Communities)</td>
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<td>CI</td>
<td>Communications International</td>
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<td>CLI</td>
<td>Calling Line Identification</td>
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<td>Comp Pol Newsletter</td>
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<td>CoR</td>
<td>Neue Juristische Wochenschrift — Computerreport</td>
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<tr>
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<td>Code des postes et télécommunications (France)</td>
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<td>CR</td>
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<tr>
<td>CRS</td>
<td>Computerized Reservation System</td>
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<td>Abbreviation</td>
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<tr>
<td>CTLR</td>
<td>Computer and Telecommunications Law Review</td>
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<td>CTR</td>
<td>Common Technical Regulation</td>
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<tr>
<td>CUG</td>
<td>Closed User Group</td>
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<td>CWI</td>
<td>Communications Week International</td>
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<td>DCS</td>
<td>Digital Communications System</td>
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| DDI | Direct Dial-
<p>| DECT | Digital European Cordless Telephony |
| DG | Directorate-General |
| Dir. | Directive |
| Dir. di aut. | Diritto di autore |
| DIT | Droit de l'informatique et des télécomms |
| DoJ | Department of Justice (USA) |
| DT | Deutsche Telekom |
| ECJ | Court of Justice of the European Communities |
| ECLR | European Competition Law Review |
| ECPR | Efficient Component Pricing Rule |
| ECR | Reports of Judgments of the Court of Justice of the European Communities |
| ECSC | European Coal and Steel Community |
| ECTRA | European Committee for Telecommunications Regulatory Affairs |
| EFD | Essential Facilities Doctrine |
| ELAI | Early Liberalization of Alternative Infrastructure |
| EJRev | European Law Review |
| EP | European Parliament |
| EPG | Electronic Programme Guide |
| ERA | European Regulatory Authority |
| ERC | European Radiocommunications Committee |
| ERMS | Pan-European land-based public radio paging |
| ERO | European Radiocommunications Office |
| ETNO | European Telecommunications Public Network Operators Association |
| ETO | European Telecommunications Office |
| ETSI | European Telecommunications Standards Institute |
| ETUC | European Trade Union Confederation |
| Eur Rev Pub L | European Review of Public Law |
| Eur Econ Rev | European Economic Review |
| EuR | Europarecht |
| EuZW | Europäische Zeitschrift für Wirtschaftsrecht |
| F 2d | Federal Reports (2d) (USA) |
| F 3d | Federal Reports (3d) (USA) |
| FCC | Federal Communications Commission (USA) |
| FDC | Fully Distributed Cost |
| FL-LRIC | Forward-Looking Long-Run Incremental Cost |</p>
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<td>Fordham Corp L Inst</td>
<td>Proceedings of the Fordham Corporate Law Institute</td>
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<td>File Transfer Protocol</td>
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<td>General Agreement on Trade in Services</td>
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<td>General Agreement on Tariffs and Trade</td>
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<td>GBT</td>
<td>Group on Basic Telecommunications</td>
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<td>GRUR Int</td>
<td>Gewerbliche Rechtsschutz und Urheberrecht — Internationaler Teil</td>
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<td>GSM</td>
<td>Global System for Mobile Communications/Groupe Spécial Mobile</td>
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<td>gTLD</td>
<td>Global Top-Level Domain</td>
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<td>Gesetz gegen Wettbewerbsbeschrankungen</td>
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<td>IC</td>
<td>Incremental Cost</td>
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<td>International Journal of Communications Law and Policy</td>
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<td>Intelligent Network</td>
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<td>Int J Ind Organ</td>
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<td>Internet Protocol/Commission Press Release</td>
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<td>Internacional Private Leased Circuits</td>
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<td>IPO</td>
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<td>IRG</td>
<td>Independent Regulators Group</td>
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<td>Indefeasible Right of Use</td>
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<td>Journal of Law and Economics</td>
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<td>Revue internationale des télécommunications (Europe)</td>
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<td>Zeitschrift für Handel (Germany)</td>
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Council Resolution of 19 December 1991 on the development of the common market for satellite communications services and equipment (1992) OJ C 158/1, 17, 53
Council Resolution of 20 April 1993 on the review of the situation in the telecommunications sector and the need for further development in that market (1993) OJ C 213/1, 20, 47, 153, 425
Without any doubt, the complete liberalization of the telecommunications sector on 1 January 1998 will rank as one of the main achievements of the European Union in the 1990s. The Commission was certainly the most dedicated proponent of liberalization, and it used its powers with great skill to convince other Community institutions to support this policy objective and further to ensure that Member States follow suit with proper implementation of EC legislation.

Telecommunications liberalization took place against the background of major changes to the sector, caused by a series of factors. Firstly, as the economy is globalizing, demand for telecommunications is growing massively, as firms and individuals increasingly need to communicate with other firms and individuals in far-away locations. At the same time, that quantitative increase in demand is matched by requirements for new and better services, including data communications. Secondly, technological advances over the past thirty years progressively enabled telecommunications suppliers to meet those customer demands. Innovations such as fibre optics, digitalization and packet-switching changed completely not only the technical, but also the economic environment of telecommunications. Whereas most used to agree that telecommunications was a natural monopoly, received wisdom now has it that they can be operated under normal market conditions. Whether telecommunications liberalization must be seen as a cause or a consequence of these factors can be left open for the purposes of the present discussion.

Just as a modification in the law, such as the removal of monopoly rights, brought about a fundamental change in the operation of the telecommunications sector, so it would seem that the converse should also take place, namely that the evolution of the sector in the wake of liberalization would in turn be reflected in further changes in the law. The law must live up to the new challenges arising from telecommunications liberalization, in particular ensuring that the full potential for wealth and welfare creation deriving therefrom is exhausted. The aim of the present work is to investigate if and how EC law is changing or could change in order to adapt to the new realities of telecommunications.

In the run-up to liberalization, the notion of "EC telecommunications law" or more broadly "EC telecommunications policy" appeared in the parlance of interested observers.
Introduction

Normally, Community policies consist in the tasks assigned to the Community in Articles 2 to 4 EC. In fact, there is quite a close relationship between those tasks, the titles of Part III of the EC Treaty, dealing with Community policies, and the internal organization of the Community institutions, in particular the directorates-general (DGs) of the Commission. Yet the Information Society DG (formerly DG XIII) — responsible for EC telecommunications law and policy — is the only DG dealing with a substantive policy area that is not designated as such in the EC Treaty.1 Already this superficial observation indicates that there might be more to EC telecommunications law and policy than meets the eye. Indeed the central assumption underlying this work is that EC telecommunications law or policy must also be seen as a distinct Community policy because it is driven by specific objectives, above and beyond the general goals of the EC Treaty.2 In this respect, it would be much like EC environmental policy, for instance, which is given a distinctive content and significance through a set of fundamental principles defined at EC level and anchored in the EC Treaty itself.3

The aim of this work is to look at how those specific policy objectives of EC telecommunications law have been implemented on the basis of the powers granted to the Community under the EC Treaty.

From the 1987 Green Paper onwards until 1998, the liberalization of the telecommunications sector appeared to be the prime policy objective behind EC telecommunications law. Chapter One provides an overview of the various regulatory models that were used in the run-up to full liberalization in 1998, and the main concepts that underpinned those models.

Chapter Two investigates the use of Article 86 EC (ex 90) to give an impulse to EC telecommunications law in the run-up to liberalization. The first section of that Chapter examines the circumstances under which Article 86 EC came to be used as a legal basis, and its relationship with other bases such as Article 95 EC (ex 100a), with a view to show how Article 86 EC was employed to give an impulse to EC telecommunications law, so that the liberalization objective could be attained despite strong resistance. The second section of that Chapter is dedicated to an analysis of whether and to what extent Article 86 EC could continue to be used in such a fashion now that special and exclusive rights have been removed in the telecommunications sector.

1 The Information Society DG actually shares some of those responsibilities with the Competition DG (formerly DG IV), since the latter is generally in charge of overseeing the implementation and application of the directives based on Article 86 EC (ex 90).

2 As will be seen infra, Chapter Four, III.3, Title XV on trans-European networks (Articles 154-156 EC (ex 129b-129d)) cannot truly be seen as the foundation of EC telecommunications policy as it now exists.

3 The basic principles of EC environmental law are set out in Article 174 EC (ex 130r), which states at para. 2 that "Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should be avoided at source and that the polluter pays."
At this juncture, liberalization has been achieved, at least at the legal level, with the opening of the whole telecommunications sector to competition. Accordingly, the objectives and the means of EC telecommunications law and policy might be up for reassessment. In this respect, a fairly widespread opinion is that EC telecommunications law should essentially retain market opening as its central aim, and thus focus on ensuring a quick and effective transition to a competitive market in fact. Chapter Three is dedicated to a thorough and critical examination of that opinion, according to which EC competition law for firms would take over from Article 86 EC as the driving force behind EC telecommunications law and policy. In that case, the distinctiveness of such law and policy would recede with time, since EC competition law implements one of the central objectives of the EC Treaty, the absence of distortions of competition in the internal market, in a general fashion across the whole of the economy. However, it could also be that competition law would take on a different flavour when it is applied in the telecommunications sector. Chapter Three relies on a discussion of EC competition law materials, as they are surveyed at the beginning of that Chapter, coupled with references to US antitrust law as a point of comparison when needed, as well as some elements of economic analysis.

Chapter Four deals with another possibility, namely that EC telecommunications law and policy would pursue other objectives besides the transition to a competitive market, in which case reliance on EC competition law as a driver would not be sufficient. In other words, achieving liberalization does not by any means diminish the specificity of telecommunications, although it puts it in a new perspective. The first section of Chapter Four explores the limits of reliance on EC competition law. In the second section, a case is then be made for rethinking sector-specific regulation and giving it a long-term role with a core regulatory mandate. The last section attempts to see how that new vision of sector-specific regulation would fit within EC law. Chapter Four is more speculative than the previous chapters, and in this respect it relies less on examples drawn from case-law or legislation, and more on case studies and basic legal and economic analysis.
The purpose of this Chapter is not to explain each of the successive regulatory models in detail or to dissect them, but rather to set out the great lines of each model as well as the main keywords or concepts which were used therein. At the same time, the main Community documents where each model was set out will be introduced, as well as the legislative instruments used to implement each of them.

The dates given for each model are those of validity, and not those where it was elaborated. As regards the transitional and the fully liberalized model, some Member States with smaller or less developed networks were given additional implementation periods which put them under a different timetable. The last extension expires in 2001.\(^{\text{3}}\)

\section{I. The Starting Model (Until 1990)}

Before the 1987 Green Paper, telecommunications were conducted within the EC much like elsewhere in the world at the time, namely with one monopoly.

1 A shortened version of this Chapter was published under the title "Telecommunications" in D. Geradin, ed., The Liberalization of State Monopolies in the European Union and Beyond (Deventer: Kluwer Law International, 1999) 15.

2 Towards a dynamic European economy - Green Paper on the development of the common market for telecommunications services and equipment, COM(87)290final (30 June 1987) [hereinafter "1987 Green Paper"].

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service and infrastructure provider (the public telecommunications operator or PTO) in every Member State. Furthermore, that PTO was in general wholly or partly owned by the State, or even fully integrated within the administration of the State, being an administrative department or agency. The only exception among the then Member States was the UK. Within each Member State, telecommunications infrastructure and all kinds of telecommunications services were provided by the local PTO (BT and Mercury in the case of the UK) exclusively.

At the infrastructure level, each PTO covered its respective country. Cross-border services within the EC were thus conducted under the traditional “correspondent system”, whereby services between two countries are ensured by the PTOs from those two countries in cooperation with one another. On the technical side, the two PTOs work together to ensure that their respective national networks are linked through facilities for which they are bilaterally responsible. Each PTO acts as a “correspondent” for the other, taking responsibility for the termination of cross-border traffic originating from the other PTO. On the commercial side, the originating PTO collects all the charges for the call from the originating customer (“collection rate”). In order to compensate the terminating PTO for the costs of terminating the call, the two PTOs agree on an “accounting rate” which is theoretically supposed to represent the cost of carrying traffic between their two countries, usually on a per minute basis. The “accounting rate” is split between the two PTOs, usually 50/50, to give the “settlement rate”, i.e., the amount which the terminating PTO should receive from the originating PTO as a settlement for the costs of terminating traffic. On a periodical basis, the two PTOs will offset the minutes of traffic in both directions and any remaining difference will be settled by a payment from the PTO of the country where the excess traffic originates from.

At that time, the only alternative to using the services provided by the PTO was to self-provide those services, which was only possible for the largest telecommunications customers (multinational corporations, banking and insurance sector, government, etc.). Given that PTOs usually held a monopoly over infrastructure as well, self-provision involved leasing capacity from the PTO and putting one’s own equipment (to the extent it was possible) on it in order to

4 It was generally assumed that the telecommunications sector was an instance of natural monopoly; see A. Ogus, Regulation - Legal Form and Economic Theory (Oxford: Clarendon, 1994) at 303.


6 Sometimes transiting through one or more third countries, in which case agreements have to be made with the PTO in these transit countries. Transit PTOs will provide to the two PTOs either dedicated transit (setting aside dedicated capacity for the purposes of carrying transit traffic) or switched transit (routing transit traffic through the PSTN in the transit country).

7 In theory, each PTO is responsible until its border.

8 The correspondent system was developed within the International Telecommunications Union (ITU) and is set out in a series of ITU recommendations. The accounting rate system, in particular, is found in Recommendations ITU-T D.140, D.125 and D.155, available at the ITU Website at <http://www.itu.int/en-TS-Recommendations-TS.dhtml>.
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At the infrastructure level, each PTO covered its respective country. Cross-border services within the EEC were thus conducted under the traditiona1 "correspondent system", whereby services between two countries are ensured by the PTOs from these two countries in cooperation with one another. On the technical side, the two PTOs work together to ensure that their respective national networks are linked, through facilities for which they are bilaterally responsible. Each PTO acts as a "correspondent" for the other, taking responsibility for the termination of cross-border traffic originating from the other PTO. On the commercial side, the originating PTO collects all the charges for the call from the originating customer ("collection rate"). In order to compensate the terminating PTO for the costs of terminating the call, the two PTOs agree on an "accounting rate" which is theoretically supposed to represent the cost of carrying traffic between their two countries, usually on a per minute basis. The "accounting rate" is split between the two PTOs, usually 50/50, to give the "settlement rate", which is the amount which the terminating PTO should receive from the originating PTO as a settlement for the costs of terminating traffic. On a periodic basis, the two PTOs will offset the minutes of traffic in both directions and any remaining difference will be settled by a payment from the PTO of the country where the excess traffic originates from.

At that time, the only alternative to using the services provided by the PTO was to self-provide those services, which was only possible for the largest telecommunications customers (multinational corporations, banking and insurance sector, government, etc.). Given that PTOs usually held a monopoly over infrastructure as well, self-provision involved leasing capacity from the PTO and putting one's own equipment (to the extent it was possible) on it in order to It was generally assumed then that the telecommunications sector was an instance of natural monopoly: see A. Ogus, Regulation — Legal Form and Economic Theory (Oxford: Clarendon, 1994) at 30-3.

Sometimes transiting through one or more third countries, in which case agreements have to be made with the FTOs in these transit countries. Transit PTOs will provide to the two PTOs at the end either dedicated (setting aside dedicated capacity for the purposes of carrying transit traffic) or switched transit traffic (switching transit traffic through PSTN in the transit country).

In theory, each PTO is responsible until its border.

The correspondent system was developed within the International Telecommunications Union (ITU), and it is set out in a series of ITU recommendations. The accounting rate system, in particular, is found in Recommendations ITU-T D.140, D.150 and D.155, available at the ITU Website at <http://www.itu.int/intset/itu-t>.

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provide the desired telecommunications services. In practice, however, the cost of leased lines, especially cross-border ones (which had to be purchased from two or more PTOs), was too high in the EC when compared to the USA, which made self-provision a very costly alternative.9

The EC regulatory model was accordingly very simple: Member States were in charge of their respective telecommunications sector. This is not to say that no difficult issues arose; these were usually solved within the respective monopoly operators in each Member State, rather than through a regulatory process. Any measure of coordination or harmonization between the Member States, be it in the technical, commercial or regulatory level, could be enacted under Article 95 EC (ex 100a). In fact, since Member States were in control of the whole sector, from rule-making to service delivery to the final customer, it was not even necessary to have recourse to a legislative enactment. “Softer” instruments such as recommendations could be used, as occurred for instance with the first real measure attempting to give some kind of Community dimension to the telecommunications sector, the Recommendation 84/549 of 12 November 1984 concerning the implementation of harmonization in the field of telecommunications.10

Since the British Telecommunications ruling from the ECJ in 1982,11 competition law was undoubtedly applicable to the telecommunications sector, but it was only sporadically used, mostly as regards cross-border telecommunications within the EC.12


That peaceful and cosy regulatory model was going to be shattered with the 1987 Green Paper, where the Commission proposed to undertake a complete overhaul of the sector.

1. History and legislative instruments

The reasons behind the Commission proposals are set out at the beginning of the 1987 Green Paper. They remain as valid today as they were over a decade ago.

The high cost of leased lines has been one of the main practical reasons behind the whole liberalization drive in the EC. It still remains a problem: see “Commission launches first phase of sector inquiry into telecommunications: leased line tariffs”, Press Release IP/99/786 (22 October 1999).

10. [1984] OJ L 298/149. Incidentally, this Recommendation was adopted on the basis of Article 308 EC (ex 235), a sign that there was some uncertainty as to how telecommunications policy could be tackled under the EC Treaty. In all fairness, Article 95 was not available as a legal basis at the time, but the Member States could just as well have used Article 94 EC (ex 100), which follows the same procedure as Article 308 (unanimity and consultation of the EP).


Essentially, technological developments (including convergence) and rising demand for telecommunications contribute to give increased significance to the telecommunications sector, both economically and socially, and Europe cannot afford to be left behind in view of the efforts made by its trading partners to change their regulatory framework to support the development of telecommunications.13

In the 1987 Green Paper, the Commission proposed a series of Community positions, which would be the core principles of EC telecommunications policy.14 Following a consultation, the Commission put forward an action programme for the period until 1992,15 to which the Council agreed by a Resolution of 30 June 1988.16 Each of the positions put forward in the Green Paper is briefly set out below, with a mention of the instruments which have carried it out in practice:

A. Member States may leave telecommunications infrastructure under monopoly, and must preserve network integrity in any event;
B. Amongst services, only public voice telephony may be left under monopoly;
C. Other services must be liberalized;

These three positions were translated into Community law through Directive 90/388, adopted by the Commission alone on the basis of Article 86 (3) EC (ex 90/3).

D. Community-wide interoperability must be achieved through harmonized standards;

In pursuance of that objective, Directive 91/263 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity, was enacted on 29 April 1991 on the basis of Article 95 EC (ex 90(3)) to provide a framework for the adoption of so-called “common technical regulations” concerning terminal equipment, and a series of Commission decisions have been taken pursuant to it.17 Action was also taken (or had already been taken) to ensure the coordinated

13 See the 1987 Green Paper, Presentation at 1-3.
14 1987 Green Paper at Figure 15 (between pp. 184 and 185), Figure 3 of the Summary Report (between pp. 16 and 17).
15 See the Communication of the Commission on the implementation of the Green Paper up to 1992, COM(88)48final (9 February 1988).
17 (1991) OJ L 272/1, replacing Directive 86/561 of 24 July 1986 [1986] OJ L 217/1. Directive 91/263 itself was consolidated through Directive 98/13 of 12 February 1998 relating to telecommunications terminal equipment and satellite earth stations, including the mutual recognition of their conformity (1998) OJ L 7/61. Under Directives 91/263 and 98/13, over 30 common technical regulations (CTRs) were adopted to harmonize the specifications of various types of terminal equipment. That system has proven too slow and heavy, and is now being overhauled and
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introduction of Integrated Services Digital Network (ISDN),18 pan-European digital mobile communications (GSM),19 pan-European Cordless Telecommunications (DECT),20 on the basis of Article 95 and 308 EC (ex l00a and 235). In addition, two Decisions were taken on a Community-wide emergency call number (112), on the basis of Article 308 EC,21 and on a Community-wide international access code (00), on the basis of Article 95 EC.22 More recently, in line with these developments, a Decision was taken on the introduction of third-generation mobile communications (UMTS).23

E. An Open Network Provision (ONP) framework must be put in place to regulate the relationship between monopoly infrastructure providers and competitive service providers (including trans-border interconnect and 41/esa);

Given that part of the telecommunications sector is liberalized and part left under monopoly, a regulatory framework is needed to ensure that the operation of the part under monopoly does not affect the competitive part. That framework, called Open Network Provision (ONP) relates in particular to the set of monopoly services and infrastructure to be offered, terms and conditions imposed on the providers of liberalized services for access to and use of monopoly services and infrastructure, the tariffication of these monopoly services and infrastructure, etc.23 On the basis of Article 95 EC (ex 106a), Directive 90/387 was enacted on 28 June 1990. It was only a framework Directive, and the precise content of ONP was set out in a series of implementing instruments:

- Directive 92/44;
- Recommendation 92/382 of 5 June 1992 on the harmonised provision of a


25 On the original ONP framework, see V. Hatzopoulos, "L'Open Network Provision (ONP) moyen de la dérégulation" (1994) 30 RTD 63.
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minimum set of packet-switched data services (PSDS) in accordance with open network provision (ONP) principles; Recommendation 92/383 of 5 June 1992 on the provision of harmonised integrated services digital network (ISDN) access arrangements and a minimum set of ISDN offerings in accordance with open network provision (ONP) principles; Directive 95/62 of 13 December 1995 on the application of open network provision (ONP) to voice telephony.

F. Terminal equipment must be liberalized;

On 16 May 1988, the Commission adopted, on the basis of Article 86 (3) EC (ex 90 (3)), Directive 88/301, which completely opened the terminal equipment market to competition. Directive 91/263, mentioned above, provided a framework for the mutual recognition of terminal equipment throughout the Community.

G. Regulatory and operational functions of the PTOs must be separated;

Article 6 of Directive 88/301 as well as Article 7 of Directive 90/388 were enacted in pursuance of that goal.

H. Competition law must be applied to PTOs, in particular as regards cross-subsidization;

I. Competition law must be applied to new service providers as well;

The Commission sought to clarify the application of competition law to the telecommunications sector with the 1991 Guidelines. Many significant decisions on the application of competition law to individual cases were also taken, which will form the basis for discussion in Chapter Three.

In a related development, the Community public procurement rules were also extended to the telecommunications sector.

J. The Common Commercial Policy must be applied to telecommunications, and competition law must be applied to international telecommunications.

The Member States were represented by the Community in the Uruguay Round

28 [1995] OJ L 321/6. This directive was later on repealed and replaced by Directive 90/10.
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and in the subsequent round of negotiations on telecommunications under the WTO framework, within the NGBT and GBT.30 Furthermore, the Member States increasingly co-ordinated their position within international organizations dealing with telecommunications, the main one being the ITU.

2. Key concepts and distinctions

The main elements of the regulatory model contained in the 1987 Green Paper were thus implemented through the twin directives of 30 June 1990, Directives 90/387 and 90/388. That regulatory model relied on a number of key concepts, which must be explained here, since they are essential for a proper understanding of that model and of subsequent changes made to it: the separation of regulatory and operational functions as well as the distinctions between services and infrastructure, between reserved and non-reserved services and between access and interconnection.

a. Regulatory and operational functions

Even if Directives 88/301 and 90/388 stand for the principle that regulatory and operational functions must be separated, they do not actually attempt to define these concepts. Rather, they provide a list of — presumably — regulatory functions which must be taken away from the PTO and entrusted to an independent body:

- drawing up the technical specifications for terminal equipment;
- monitoring the application of these specifications;
- grant of type-approval to terminal equipment;
- grant of operating licenses to service providers;
- control of type-approval and mandatory specifications;
- allocation of frequencies;
- surveillance of usage conditions.

b. Services and infrastructure

The distinction between services and infrastructure took a central place in the regulatory model of the 1987 Green Paper, since there was no obligation to liberalize infrastructure, while services must in principle be opened to competition. Of course the most important service, public voice telephony, could remain under a monopoly, but that was not seen as a permanent measure; in contrast, the recitals of Directive 90/388 did not appear to question that special or exclusive rights could be granted for the provision of telecommunications infrastructure.31

30 See M.C.E.J. Bronkers and P. Larouche, "Telecommunications services and the WTO" (1997) 31:3 Journal of World Trade 5. See also infra, Chapter Four, 1.9.3.
31 See Recital 5, where it is stated that "[t]he granting of special or exclusive rights to one or more undertakings to operate the network derives from the discretionary power of the State", while at Recital 18, the conclusion is less definitive: "[t]he opening-up of voice telephony to competition could threaten the financial stability of the PTO".
For the purposes of Directives 90/387 and 90/388, telecommunications infrastructure meant essentially the "public telecommunications network". That latter expression was to be contrasted with "telecommunications services", both of which were defined in the same terms in Directives 90/387 and 90/388.

"public telecommunications network" means the public telecommunications infrastructure which permits the conveyance of signals between defined network termination points by wire, by microwave, by optical means or by other electromagnetic means;

"telecommunications services" means services whose provision consists wholly or partly in the transmission and routing of signals on the public telecommunications network by means of telecommunications processes, with the exception of radio broadcasting and television;

The distinction introduced by these definitions appears clear at first: infrastructure is the physical plant which enables the transmission of telecommunications signals, while the action of transmitting and routing signals on that plant constitutes telecommunications service. It will be noted that the definition of "telecommunications services" was couched in such broad terms that it was necessary to specify that it does not extend to radio and television broadcasting.

The case of leased lines shows that the distinction is far from being so clear. Leased lines are a typical offering made by the owner of a telecommunications network, whereby a unit of capacity (line, channel) between two points on a network is sold on a separate and continuous basis. According to Directive 92/44, a leased line was thus part of the telecommunications infrastructure, so that if the infrastructure was under monopoly, only the monopolist could offer leased lines:

It is regrettable that the term "network" and not "infrastructure" is used in the expression "public telecommunications network" in the liberalization and ONP directives, especially since the definition makes it clear that that expression concerns infrastructure. Indeed, while "infrastructure" indubitably refers to a concrete element (wire, fiber, etc.), a "network" can also be built from leased capacity which does not properly belong to the person offering services therewith. Such is the case for instance for private networks used by large corporations, which are put together using capacity leased from telecommunications operators and switching equipment owned by the company in question. Within the framework of Directive 90/388, even if there are exclusive rights over the "public telecommunications network", building "private networks" on a similar basis is allowable, since there is an operation in the infrastructure underlying the public network remains in the hands of the holder of the exclusive rights (it is merely leased by the corporation). While it is proper to speak of a private network in this case, it would not make sense to speak of a private infrastructure. Since "network" can be used for both the public telecommunications network and a private network, terminological difficulties could have been avoided by using the expression "public telecommunications infrastructure" in the liberalization and ONP directives. Accordingly, in this work, the term "infrastructure" will be used whenever a reference is made to the ownership of the actual physical elements used for the transmission of telecommunications signals.

As the name indicates, the service initially consisted in renting an actual line between two points. Nowadays it rather involves a software reconfiguration of the network to create a clear channel between two points, without there actually being a physical connection dedicated for that purpose. For the user, it still appears as if a physical line was leased, hence the name has survived until now.
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'leased lines' shall mean the telecommunications facilities provided in the context of the establishment, development and operation of the public telecommunications network[35] which provide for transparent transmission capacity between network termination points...

Yet, once a line has been leased, it is possible to resell its capacity to third parties, with minimal changes to the actual service offering.36 This is known as simple resale, and was considered as a telecommunications service under the model of the 1987 Green Paper. Thus the same offering of capacity could be characterized as infrastructure if leased directly from the owner and as a service if procured from a reseller.37

c. Reserved and non-reserved services

If the boundary between services and infrastructure is at best fluid, the distinction between reserved and non-reserved (i.e. liberalized) services could be branded abstruse. This is another key conceptual distinction in the regulatory framework of the 1987 Green Paper, yet as the Commission itself acknowledged in that document,[38] a stable "natural" boundary line between a "reserved services" sector and a "competitive services" sector (including in particular "value-added services") is not possible. Any definition (and reservation) of a service can only be temporary and must be subject to review if it is not to impede the overall development of telecommunications services.

It must be noted that, contrary to what is often assumed, it cannot be said in general that "basic services" were reserved and "value-added services" were non-reserved. In the 1987 Green Paper, the Commission demonstrated that this distinction, which is modelled on the distinction between "basic" and "enhanced" services in the USA,[39] was neither stable nor consistently made throughout the Member States. In fact, "non-reserved" or "liberalized" services were simply defined as all services which are not reserved. Since the only reserved service in the regulatory...

35 The words "provided in the context of the establishment, development and operation of the public telecommunications network" were removed by Directive 97/15/EC.
36 This can be an attractive commercial proposition if capacity is bought "in bulk" and resold to smaller units at prices above "bulk" price but below the "retail" price of the infrastructure owner.
37 In fact, Directive 90/388 allowed Member States to prohibit simple resale of capacity (i.e. resale of leased lines) for data communications until 31 December 1992, in derogation of the obligation to abolish special or exclusive rights, because it was feared that it would upset the tariff scheme whereby leased lines were excessively priced in order to try to bring data traffic onto the public packet-switched data network: see Art. 3, first paragraph.
38 As ll of the Summary, see also 33-6.41-2.
39 That distinction was developed in order to delineate the scope of FCC jurisdiction as regards telecommunications services which also relied on data processing (e.g. electronic mail): see FCC, Second Computer Inquiry, Docket 20828, Final Decision, FCC 80-189, 77 FCC 2d 384, 7 April 1980 and Third Computer Inquiry, CC Docket 85-229, Report and Order, FCC 86-252, 164 FCC 2d 654, 15 May 1986.
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model of the 1987 Green Paper was voice telephony, the matter boiled down to defining that service. Directive 90/388 contained the following definition:

‘voice telephony’ means 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 [emphasis added]

These few lines were central to the whole regulatory model of the 1987 Green Paper. The Commission published a Communication dealing in great part with that definition.40 As an interpretation guide, the Commission suggested that the definition of public voice telephony41 be construed narrowly, since it is an exception to the rule that telecommunications services are liberalized;42 while this may appear to be an obvious application of the general principle that exceptions are to be interpreted restrictively, in practice it was quite a bold step to assert that the largest and most established telecommunications service by far must be seen as the exception to the rule. In the following paragraphs, the key elements of the definition are briefly surveyed.

- speech: voice telephony is obviously concerned with speech as opposed to data or images, for instance. Already, on that basis alone, it can be concluded that the whole data communications sector was not reserved, and that without recourse to any notion of added value or enhancement. The case of mixed services is more difficult: videoconferencing, for instance, comprises both speech and images. To the extent these services are new and voice is only part of a larger whole, it may be considered that they also fell outside of the definition of public voice telephony.43

- commercial: the mere fact of pooling or sharing resources on a non-profit basis, even if these resources are used for voice communications, did not as such constitute the offering of public voice telephony.

- direct transport and switching in real time: this element of the definition was rather technical. ‘Real time’ meant that all services where voice is stored, such as voice mail, were excluded from public voice telephony. Similarly, calling card services or credit card telephony also fell outside of public voice telephony, since these services more often than not do not necessarily involve ‘direct transport and switching’, but rather the transport of voice signals along certain routes (which may or may not be the most direct) as part of a larger service.44

41 For the purposes of this work, and in order to avoid confusion, the term “public voice telephony” will be used to designate voice telephony within the meaning of Directive 90/388.
43 This appears to be the Commission’s position, ibid. at 6.
44 Ibid. at 6.
between public switched network termination points: while this element may seem technical, it worked so as to exclude a fair amount of voice traffic from the definition of public voice telephony. Any voice call which either did not originate or did not terminate on the public switched network (e.g. PSTN or ISDN) fell outside of reserved services.

for the public: this was by far the most controversial element of the definition of public voice telephony. In its Communication, the Commission proposed to give “for the public” its common sense meaning of “available to all members of the public on the same basis.”\(^{45}\) No further elaboration was made, but two examples of services which are not for the public were given, namely corporate networks and closed user groups (CUGs). The former are those networks generally established by a single organization encompassing distinct legal entities, such as a company and its subsidiaries or its branches in other Member States incorporated under the relevant domestic company law while the latter are those entities, not necessarily bound by economic links, but which can be identified as being part of a group on the basis of a lasting professional relationship among themselves, or with another entity of the group, and where internal communications result from the common interest underlying this relationship. In general, the link between the members of the group is a common business activity.

The Commission considered that both corporate networks and the offer of voice communications to CUGs are not “for the public”, therefore they fell outside of the definition of voice telephony in Directive 90/388 and were not reserved services.\(^{46}\)

The workings of the last two elements can be explained with the help of Figure 1.1. On this figure, Corp\(_1\), Corp\(_2\), Corp\(_3\), and Corp\(_4\) are four business locations of company Corp, Home Worker is an employee of Corp and Supplier is a supplier of Corp. Corp does business with a telecommunications service provider (SP). The full lines indicate the network of the service provider, whereas the clouds represent public networks (PSTN, ISDN) and the dotted lines connections made to or from a public network termination point.

A call between Corp\(_1\) and Corp\(_2\) does not fall within the definition of voice telephony, since it is not between public network termination points; the call is entirely carried on the SP network. Moreover, a call from Corp\(_1\) to Corp\(_3\) only terminates on the public network at one end (Location 3), and thus it also falls outside of the definition of voice telephony. The same can be said of any call.

\(^{45}\) Ibid. at 5. \(^{46}\) Ibid. at 8. \(^{47}\) Some Member States, including Germany, were of the opinion that only corporate networks were “not for the public” and that CUGS still fell within the scope of the monopoly: Ibid. at 16.

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Anyone, Figure 1.1 The definition of public voice telephony

from Corp3 or Corp2 to any of Corp1, Corp9, Supplier, Home Worker or for that matter Anyone (these are so-called "dial-out" communications). Conversely, if Corp3 calls Corp2, the call originates from the public network, but does not terminate on it (Corp2 is served by the SP network); it also does not constitute voice telephony either. The same goes for any call from Supplier, Home Worker or Anyone to Corp1 or Corp2 (these are so-called "dial-in" communications). Accordingly, SP may provide a service whereby anyone can call a given number, access the SP network and then be routed through to Corp1 or Corp2 (suitable for inquiries or customer service).

All the communications studied so far have fallen outside of the definition of voice telephony in Directive 90/388 because they were not between two public network termination points. If someone at Corp3 calls someone at Corp4 through the SP network, however, the call originates and terminates at a network termination point. This is where the "for the public" element, and the concepts of corporate network and CUG, come in. Corp3 and Corp4 are two Corp locations, however; the call involves two Corp employees and not two members of the general public. More precisely, it can be said that, in linking Corp3 and Corp4, SP is providing a Corporate Network service to Corp, and that accordingly this
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is not a service “for the public”. The limitations of the Corporate Network concept are shown in the case of Home Worker calling a colleague at Corp3 over the SP network. Here it can hardly be said that such a call is part of a Corporate Network, since Home Worker is at home. Yet Home Worker and the colleague at Corp3 are all Corp employees, and they are no strangers to one another. They can be seen as members of a Closed User Group (CUG) as defined above. As shown by this example, the CUG concept covers a broader range of communications than the Corporate Network concept. The outer bounds of the CUG concept are reached in a case where Supplier would call an employee of Corp at Corp4, for instance, using the SP network. Supplier is not legally part of Corp, but that would not prevent Supplier from being in a CUG with Corp; however, the links between Supplier and Corp must form “a lasting professional relationship” with a “common interest”. This would probably be the case if Supplier was making bi-weekly deliveries to Corp of a product essential to Corp’s business, which Corp and Supplier have developed jointly, for instance; on the other hand, if Supplier sold office supplies to Corp three times a year, it would likely not form a CUG with Corp.

Even on the most liberal interpretation of the CUG concept, calls from any of Corp3, Corp4, Supplier or Home Worker over the SP network to Anyone (even if motivated by Corp’s business interests) would constitute public voice telephony within the meaning of Directive 90/388, since the call originates and terminates on the public network and there is no special relationship between the parties to the call that would put them in a CUG (even less in a Corporate Network). A fortiori, a call between Anyone and Anyonez which would pass through the SP network would constitute public voice telephony.

If any one phrase can sum up the complex scheme created by the interplay of all the elements of the definition of public voice telephony, as laid out in the previous paragraphs, it is “corporate services”. Indeed, most if not all of the services used by multinational corporations and large corporate users fell outside of the scope of public voice telephony for one reason or the other: data communications and video-conferencing do not constitute voice communications, other services such as voice mail or calls made using corporate credit cards or calling cards do not involve primarily direct transport and switching in real time and finally most voice communications required by a corporation to do business will fall outside of public voice telephony either because they do not involve two termination points of the public network (dial-in, dial-out) or because they are within a Corporate Network or CUG. In contrast, the small business or residential users could not expect as much from the regulatory model of the 1987 Green Paper: while data communications were liberalized (but not at that time, few providers catered to the needs of this customer segment),

Alternatively, it can be seen that the users at Corp3 and Corp4 are part of a closed user group (CUG).
in all likelihood the voice communications made by these customers remained within the definition of public voice telephony in Directive 90/388 and could thus be left under the monopoly of the local TO.

d. Access and interconnection

One of the finer points of the regulatory model of the 1987 Green Paper concerned the relationships between the various actors, in particular the relationship between service providers and the local TO. From a technical perspective, there are two main types of relationships to the public telecommunications infrastructure:

- **Access** is what users receive as a rule. Access occurs at a network termination point, and enables the user to use the public infrastructure. For residential users, this means connecting a telephone, a fax or a modem to a wall outlet (network termination point) and being able to obtain a connection when dialling a number. Larger users will connect a more sophisticated piece of equipment (a private branch exchange (PBX), for instance) and may be able to derive more functionality from the network, but the basic principle is the same. Access tariffs can often be too high.

- **Interconnection** can be conceived as a special form of access, but it is usually seen as technically different. It is "the physical and logical linking of telecommunications networks used by the same or a different organization in order to allow the users of one organization to communicate with users of the same or another organization, or to access services provided by another organization." The connection of the two networks does not take place at network termination points, but rather at a higher level (eg switching nodes). Furthermore, as the definition indicates, it is in the essence of interconnection that user 1 (connected to the network of provider A) can call user 2 (connected to the network of provider B), something which in principle cannot automatically be achieved with access. Interconnection thus takes place not between a network provider and a user, but between two "equals", i.e. two network providers. Accordingly, interconnection can be seen as a form of "wholesale" business, and the tariffs for interconnection are much less than for access.

50 Directive 97/33, Art. 2(1)(a).
51 Directive 90/33, Art. 2(1)(a).
The legal impact of that technical distinction may not be so considerable, especially when a concept such as “special network access” is introduced in Directive 95/62.52 “Special network access” is to be granted at other network termination points than those offered in the standard conditions; it may involve creating new accesses closer to the core of the network, which can contribute to alleviating the technical limitations of the access regime for providers of liberalized services. In the end, the sole remaining difference may lie on the commercial side, in the pricing range.

Although the use of terms is not always consistent,53 the regulatory model of the 1987 Green Paper is framed in terms of access and not interconnection. As is clearly set out in Directive 95/62, only a fairly limited class of service providers can obtain interconnection to the public network infrastructure, namely TOs from other countries or providers of mobile telephony.54 Others, more specifically the providers of liberalized services, must be content with mere access to the public infrastructure. Figure 1.2 illustrates the nature of the relationships between the various actors under the regulatory model of the 1987 Green Paper, as appears from Directive 95/62 in particular.

Figure 1.2 Access/interconnection - Model of the 1987 Green Paper

52 Directive 95/62, supra, note 28, Art. 10. A similar provision is now found in Directive 98/10, Art. 16.
53 Directive 92/44, in particular, mentions at Recital 6 the “interconnection of leased lines among each other... the interconnection of leased lines and public telecommunications networks”, while the second paragraph of Article 6 provides that “No restriction shall be introduced or maintained for the intercommunication [!] of leased lines and public telecommunications networks”.
54 Directive 95/62, supra, note 28, Art. 11. As regards interconnection, Article 11 makes a distinction between mobile telephony operators from the same Member State as the TO and from other Member States, the latter enjoy weaker interconnection rights.
Figure 1.3 The regulatory model of the 1987 Green Paper

On the basis of the foregoing discussion, the resulting model can be illustrated as shown in Figure 1.3.

This table attempts to take into account the proportion of the total telecommunications sector represented by the liberalized services, in order to convey some impression of how much (or how little) was liberalized. As was seen before, data and advanced services (i.e., voice-mail, video conferencing, etc.) can relatively clearly be delineated, as shown by the dotted lines. Furthermore, a significant part of voice communications falls outside of the definition of public voice telephony and is thus also liberalized, although there the borderline is rather fuzzy.

The regulatory model of the 1987 Green Paper, as implemented by the

55 At the time of the Green Paper and until the mid-90s, data and advanced services represented no more than 20% of PTO turnover. Since no figures were available on the split in turnover between infrastructure provision and service provision, it was assumed that half of total telecom turnover was attributable to infrastructure activities. Furthermore, as explained above in the main text, an unknown proportion of voice services, essentially the services used by multinational corporations and large corporate clients, must be accounted for on the liberalized side, since they could be provided without necessarily falling within the definition of voice telephony given in Directive 90/388.
measures described above, was by and large valid until the adoption of Directive 96/19, which started to produce effects on 1 July 1996.


Between 1990 and 1996, two sectors were added to the regulatory model, namely satellite and mobile communications. Since both of them presented some difficulties over and above other parts of telecommunications, they had been expressly left out of the regulatory model of the 1987 Green Paper as it had been implemented by Directives 90/387 and 90/388 in 1990, ie they were not included in any of the categories discussed above — infrastructure, reserved services or liberalized services.

Satellite communications involve the use of earth stations and satellites. A satellite communication can be broken down into segments: an earth segment from the originator of the communication to an earth station, a satellite segment from the earth station to a satellite (uplink), which then relays the signals coming on the uplink to another earth station (downlink) and finally a second earth segment from the receiving earth station to the addressee of the communication. The most thorny political issue is the space segment, since it has traditionally been offered by a number of international organizations (Eutelsat, Inmarsat, etc.) whose services were distributed in each country by the PTO. The Commission produced a Green Paper on a common approach in the field of satellite communications in the EC, which contained proposals for action that were approved by the Council in a Resolution of 19 December 1991. Directive 94/46 was subsequently enacted by the Commission on the basis of Article 86 EC (ex 90) to bring the requisite changes to Directives 88/301 and 90/388 in order to:

- liberalize the market for earth station equipment by bringing it under the definition of “terminal equipment” in Directive 88/301;
- liberalize the use of satellite networks for the provision of telecommunications services (with the exception of public voice telephony) by ensuring that telecommunications services provided over satellite networks are comprised in the definition of “telecommunications services”, where according to Directive 90/388 no special or exclusive rights can be maintained (with the exception of public voice telephony).

However, the practical impact of that first breach of the infrastructure monopoly in favour of satellite networks was limited, because of technical and economical considerations (satellites are...
expensive and cannot support every telecommunications application; and because the TOs controlled most of the available capacity on the space segment in any event;

- subject space segment provision to competition law principles, by abolishing restrictions to the provision of space segment capacity to authorized earth station operators, and by requiring the Member States to collaborate with the Commission in the investigation of possible anti-competitive practices by international satellite organizations.

Mobile communications dispense with fixed network termination points and the resulting loss of mobility for the user. Instead, the user is connected by a radio link to a base station, which in turn is linked to (i) a network of base stations, which can often carry the communication is case the user wants to reach another mobile user and (ii) the PSTN, on which the call can be terminated (if the user wants to reach a user of the fixed network) or originated (if a user of the fixed network wants to reach a mobile user). The precise reasons why they were not included in the scope of Directive 90/388 are not known: it seems that they were seen as a direct substitute to public voice telephony and hence that Member States should be left free to leave them under exclusive or special rights. In any event, mobile communications had not yet “boomed” at the time, and in fact the Community was attempting to bring about the co-ordinated introduction of GSM throughout the EC, a first which could have been disrupted by the opening-up of the sector. The Commission published a Green Paper on mobile communications in 1994, where it made a series of proposals which were agreed by the Council in June 1995. Mobile communications were integrated into the current regulatory framework essentially through Directive 96/2. In fact, however, mobile communications were pushed directly into the next regulatory model, since Directive 96/2 comprised provisions dealing with interconnection, licensing of mobile networks as well as the use of alternative infrastructure. Given that Directive 96/19, the Full Competition Directive, was going to be adopted only two months later, it made sense to try to insert mobile communications directly into the new model.

91 Ibid., Art. 3.
92 See Towards the Personal Communications Environment: Green Paper on a common approach in the fields of mobile and personal communications in the European Union, COM(94)145final (27 April 1994) at 20. That argument should have led to mobile services being classified as “reserved services” and not being left out of Directive 90/388 altogether. On the other hand, since many Member States were introducing new digital cellular mobile services (GSM) on a duopoly basis, it might have been odd to place mobile services in the same category as public voice telephony, which some Member States steadfastly wanted to keep under monopoly.
93 See Communication on the co-ordinated introduction of public pan-European cellular land-based mobile communications in the Community, COM(90)655final (23 November 1990) at 5.
94 Towards the Personal Communications Environment: Green Paper on a common approach in the fields of mobile and personal communications in the European Union, supra, note 62.
resulting from that Directive. Nevertheless, that insertion was not completely successful: the interplay between Directives 96/12 and 96/19 is far from perfect.66 Even the new ONP regime elaborated in 1996-98, while it was conceived to cover all telecommunications networks and services, does not appear to follow any guiding principle in its treatment of mobile communications services.67 According to the new regulatory model as described below generally also applies to mobile communications, but not always very consistently: mobile telephony is generally considered as a public (or publicly available) telecommunications service, and the underlying network as a public network.


1. History

Directive 90/388 provided for a review of EC telecommunications policy in 1992.68 In addition, the Commission had undertaken to review telecommunications pricing within the Community at the start of 1992 to see if and how much progress had been made towards the objective of cost-orientation of tariffs.69 At the end of 1992, following these reviews, the Commission published a Communication as a basis for discussion, in which it laid out a series of options, including the full liberalization of voice communications, from which it favoured the incremental option of opening intra-Community cross-border voice communications to competition.70 In the subsequent consultation process, the Commission was faced with massive pressure — mostly by users and providers of liberalized telecommunications services — to go further in the liberalization process; in particular, the participants brought the Commission to consider a possible liberalization of telecommunications infrastructure, which had not been mentioned in the Communication. As a consequence, the Commission recommended to Council an ambitious timetable, comprising among others:71

66 Both directives amended Directive 90/388. In general, a self-contained regime regarding mobile communications was introduced through 96/12, while 96/19 dealt with fixed communications. In the end, Directive 90/388 thus contains two parallel sets of provisions dealing with similar themes, one of which deals more specifically with mobile (cf Art. 3a to 3d), and the other, with fixed communications (cf Art. 4 to 44; compare for instance the provisions on mobile-mobile and mobile-fixed interconnection at Art. 3d and those on fixed-fixed interconnection at Art. 4a.

67 Directive 98/110 does not indicate why some of its provisions would apply to mobile communications but not others: see Rec. 3 and Art. 1(2). See also Directive 97/33, Art. 5(1), whereby providers of mobile telecommunications services and networks and operators cannot receive any financing via universal service mechanisms but yet can be called upon to contribute to the financing of universal service provided over fixed networks.

68 Directive 90/388, Art. 10(1).


71 Communication on the consultation on the review of the situation in the telecommunications services sector, COM(94)195fin (28 April 1994).
By 1996:
- liberalization of alternative infrastructure for self-provision of services as well as provision of services to Corporate Networks and CUGs;
- liberalization of cable TV network for the provision of liberalized services;

By 1998:
- full liberalization of telecommunications services (i.e. liberalization of public voice telephony, the only remaining reserved service) by 1 January 1998;
- a new framework for public telecommunications infrastructure.

The Council only agreed in part in its subsequent Resolution. It accepted the full liberalization of telecommunications services by 1 January 1998, but it left any consideration of infrastructure liberalization to the discussion which would arise following the upcoming Green Paper on infrastructure. 72

In the Green Paper on the liberalization of telecommunications infrastructure and cable television networks of 1994,73 the Commission put forward the principle that liberalization of infrastructure and services should go hand in hand, which led it to propose a two-stage liberalization timetable, whereby the provision of infrastructure for liberalized telecommunications services (i.e. all services with the exception of public voice telephony) would be liberalized immediately (for 1995), and the provision of infrastructure for public voice telephony would be liberalized at the same time as public voice telephony itself, on 1 January 1998.

2. Alternative infrastructure

A new concept was introduced in the regulatory model by the 1994 Green Paper to designate the infrastructure which should be liberalized immediately: alternative infrastructure. That term is somewhat of a misnomer, since on its face it refers to any telecommunications infrastructure owned by some other party than the local TO, which then constitutes an alternative to the public telecommunication infrastructure.74 Nevertheless, "alternative infrastructure" has emerged through the discussions as a convenient short-hand for "the provision of infrastructure for liberalized telecommunications services".

The 1994 Green Paper created some confusion by seeming to restrict alternative infrastructure to already existing infrastructure (networks built by utilities, private or public, and often in the past reserved for monopoly use), such as those owned by utilities and telecommunications companies, and within a broader definition all privately owned infrastructure, thus excluding the public telecommunication infrastructure.

72 Resolution of 22 July 1993 on the review of the situation in the telecommunications sector and the need for further development in that market [1993] OJ C 213/1.
73 For time reasons (in order to meet the deadline of 1 January 1995 set by the Council), the Green Paper was published in two parts: Part I - Principles and timetable, COM(94)440final (25 October 1994) and Part II - A common approach to the provision of infrastructure for telecommunications in the European Union, COM(94)682final (25 January 1995). Both parts will hereinafter be collectively referred to as the 1994 Green Paper.
74 Ibid., Part I at 15, Note 11.
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railways, cable TV operators, etc.17 As was made clear in Directive 96/19, however, the "early liberalization of alternative infrastructure", as it would come to be called, applied both to existing and to new infrastructure.

3. Legislative instruments

Despite objections by the Council, the Commission nonetheless imposed the early liberalization of alternative infrastructure in a series of Directives adopted under Article 86(3) EC (ex 90(3)), and the last restrictions had to be removed by 1 July 1996 at the latest.18

In addition, the transitional model departs from the regulatory model of the 1987 Green Paper in a second fashion, by providing for interconnection rights (instead of mere access) for the networks based on alternative infrastructure.19 In sum, as of 1 July 1996, all categories of alternative infrastructure envisoned by the Commission in the 1994 Green Paper had been liberalized, or to put it in the right order, the use of infrastructure for telecommunications services was liberalized to the extent these services themselves were liberalized. The transitional model thus looked as shown in Figure 1.4.

The lifetime of the transitory model was rather short, since Directive 96/19 also contained the provisions leading to full liberalization (and to the current regulatory model) on 1 January 1998. It will be recalled that the Commission had proposed early liberalization of alternative infrastructure in early 1993 as a result of the consultation process on the 1992 Review, in order to alleviate the high cost and scarcity of leased lines and allow the model of the 1987 Green Paper to bear fruit in practice. It took more than three years for it to be realized, and with early liberalization of alternative infrastructure a mere 18 months ahead of full liberalization, it was unlikely to have any significant impact.

17 Ibid., Part I at 38 ("...lifting of restrictions on the more general use of available infrastructures...") and most of all in the Schedule given at 41 ("...lifting constraints on the use of existing alternative infrastructure...").


19 For Cable TV networks: Directive 90/388, Art. 4, new third paragraph, second dash, as inserted by Directive 95/31, Art. 1(2). For mobile telephony networks: Directive 90/388, Art. 3d, as inserted by Directive 96/2, Art. 1(3). For other alternative infrastructure: Directive 90/388, Art. 4e(3), as inserted by Directive 96/19, Art. 1(6). The ambiguity of the distinction between access and interconnection is brought to the fore by these provisions, which give interconnection rights to service providers that use alternative infrastructure, whereas they only had access to the public telecommunications infrastructure when they operated on the basis of leased lines from the local TO.
IV. THE FULLY LIBERALIZED MODEL (1998-)

A. HISTORY AND LEGISLATIVE INSTRUMENTS

As mentioned above, in the wake of the 1992 Review, the Council agreed to liberalize public voice telephony by 1 January 1998, and on the basis of the 1994 Green Paper, the Council accepted the Commission’s proposal to align the liberalization of telecommunications infrastructure with that timetable. Full liberalization involves a thorough change in the regulatory model, especially since the last areas to be liberalized are those where the most “public interest” concerns come to bear.  

Following a consultation process on the 1994 Green Paper, the Council adopted a Resolution in September 1995 in which it outlined the basic principles applicable to the main regulatory issues to be settled. In addition, the Resolution listed the main legislative measures that still had to be adopted until 1 January 1996, on the following topics (the actual measures which were adopted are mentioned):

**Liberalization of all telecommunications services and infrastructures**

As mentioned before, Directive 96/19, adopted by the Commission on the basis of Article 86(3) EEC (ex 90(3)), realized that objective. At the same time, Directive 96/19 contained the core elements of a regulatory model for the liberalized telecommunications market (including provisions dealing with the topics discussed hereafter).

**Adaptation to the future competitive environment of ONP measures**

Significantly later than originally planned, two Directives were finally adopted by the Council and the European Parliament on the basis of Article 95 EEC (ex 100a) in order to revise the ONP framework, Directive 97/51 of 6 October 1997 and Directive 98/10 of 26 February 1998.

**Maintenance and development of a minimum supply of services throughout the Union and the definition of common principles for financing the universal service**

The action of the Community in the area of universal service is more difficult to account for. The Commission outlined its vision of universal service in telecommunications in a Communication released in early 1996. Both Directive 98/10 and Directive 97/33 contain provisions regarding universal service; while Directive 98/10 defines a basket of services which can be funded through universal service funding mechanisms, Directive 97/33 specifies how the costs of universal service can be recovered from certain market participants. In a further Communication, the Commission indicated how it intended to review the universal service financing mechanisms which could be put in place by Member States.

**Establishment of a common framework for the interconnection of networks and services**


81 Universal Service for Telecommunications in the Perspective of a Fully Liberalised Environment, COM(96)73/ Final (13 March 1996).

82 Communication on Assessment Criteria for National Schemes for the Costing and Financing of Universal Service in telecommunications and Guidelines for the Member States in Operation of such Schemes, COM(96)608/ Final (27 November 1996).
Approximation of the general authorization and individual licensing regimes in the Member States

The Community always tried to act on the authorization and licensing regimes of the Member States, without ever obtaining much success. With the telecommunications sector being fully opened to competition, it was imperative to reach some measure of harmonization in that respect, which was done through Directive 97/13, adopted by the Council and the European Parliament on the basis of Articles 47(2), 55 and 95 EC (ex 57(2), 66 and 100a).

Among the difficulties which the new regulatory model presents, one of most daunting comes from the existence of two parallel legislative sets, that of Directive 90/388 (as amended by Directive 96/19) and the more elaborate ONS framework of Directives 90/387 (as amended), 92/44 (as amended), 97/53 and 90/10 and Directive 97/13 on licensing. While the two sets are broadly consistent in substance, the main regulatory concepts differ. Accordingly, it is necessary to discuss each of them separately, before touching upon three central substantive elements in the fully liberalized model, namely universal service, interconnection and licensing.

The model of Directive 96/19

The regulatory model of Directive 96/19 shows some continuity with the previous regulatory models, in that some pre-liberalization concepts are "recycled" in the post-liberalization context. For instance, the definition of public voice telephony, which becomes pointless inasmuch as it served to delineate reserved and liberalized services, nonetheless remains central to the regulatory model.

Indeed, pursuant to Directive 90/388 as amended by Directive 96/19, Member States must impose many specific obligations — as well as some specific rights — on certain actors (in practice the former monopoly holders) in order to ensure that competition takes root on liberalized markets. The main ones are:

- TOs must provide interconnection to the public voice telephony service as well as the public switched telecommunications network to other providers authorized to provide the same services or networks and publish standard interconnection offers.65

63 The relationship between these two sets is discussed in detail supra, Chaps. Two, I.E. and I.F.
66 Ibid., Art. 4(2), as inserted by Directive 96/19, Art. 1(6).
Similarly, Member States may impose an individual licensing process only for public voice telephony, public telecommunications networks and other networks using radio frequencies. In addition, contributions to a universal service fund can only be required from providers of public telecommunications networks. Providers of public telecommunications networks are entitled to non-discriminatory treatment as regards the grant of rights of way.

The concept of public voice telephony therefore remains a central role under the regulatory model of Directive 96/19, since it triggers the application of a heavier regulatory framework.

As for "public telecommunications network", it is redefined by Directive 96/19 as "a telecommunications network used inter alia for the provision of public telecommunications services". The latter term in turn means "a telecommunications service available to the public". Directive 96/19 does not further define what is meant by "available to the public". It could be that it is defined along the same lines as the phrase "for the public" in the definition of public voice telephony, in which case at least some guidance could be derived from the Corporate Network and CUG concepts. Yet the definition of public voice telephony comprises other elements besides the phrase "for the public".

The concept of "public telecommunications services" includes not only the definition of "telecommunications services". As a consequence, public packet-switched data services (which were liberalized in 1990 by Directive 90/388), for instance, could be considered as "public telecommunications services", since they are available to the public. The public packet-switched data network would then be a "public telecommunications network" and accordingly subject to the provision mentioned above, which could actually put it under a heavier regulatory burden than before liberalization. The concept of "public telecommunications network" may thus be somewhat inconsistent with the previous regulatory models.

The regulatory model of Directive 96/19 therefore relies on the concepts of "public voice telephony" and "public telecommunications network" in order to draw the line between the lighter regulatory framework generally applicable and the heavier framework applicable to services where concerns related to the public interest or to possible restrictions of competition arise, with some extra obligations being imposed on TOs only. The regulatory model of Directive 96/19 could be presented as Figure 1.5.

The whole of the telecommunications sector is now liberalized, as shown by

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48 Ibid., Art. 2(3) and 3, as replaced by Directive 96/19, Art. 1(2) and (3).
49 Ibid., Art. 4(11), as inserted by Directive 96/19, Art. 1(6).
50 Ibid., Art. 46, as inserted by Directive 96/19, Art. 1(6).
51 Namely the following: "switching", "commercial", "direct switching and transport in real time" and "between network termination points".
the grey shading. Furthermore, specific rights and obligations apply to “public voice telephony” and “public networks”. As mentioned above, the definition of “public networks” is such that it could also encompass networks used to provide data and advanced services.

C. THE MODEL OF THE NEW ONP FRAMEWORK

The new ONP framework results in a more complex regulatory model than that of Directive 96/19.

Under the old ONP framework, ONP directives applied to infrastructure and reserved services, ie leased lines and voice telephony. Members States were thus bound by the ONP Directive to impose certain obligations on their respective TOs, which held exclusive rights for the provision of infrastructure and

62 With Recommendation for sectors which were liberalized but where concerns arose regarding access, such as public packet-switched data services or ISDN.
reserved services. As regards the scope of application, Article 1 of Directive 90/387 appears not to have been changed: the ONP framework concerns "public telecommunications networks" and "public telecommunications services". The definition of "public telecommunications networks" was modified in Directive 90/387 in the same way as in Directive 90/388, thus giving rise, as discussed above, to some uncertainty as regards the meaning of "publicly available". No definition of "public telecommunications services" is given, although the other two ONP Directives and Directive 97/13 use the term "publicly available telecommunications services" instead.

Now that exclusive rights were going to be removed, the future of the ONP framework was for a time under intense discussion. While the outright termination of ONP was never seriously envisaged, the class of ultimate addressees of the ONP obligations93 had to be redefined in a liberalized context. The solution retained in Directive 96/19 - imposing certain extra obligations on TO's in their quality as former monopoly holders - was not sustainable in the long run, since it relied on historical facts only. During the consultations which were held by the Commission, TO's argued for the use of more technical concepts such as control over bottleneck facilities, while new entrants claimed that the ONP obligations should apply according to market-oriented concepts such as dominance.94 The Community institutions went in the direction requested by new entrants, although they did not retain the dominance criteria as it is understood under EC competition law. Under the new ONP framework, the ultimate addressees of ONP obligations are "organizations which have significant market power", which are defined through an apparently "bright line" rule, namely a market share of more than 25% of the relevant market.95 It will be noted that none of the new ONP Directives gives any further details on what the relevant market could be or even how it could be defined for the purposes of the ONP framework. The application of this definition is in the hands of the national regulatory authorities (NRAs), which must decide which telecommunications operators meet that rule-of-thumb criterion and notify them to the Commission and other NRAs.96 NRAs are free, however, to stray from the 25% criterion and make a determination based on an "organization's ability to influence market conditions, its turnover relative to the size of the market, its control of the means of access to end-users, its access to financial resources and its experience in...

93 The ONP Directives themselves are addressed at the Member States, but many of the provisions actually obligate Member State to grant certain rights and/or impose certain obligations on actors in the telecommunications sector (the ultimate addressees).

94 As evidenced in the consultation on the Green Paper on the liberalisation of telecommunications infrastructure and cable television networks, COM(93)1586 final (3 May 1993) at 10-1, 24.


96 Directives 92/54, Art. 11(4), as added by Directive 97/51, Art. 2(1); Directive 96/10, Art. 25(2). Directive 97/13 is not so explicit, but it can be derived from Art. 3(2) and (3) that it is up to the NRA to decide whether an organization has significant market power: any other result would not be consistent with that other ONP Directives.
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providing products and services in the market. In the end, therefore, the ultimate addressees are determined by NRAs, on the basis of criteria defined in Community legislation.

The new Licensing Directive, Directive 97/13, follows by and large the same regulatory model, where the central element is the distinction between "public telecommunications networks" and "publicly available telecommunications services", on the one hand, and other networks and services, on the other hand.

The new regulatory model as resulting from the ONP directives affected the distinctions which were at the core of the model of the 1987 Green Paper and, with a few modifications, of the transitional model (and were "recycled" to some extent in the model of Directive 90/19):

- The distinction between regulatory and operational functions, which underpinned Directive 90/388, is given a new dimension by the inclusion of general provisions on the independence of the NRA towards both the TO and the State.
- The distinction between services and infrastructure has not expressly been repudiated, but the new regulatory model uses the terms "network" and "service" in parallel, so that every category in the new model encompasses both networks and services, which would indicate that the distinction between networks and services is not very useful anymore. Nonetheless, that distinction retains a role, among others in the rules relating to interconnection and licensing;
- The distinction between reserved services (and public infrastructure), on the one hand, and liberalized services (and alternative infrastructure), on the other hand, disappears, since it serves no purpose anymore. The new regulatory model replaces it with a new cardinal distinction, between public or publicly available networks and services, on the one hand, and other networks and services on the other hand. As was mentioned before, the meaning of the terms "public" and "publicly available" has not yet been elaborated, and the only guidance now available concerns the interpretation of the phrase "for the public" in the definition of "public voice telephony" under the regulatory model of the 1987 Green Paper. However, each of the new ONP Directives, as well as the Licensing Directive, adds its own enumerations or explanations of "public" or "publicly-available" services, so that in the end these categories may become no more than empty labels to cover a series of specific categories defined in the context of each legislative measure;
- The distinction between access and interconnection, even if it is not very solid, as explained above, retains some significance, since the new ONP


99 As discussed supra, note 32, "network" and "infrastructure" are not mutually co-terminous.
The regulatory model of the new ONF framework does not extend interconnection rights under EC law beyond the sphere of organizations providing public networks or services.\footnote{Directive 97/35, Art. 3(1), 4(1).} The regulatory model of the new ONF framework could thus be pictured as shown in Figure 1.6.

In comparison with the model of Directive 96/19, it can be seen that the concept of "public or publicly-available services" has replaced that of "public voice telephony". Much like in the case of public networks, there is no further explanation of the terms "public" or "publicly-available", which could mean that some data or advanced services would be brought into the category of public or publicly-available services and thus potentially subject to a heavier regulatory framework under the new ONF framework than under Directive 96/19.

The overall picture, as depicted in Figure 1.7, is thus a three-tiered framework:
- At the top, subject to the heaviest regulatory framework, are organizations with significant market power (as determined by NRAs) which are the ultimate addressers of ONP obligations (taking into account that, for the time being, the organizations entrusted with the provision of universal service are likely to have significant market power as well);

- In the middle, subject to some regulatory constraints, including the need to obtain an individual license, but also benefiting from certain privileges, such as the right to obtain interconnection, are public/publicly available telecommunications services and public telecommunication networks. Since in all likelihood, organizations having significant market power will also provide such services and networks, they will also be subject to this layer of regulation;

- At the bottom is the general regulatory framework applicable to all actors on the market and to the provision of all kinds of services or networks.

D. MAIN SUBSTANTIVE ELEMENTS

While public voice telephony and infrastructure were under legal monopolies, public policy concerns translated in a number of constraints imposed on the TO

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9 Directive 97/33, Art. 4(1).
through various instruments ranging from regulations to administrative circu-
lares, including license conditions or cahier de charges. These made up a
relatively opaque regulatory framework, which under the fully liberalized model
had to be adapted to a competitive environment and articulated in open terms.
Furthermore, a number of new issues arose (or took on new dimensions) as a
result of liberalization.

1. Universal service

In the fully liberalized model, universal service rests on the three principles of
continuity (a specified quality must be offered all the time), equity (access
must be offered independently of location) and affordability. Member States
are in principle free to decide on the scope of universal service obligations
(USOs) which they impose on certain telecommunications service providers,
provided they respect Community law. Pursuant to Directive 98/10, Member
States are however bound to include a defined set of services within their
USO, namely access to the PSTN for the purposes of voice, fax and data communi-
cations — on a narrowband scale — directory services, public payphones
and specific measures for disabled users or users with special social needs.
In addition, the ONP framework requires Member States to ensure the availability
of a range of services and features, but not necessarily according to the princi-
bles of universal service. Obviously, the imposition of USOs aims to compel
service providers to offer certain services everywhere, irrespective of geographi-

cal location, and to everyone at a given price, irrespective of the economic

102 These three principles were identified as far back as 1993, in the Communication on the
consultation on the Review of the situation in the telecommunications sector, supra, note 71 at 21.
They have been reaffirmed ever since and are now found in the definition of universal service in
Directive 97/55, Art. 2(1)(g) and Directive 98/10, Art. 2(2)(d).

103 In Member States are free to extend the scope of universal service beyond the services to
be included under the Community law, so long as they do so in line with competition law and
general principles of transparency, proportionality and non-discrimination: see Directive 98/10, Art.
4(3) and the Communication "Universal service for telecommunications in the perspective of a fully
liberalised environment", supra, note 81 at 5. However, industry-wide financing mechanisms for
universal service are available only for access to the PSTN and certain services equally related to it,
as explained in the main text.

104 If it can be assumed that Annex I of Directive 97/55 (which outlines the scope of services
that can be financed through a universal service financing mechanism) provides an indication of the
cost of all services which the Continuity institutions had in mind, fax transmission is implied to be
covered according to Group III specifications and the PSTN must support data transmission as a
minimum of 2400 baud (a speed which is not suitable for more advanced Internet applications such
as WWW browsing).

105 These services are set out in Directive 98/10, Art. 5.8.

106 These are: (i) a range of leased lines, according to Directive 92/44 (as amended by Directive
97/55), Art. 1(2), 7, 11(1a) and Annex II, (ii) emergency services, demand billing, new dialling,
selective call barring, according to Directive 98/10, Art. 9(c) and 14. In addition, Recommendations
92/382 and 92/383 encourage Member States to ensure the availability of packet-switched data
services (PSDS) and Integrated Services Digital Networks (ISDN) on their territory as well.
Furthermore, Directive 97/66 of 15 December 1997 concerning the processing of personal data and
the protection of privacy in the telecommunications sector (1997/70/EC) requires Member States
to ensure that users can take advantage of features concerning telemail billing, calling list informa-
tion and call forwarding which safeguard their privacy rights. Art. 7, 8 and 10.
situation. The very existence of an USO therefore implies that in many cases the services in question would not be offered under normal market conditions since they would not be profit-making. The service provider subject to an USO is therefore bound to incur losses as regards the services covered by the USO in certain cases. 108

In counterpart to the imposition of an USO and in order not to put the service provider subject to it at too great a competitive disadvantage, the service provider could conceivably be relieved from all or part of the losses incurred by the USO. A first possibility would be for the State to assume these losses directly by way of a subsidy to the service provider subject to an USO, subject to Community State aid rules; 109 however, in the current budgetary context, this appears unrealistic. Accordingly, the Community regulatory framework has focussed more on the possibility of spreading the costs of USOs over the industry. Directives 96/19 and 97/33 provide for two mechanisms, namely supplementary charges for interconnection with the service provider subject to the USO or a universal service fund, fed by contributions from the industry in proportion to market activity, in order to compensate that service provider for losses related to the USO. 110 Pursuant to Directives 97/33 and 98/10, supplementary charges or universal service funds can only be used in relation to USOs which Member States are bound to impose under Community law as listed above (access to PSTN, directory services, public payphones, disability/social programmes). 111 Beyond that limited range of services, no USO may be financed through an industry-wide cost-sharing mechanism.

The practical impact of these measures has so far been limited, given that fewer Member States than expected decided to put in place universal service funding mechanisms. 112

108 For the sake of simplicity, this passage is drafted as if only one service provider was subject to an USO for the whole of a territory of a Member State, but it is of course possible to impose USOs on many providers, on a region per region basis. The financing mechanisms described in the text must then be adapted accordingly.

109 How these losses are actually assessed and measured is in itself a controversial subject. The position of the Commission on this issue is set out in the Communication on Assessment Criteria for National Schemes for the Costing and Financing of Universal Service in telecommunications and Guidelines for the Member States on Operation of such Schemes, supra n 82, as recalled inter alia at n 4.

110 See Directive 90/388, Art 4 c (as introduced by Directive 96/19, Art 1d) and Directive 97/33, Art 5a.

111 Directive 97/33, Art 5(1) and Directive 98/10, Art 4(3). It can be mentioned that the two Directives do not refer to the same description for the range of services where an USO can be financed through industry-wide cost sharing. Article 5(1) of Directive 97/33 refers to Part I of Annex 1 of that same Directive, while Article 4(3) of Directive 98/10 refers to the services listed in Chapter II of Directive 98/10 itself (Articles 5-8). The two descriptions are substantially almost identical, and it can be assumed that no discrepancy was intended.

112 While some Member States have provided for universal service funding mechanisms, only two of them (France and Italy) have actually put them in operation: F080 Report on the Implementation of the Telecommunications Regulatory Package, C/566 (1995) 57 (11 November 1999) at 10.
2. Interconnection

Interconnection agreements essentially aim to ensure that the networks of the parties to the agreement are linked in such a way that the customers of one party can both communicate with those of the other party and obtain services provided on the other party’s network by the other party or by a third party.\(^{115}\)

Interconnection is an attractive proposition for telecommunications service providers for a number of reasons. Firstly, the value of their respective networks to actual and potential customers increases with the number of reachable users, a phenomenon known in economics theory as “network effects.”\(^{116}\) Secondly, interconnection in and of itself can be a profitable business, since the provider can ask for compensation in return for connecting one of its customers to a customer of another provider. By the same token, it can readily be seen that the incentives freely to conclude interconnection agreements will vary from one provider to another: the incumbent, with almost complete dominance of the market, gains little by having access to the few customers of a new provider, whereas the new provider absolutely needs interconnection. The incumbent therefore has a very strong bargaining position, and it could impose prohibitive charges on the newcomers, so as to stifle market entry.

In the light of the above, interconnection is a key element of the fully liberalized model. The general principles of the fully liberalized model are that interconnection between public networks and services must be ensured,\(^{117}\) and that operators with significant market power must grant access to their networks and respect the principles of non-discrimination, proportionality, transparency and objectivity.\(^{118}\)

It should be noted that, under the fully liberalized model, the interconnection rules are meant to apply not only to interconnection between competing providers within a given Member State, but also to cross-border interconnection. Accordingly, it is intended that the traditional correspondant system for international communications, as described earlier,\(^{119}\) with its shared facilities and its accounting rates, will disappear as between the Member States.

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\(^{115}\) See Directive 97/33, Art. 2(3)(a) as well as Directive 90/388, Art. 1(b), as added by Directive 96/19.

\(^{116}\) Network effects are discussed in greater detail as a central plank of the long-term case for sector-specific regulation supra, Chapter Four. B.B. and B.C.

\(^{117}\) In addition, these customers are likely to have been lost by the incumbent to the other provider, so that by granting interconnection, the incumbent is in fact making it easier for the other provider to take customers away from it, since interconnection prevents these customers from being faced with a loss of network effects when moving to another provider.

\(^{118}\) Directive 97/33, Art. 3 and 4.

\(^{119}\) Directive 97/33, Art. 4(2), as well as Directive 90/388, Art. 4a (as introduced by Directive 96/19).
3. Licensing

Under EC telecommunications law, authorizations comprise general authorizations and individual licenses. A general authorization procedure provides that undertakings complying with certain conditions may offer a given service without a prior and explicit authorization from the authority.120 An individual licensing procedure, in contrast, requires undertakings to obtain a prior and explicit permission from the regulatory authority before offering a given service.121 It follows from that distinction that general authorizations will contain a limited number of "off-the-shelf" conditions that can be formulated ex ante to apply to all providers alike. In contrast, individual licences are "tailor-made" to suit each licensee (within the limits of general principles such as necessity, proportionality and non-discrimination); accordingly, the licensing authority has more discretion in the formulation of individual licence conditions, and furthermore it can use individual licences to impose on a given licensee more exacting conditions than could justifiably be imposed through a general authorization (e.g. conditions relating to market power or control over certain facilities).

The fully liberalized model affects authorization procedures in two respects. Firstly, the abolition of special and exclusive rights implies that entry in the telecommunications sector should be free; in cases where conditions must be imposed upon entrants, they must be objective, proportional, transparent and non-discriminatory.122 In particular, if licences are required, their number should not in principle be limited; if it is only possible to grant a limited number of licenses (eg for lack of available frequencies), they must be awarded according to the principles just mentioned.123 Secondly and more importantly for the present discussion, authorization procedures must not prevent market

120 The term is defined at Directive 97/13, Art. 2(1)(a) Under Directive 97/13, general authorization may be with or without a prior registration procedure, whereby an undertaking must satisfy the regulatory authority that it intends to offer a given service before beginning to do so (without having to obtain permission from the authority): see Art 2(1)(a), 5(2). In contrast, Art 3(2) of Directive 90/388 distinguishes between "general authorization" and "declaration procedures", which correspond to "general authorization without registration" and "general authorization with registration" respectively, for the purposes of Directive 97/13. This slight terminological discrepancy between the two directives is immaterial for the discussion here. 

121 See the definition at Directive 97/13, Art. 2(1)(a): There is no reason to believe that Directive 90/388 uses that term any differently.

122 Imposing entry conditions on any other basis would amount to the creation of a special right within the meaning of Directive 90/388, Art. 1, as introduced by Directive 94/44. That definition of "special right" has been upheld in substance by the ECJ in the context of litigation surrounding Directives 90/387 and 92/44: Case C-302/04, Judgment of 12 December 1996, R. v. Secretary of State for Trade and Industry, ex p. BT [1996] ICR 16417 at rec. 34. The creation of special rights in the telecommunications sector is not allowed anymore, pursuant to Directive 90/388, Art. 2(1) (see also Directive 97/13, rec. 3).

123 Art. 7 of Directive 90/388 (as replaced by Directive 96/19) provides that the number of licences may only be limited because of the lack of available radio frequencies. In addition, Art. 10(1) of Directive 97/13 allows for the number of licences to be limited if not enough numbers are available; this discrepancy is not so significant, given that Directive 97/13 expressly states that limitations for reasons of number may only apply "for the time necessary to make available sufficient numbers". 
entry or distinct competition; it follows therefrom that any authorization proce-
dures provided for in national law must be both necessary and proportionate.124

These two conditions are reflected in the choice of authorization procedure:

- Authorizations procedures should only be used when essential requirements are at stake;125 these requirements have been harmonized in the EC regulatory
framework.126

- Authorizations procedures should intrude as little as possible on the freedom to provide services and on competitive market forces. Hence, as a rule, the
authorization procedure should take the form of a general authorization.127

Only in a few cases, where ONP obligations are involved or scarce resources
must be allocated, should Member States be able to require individuals' licences.128

V. CONCLUSION

On the way to full liberalization, EC telecommunications law went through no
less than four regulatory models within 10 years, from the traditional model
(until 1990), through the model of the 1987 Green Paper (1990-1996) and the
(1995-1998) through to the fully liberalized model (in place since 1998). The
evolution was progressive, however, with each new model building on the
elements of its predecessor.

In the course of a cursory examination, this Chapter showed that the carefully
crafted political compromises that led to the full liberalization of telecommuni-
cations within the EC in 1998 translated into regulatory models that — perhaps
inevitably — echoed the vagueness inherent in such compromises. Central
concepts such as "regulatory" and "operational" functions, "telecommunications
services", "telecommunications networks", "public voice telephony", "access", "interconnection", "publicly available telecommunications services", "public telecommunications networks", "significant market power" are not
defined precisely. In fact, this is probably no agreement yet amongst decision-
makers and interested parties as to what these terms mean. Indeed the actual
shape of the fully liberalized model still remains to be defined in part through

124 See Directive 96/19, rec. 9 and 10, as well as Directive 97/13, Art. 3(2).
125 Directive 90/388, Art. 2(3). See also Directive 97/13, Arts. 3(2), 4 and 5.
126 For the telecommunications sector in general, essential requirements comprise network
security; network integrity; interoperability of services, data protection; environmental protection;
local and country planning as well as frequency management; see Directive 90/388, Art. 1 (as
modified by Directive 96/19), Directive 90/387, Art. 2(6) (as modified by Directive 97/13); and
Directive 97/13, Art. 26). Whether and how each of these requirements applies will depend on the
circumstances of the service in question; see Directive 92/44, Art. 6(3); Directive 97/13, Art. 10 and
Directive 96/10, Art. 3(2).
127 Directive 97/13, Art. 3(2).
128 See Directive 90/388, Art. 2(3) and Directive 97/13, Art. 7.
the interpretation that will be given to those terms in the course of decision practice.

Nevertheless, the magnitude of the achievements since the 1987 Green Paper must be acknowledged. The following Chapter shows how Article 86(3) EC (ex 90C3)) was used as a legal basis, in combination with Article 95 EC (ex 100a), in order to give an impulse to the liberalization process. Afterwards, the availability of that basis for the further development of EC telecommunications law is investigated.
THE "HARD CORE" OF REGULATION AND ARTICLE 86 EC

This Chapter aims to show how Article 86(3) EC (ex 90(3)) was used to give an impulse to EC telecommunications policy in the run-up to liberalization (I.), and how its use is bound to diminish now that liberalization has taken place (II.).

I. THE INTEGRATION OF ARTICLES 86 AND 95 EC IN THE RUN-UP TO LIBERALIZATION

This section surveys the use of Article 86(3) EC (ex 90(3)) in the run-up to liberalization, with emphasis on its relationship with Article 95 EC (ex 100a). It starts by recalling the position taken by the Community institutions involved in the implementation of the 1987 Green Paper (A.) and the compromise reached in December 1989 (B.). The ECJ added its legal assessment of the situation in the course of the challenges to Directives 88/301 and 90/388 (C.). Afterwards, Article 86(3) EC was used as a basis for a number of subsequent directives (D.), and in fact it was integrated with Article 95 in an original legislative procedure (E.), whereby directives adopted under Article 86(3) EC form a regulatory "hard core" that gives the impulse for the enactment, implementation and interpretation of more detailed directives adopted pursuant to Article 95 EC. The interaction of the two bases is illustrated with some concrete examples, concerning specific issues relating to universal service, interconnection and individual licenses (F.).

A. THE STARTING POINTS

In the run-up to the main Directives implementing the 1987 Green Paper, namely Directive 88/301 concerning terminal equipment and Directives 90/387 and 90/388 concerning services, the appropriate legal basis proved to be a vexing issue between the Commission and the Council. It will be recalled that the regulatory model of the 1987 Green Paper foresaw the liberalization of telecommunications terminal equipment and services (with the exception of
reserved services, comprising public voice telephony), and the maintenance of existing special or exclusive rights over telecommunications networks.1

While all actors agreed that Article 95 EC (ex 100a) could be used, disagreement centred on the possible use of another legal basis, namely Article 86(3) EC (ex 90(3)). It is useful to recall the text of Article 86 EC:

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

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

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

In addition to any substantial distinction between Articles 86(3) and 95 EC (ex 90(3) and 100a) as to their field of application, they involve different legislative procedures. At the time of the 1987 Green Paper, Article 95 EC (ex 100a) provided for measures to be enacted pursuant to the cooperation procedure, whereby the Council adopts the measure and the European Parliament is involved to a certain extent,2 since the entry into force of the Treaty on European Union in 1993, Article 95 EC now falls under the co-decision procedure, under which measures are enacted jointly by the Council and the European Parliament.3 In any event, the power to enact measures under Article 95 EC has always been with the Council, and is now shared with the European Parliament.

In contrast, Article 86(3) EC (ex 90(3)) is one of the rare instances in the EC Treaty where the Commission is entrusted with the power to issue a generally applicable instrument such as a directive.4 Neither the Council nor the European Parliament has any explicit role in the law-making process under Article 86(3) EC. Nevertheless, from a broader political standpoint, it would not be desirable for the Commission to ignore the views of the Council or the

1 Supra, Chapter One, IV.
2 The cooperation procedure is set out at Article 149 EC Treaty, as it had been introduced by the Single European Act in 1986. That Article was subsequently repealed by the Treaty on European Union in 1993, but its context was moved to Article 222 EC (ex 186a).
3 The co-decision procedure is set out at Article 351 EC (ex 189a), to which Article 95 EC refers.
4 See also Article 79 EC (ex 48), whereby the Commission is empowered to make regulations concerning the conditions under which workers may remain in another Member State following the termination of their employment there.
European Parliament when acting under Article 86(3) EC, if only because these two institutions have the final say under the other legal bases of the EC Treaty and Member States will be in charge of implementing measures taken under Article 86(3) EC. By exceptionally leaving the Commission with the last word, Article 86(3) EC in fact tips the institutional balance in favour of the Commission, and puts it in a stronger position to "convince" the other actors to follow its view.

The choice of legal basis therefore has a significant institutional impact: pursuant to Article 95 EC, the Council (now with the European Parliament) is in the "driver seat", whereas the Commission assumes that role under Article 86(3) EC.

In addition to these political considerations, fundamental differences between Commission and Council as to the priorities and timetable of telecommunications reform also lurked behind the debate surrounding the legal basis, as will be seen below.

1. The position of the Commission

In the 1987 Green Paper, the Commission proposed to change the Community telecommunications policy. Whereas until then the focus had been on co-ordination between Member States as regards service offerings, in particular as regards the introduction of new services, the Commission advocated the increased opening of the telecommunications sector to competition.4

There are now many service functions and features that can be performed either by the public network or by a private network or the terminal equipment attached to the network.

This fact tends to make traditional regulatory boundary lines of services more and more unstable. All countries are confronted with the option of either extending the application of telecommunications regulation to the sector of data-processing terminals and imposing more and more restrictions (many of which will be difficult to control) on the growing capability of private installations in switching and intelligent functions, such as digital PABXs or personal computers connected to the network, or defining the telecommunications regulatory framework more narrowly, allowing the full benefits of technical progress to be reaped.

The trend points world-wide towards the latter solution. The question facing Europe is how to translate this trend into a step-by-step transformation of the regulatory measures in force.

The above excerpt, among others, announced the drive towards liberalization that would become a central feature of Community telecommunications policy after the 1987 Green Paper. For the Commission, liberalization is the most appropriate response to the evolution of the telecommunications sector. Harmonization and co-ordination of PTO service offerings, as had been done

3 Supra, Chapter One, 2. 4 1987 Green Paper at 42. 5 See also ibid at 177 ff.
before, would retain some significance, but not as the mainstay of telecommunications policy.

In legal terms, the above excerpt shows that the Commission anticipated that it might be necessary to "roll back" the domain of monopoly rights granted by Member States to their respective PTOs. Even if prima facie it should be possible to do so within the context of a directive based on Article 95 EC (ex 100a), choosing that legal basis would leave the final word with the Council, where considerable resistance to any loosening of national monopolies could be expected from a number of Member States. The chances of success were far greater if the Commission could ultimately decide on the liberalisation measures pursuant to Article 86(3) EC (ex 90(3)). In the 1987 Green Paper, the Commission already alluded to the possibility of using Article 86(3) EC as a legal basis for measures in the telecommunications sector. The clearest statement came in the concluding section: 8

In pursuing the implementation of these proposals, and the lifting of existing restrictions, the Commission will take full account of the fact that the competition rules of the Treaty apply to Telecommunications Administrations (PTOs), in particular to the extent they engage in commercial activities. It may use, as appropriate, its mandate under Article 90(3) (now 86(3)) of the Treaty to promote, synchronise and accelerate the ex-going transformation.

According to the Commission, therefore, the implementation of the objectives outlined in the Green Paper would rest on both legal bases. The Commission did not define their respective realms very precisely, however. In one passage, it seemed to indicate that Article 86 EC (ex 90) would be used for "network access", while Article 95 EC would provide the basis for the harmonization of "technical specifications". For the Commission, both sets of measures would fall under the broad heading "Open Network Provision" (ONP), which would concern "access" in general. The Commission also states later that access comprises "technical interfaces", "tariff principles" and "restrictions of use". 9

There is no indication as to how these three categories relate to the two legal bases put forward by the Commission.

For the Commission, Article 86(3) EC could therefore be used to spearhead the implementation of the liberalization goals of the 1987 Green Paper. Still the 1987 Green Paper does not put forward any cogent explanation as to why Community measures would be taken under Article 86(3) as opposed to Article 95 EC.

In all likelihood, the Commission waited for the reaction of the other institutions and of the various actors in the telecommunications sector before being

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8 Ibid. at 62, n. 69.
9 Ibid. at 186.

8 Both P. Reynolds, "La Communauté européenne et les télécommunications: développements récents en matière de concurrence" [1991] RIDE 103 at 128-9 (Note 42) and V. Hatzopoulos, "L’"Open Network Provision", moyens de la déréglementation" (1994) 30 RTD exc. 63 at 70-1 note that the 1987 Green Paper was not very clear as regards legal bases.
11 1987 Green Paper at 70.
more explicit. After having collected comments on the 1987 Green Paper, it was announced at the beginning of 1988, in its Communication on the Implementation of the Green Paper up to 1992, that it would issue directives based on Article 86(3) EC for (i) the liberalization of the market for terminal equipment and (ii) the opening of telecommunications services and the separation of regulatory and operational functions.

In view of persisting controversy, the Commission saw fit to set out its position in greater detail in the explanatory memorandum accompanying its proposal for the ONP Framework Directive:

"...The Commission has been guided by two basic considerations:
- On the one hand, its duty of surveillance and its obligation to end restrictions which constitute infringements of the Treaty;
- On the other hand, the need to create the conditions for an open Community-wide market, by progressive harmonization.

In this context, it seems useful to recall the respective roles of Article 100A [now 95] and the duties of the Commission under Article 90(3) [now 86(3)] of the Treaty.

On the one hand, Article 100A [now 95]... has... a function of harmonization... in order to abolish barriers resulting from a divergence of national legislation or regulations.

On the other hand, the Treaty, in particular Article 90 [now 86], entrusts to the Commission a specific obligation of surveillance and a duty to act with regard to Member States concerning their obligations under Article 90(1) [now 86(1)]...

The Commission therefore considers that Article 100A and Article 90 [now 95 and 86] are complementary and cannot be substituted for each other. Accordingly, the Commission considers a two-pronged approach appropriate, emphasizing the complementarity of progressive harmonization (Open Network Provision - ONP) via Council Directives (Article 100A [now 95]) and action under the Commission’s obligation of surveillance and duty to act with regard to compliance with Treaty rules (Article 90C [now 86(3)])... via a Commission Directive.

In the above passage, the Commission presents for the first time an articulated view of the relationship between Articles 86(3) and 95 EC: in its opinion, the two legal bases are complementary and not interchangeable. The former applies more precisely when the Commission acts in its function as guardian of..."
the Treaty to put an end to violations of the provisions concerning the free movement of services (Article 49 EC (ex 59)) or competition (Articles 81-82 EC (ex 85-86)). In that respect, the use of Article 86(3) can be seen as a "fast-track" alternative to Article 226 EC (ex 169). Article 95 covers harmonization measures in order to smooth out barriers resulting from national legislation. According to the Commission, no other legal base than Article 86 EC (ex 90) could be used for the purpose of removing special or exclusive rights or mandating the separation of operational and regulatory functions.

2. The position of the Council

Some Member States agreed with the Commission. Yet for a majority, Community telecommunications policy could evolve to meet the goals set out in the 1987 Green Paper without breaking with the previous ways, as the Commission appeared to propose. As shown in the Council Resolution of 30 June 1988, the Council envisaged a different path than the Commission, whereby the organization of the telecommunications sector as it was in 1988 would not be changed dramatically. The sector would blossom not so much by "rolling back" exclusive or special rights, but rather by ensuring a high degree of harmonization in the offerings of the respective PTOs, so that all users (and providers of liberalized services, which count as users under that model) would find the same basic offerings throughout the EC and would therefore be in a position to bring forward the common market for telecommunications. As the Council underlines, this implies not only that PTOs would be under certain obligations relating to their special or exclusive rights, but also that users (including providers of services to third parties) will suffer from certain restrictions with respect to access to the public network. Amongst the "major policy goals" identified by the Council, the first is indeed "Community-wide network integrity", based on "full interconnectivity between all public networks". The creation of an "open common market for telecommunications services" comes in second place, and even then it is to be done only "progressively" and in close connection with the development of the framework for Open Network Provision (ONP). Furthermore, cooperation between PTOs (and others as well) is to be encouraged as far as is compatible with competition law. Liberalization of certain telecommunications services is not openly mentioned in the Council Resolution; it would seem to constitute more of a side-effect from harmonization than an explicit policy goal. Furthermore, liberalization would in that context constitute the consequence of a particular choice of Community policy (among a range of possible options under the EC Treaty), and not a result directly mandated by the Treaty.

In light of the position outlined above, it can be understood that, contrary to the Commission, the Council (or at least a majority thereof) did not seem to see a role for Article 86(3) EC (ex 90(3)) in the development of the Community telecommunications market; the measures to be taken to fulfil the objectives of the 1987
Green Paper (and generally, to achieve the single market in the telecommunications sector) reflected policy choices as to telecommunications policy at the EC level, and accordingly they should rest upon Article 95 EC. Moreover, any questions of compatibility with the EC Treaty should be raised in infringement proceedings before the ECJ pursuant to Article 226 EC (ex 169), and not under Article 86(3) EC, which offers less procedural guarantees to the Member States.17

3. The position of the European Parliament

As far as legal bases are concerned, the European Parliament agreed with the Council that Article 95 EC (ex 100a) would be the appropriate legal basis for all measures related to the achievement of the goals of the 1987 Green Paper. In a Resolution of 23 November 1989, the EP expressly called upon the Commission to modify the legal basis of its Directive on competition in the markets for telecommunications services and bring it under Article 95 EC.18

The substantive concerns of the EP were not the same as those of the Council, however. The EP was worried that liberalization would be done at the expense of services to the population in general. It considered that it is “important that basic universal services be provided at reasonable prices for the entire population” and that such services “should be provided exclusively by [PTOs], since any break-up of this monopoly might engender an unbridled profit mentality, thus jeopardizing the provision of certain services for marginal user categories”.19 For the EP, accordingly, monopoly rights in the telecommunications sector were not necessarily incompatible with the EC Treaty, and their abolition would reflect a policy choice on the way towards the realization of the single market, hence the insistence on using Article 95 EC as a legal basis.

B. The Compromise of December 1989

In the meantime, the Commission had already enacted Directive 88/301, which provided for the removal of special or exclusive rights concerning telecommunications terminal equipment, on the basis of Article 86(3) EC (ex 90(3)). A significant number of Member States challenged the legal basis of Directive before the ECJ;20 the judgment of the ECJ is discussed further below.21

17 For more details, see the position of the Member States as set out in the Report for the Hearing in Case C-202/88, France v. Commission [1991] ECR 1123 at I-1; 236 and ff.
19 European Parliament Resolution of 14 December 1989 to the need to overcome the fragmentation in telecommunications [1989] OJ C 126/1 at clause f4 and 13 respectively.
20 Case C-202/88, France v. Commission [1991] ECR 1123. France was supported by Italy, Belgium, Germany and Greece. All of these Member States together tallied more than enough votes to block a proposal under Article 95 EC, which would lead one to believe that Directive 88/301 might not have been enacted with the same consternation under Article 95 EC; if it is assumed that Member States which went before the ECJ had reservations about the substance of the Directive as well as its legal basis.
21 Infra, J.C.
Figure 2.1 Disagreement on the scope of Directive 90/384

The Commission was bound to proceed in the same fashion for the liberalization of telecommunications services. At the end of 1988, it had adopted a draft Directive on competition in the markets for telecommunications services, based on Article 96(3) EC,22 at the same time, a draft Directive on Open Network Provision (ONP), based on Article 95 EC (ex JOA), was tabled before the Council.23 The Member States disagreed with the Commission not only on its legal basis of the draft Directive based on Article 96(3) EC, but also on its substance. The scope of the disagreement can be illustrated as shown in Fig. 2.1.

The Council agreed with the Commission that, as regards voice telephony, all basic voice telephone service (public voice telephony) would remain undistinctive or special rights (thus excluding the possibility that the basic transmission of voice communications would be done on private networks, as reflected in the above figure), while other voice services would be liberalized.24 As regards data services:

22 See Bulletin EC 13-1987, pars. 2.1.72.
24 See supra, Chapter 11, II.2.c, for a discussion of how public voice telephony was defined as the scope was left for other voice services.
communications, there was also agreement that any service going beyond basic data communication, ie the mere carriage of data on the public packet-switched network, would be liberalized.

Disagreement between the Commission and the Council centred on the regime applicable to basic data services. At that point in time, Member States followed different models for the regulation of the data communications sector. In some Member States, such as the UK, public data services were not very developed, since the official policy had been to leave it to the users of data services (back then mostly large corporations and multinationals) to arrange for these services, usually by putting together their own data networks (self-provision) or - where data services were not subject to exclusive rights - by purchasing such services from a private service provider. Other Member States, however, had taken a public service approach and entrusted the PTO with the rollout of national packet-switched data networks, so as to make data communications available to a large class of customers; that model usually implies the grant of exclusive rights, in order to bring as much traffic as possible onto the data network so that the cost of the public service obligations are minimized. Such was the case in France, where in addition the deployment of a nationwide data network had gone hand in hand with the Ministre programme. For the latter group of Member States, a complete liberalization of basic data transport would upset the financial balance of public packet-switched data communications, among others by allowing "cream-skimming" by the new service providers.

In its draft Directive, the Commission was apparently ready to allow Member States until 31 December 1992 to liberalize basic data services, so as to leave them time to adjust the financial regime of the public network. After that date, basic data services would fall under the same regime as other liberalized services, ie no other conditions than essential requirements (as defined in the Directive) could be imposed on the authorization to provide the service. That was not sufficient for the Member States concerned. On 28 June 1989, a Directive on competition in the markets for telecommuni-
cations services was adopted, but it was not immediately notified to the Member States. It appears that the Commission was anxious to avoid a conflict with the Council over both the substance of this Directive and the use of Article 86(3) EC as its legal basis, and chose instead to suspend the notification of the Directive until some form of consensus could be reached with the Council, which was also debating the draft ONP Directive. The Commission had however indicated that, in the absence of agreement in the Council, that Directive would be notified on 1 April 1990. Discussions were held in the fall of 1989, and a compromise was reached at the Council meeting of 7 December 1989. The "Compromise of December 1989", as it is often referred to, involved a number of points, which were summed up by the Council as follows:

The Council:
- noted that a large majority of delegations express their agreement with the contents of the amendments made by the Commission to Articles 3 and 10 and the recitals of its Directive on competition in markets in telecommunications services enabling the Council to adopt the ONP Directive as part of an overall compromise, while some delegations continued to have reservations on that content;
- welcomes the spirit of cooperation shown between the Commission and the Member States, which has made possible a significant step forward in the completion of the internal market in telecommunications services;
- notes that a large majority of Member States nevertheless dispute the legal basis chosen by the Commission for its Directive and reaffirms that Article 106a [now 95] provides the appropriate basis for implementing the aims set out in the Commission's Green Paper and the Council Resolution of 30 June 1988.

The first dash signals that the Commission has changed its Directive of 1989 in order to accommodate the group of Member States that took a public service approach to basic data services. As is reflected in Article 3 of Directive 90/388, while those services must be liberalized, Member States were allowed to impose restrictions upon service providers going beyond essential requirements: these restrictions may pertain to the permanence, availability and quality of service, or to the safeguard of the task of general economic interest imposed on public service operators.

39 See Blanfix-Obermesser, supra, note 25 at 99.
40 See Bull. EC 6-1989, para. 2.3.95.
42 Before that, an informal meeting had been devoted to the issue of telecommunications liberalization and harmonization on 12 September 1989; see Blanfix-Obermesser, supra, note 25 at 97.
44 This summary is found in Council Press Release 235/89, ibid., where it is included within quotation marks, thus indicating that it is a direct extract from the records of the Council. See also C. Hacker, "Le compromis du 7 décembre 1989" [1990] LEF 73.
46 These are the three characteristics of universal service, as it was defined later in Directive 97/35. See supra, Chapter One, IV. D.1.
By the Member State upon its PTO. In addition, the Member States agreed to put
packet-switched data services high on the list of topics for which a specific ONP
instrument would be agreed. In the end, therefore, basic data services find
themselves in the awkward position of being liberalized on almost the same
footing as other liberalized services (but for the grace period and the additional
conditions provided for at Article 3 of Directive 90/388), while being covered by
ONP on the same basis as infrastructure or reserved services such as voice
telephony, thus reflecting the various regulatory approaches to these services.

The second dash has greater long-term significance, since it represents an
acknowledgement that the Commission had accepted to change the substance
of a Directive based on Article 86(3) EC (ex 90(3)) in order to obtain the support
of the Council (presumably the qualified majority which would have been
required for the same measure to be adopted pursuant to Article 95 EC (ex
100a)), and to delay the adoption of such a Directive until it had gained such
support. Some criticism was levelled at the Commission for compromising on
the use of Article 86(3) EC; others noted that the Commission had acted without
compulsion and merely delayed the entry into force of its Directive without
abandoning it. It is true that the Commission had not prejudiced its legal
position, but it had nonetheless recognized the practical and political limits of its
power to issue Directives pursuant to Article 86(3) EC, and created a precedent
in inter-institutional practice. In every subsequent resolution on telecommunica-
tions policy, the Council would recall the "Compromise of December 1989" in
order to remind the Commission that it should seek the support of the Member
States before enacting a Directive based on Article 86(3) EC. Finally,
the third dash in the account provided by the Council indicates that
there was still no agreement on the appropriate legal basis for the measures
presented by the Commission, since a "large majority" of Member States would
have favoured Article 95 EC. In any event, since the Commission had modified
the substance of its Directive in order to make it acceptable to the Council,
the dispute on the legal basis became pointless, at least from the point of view
of the Council. The views of the European Parliament, on the other hand, had not
been taken into account, and, for its perspective the Compromise of December 1989
was probably not satisfactory.


See Recommandation 92/88 of 5 June 1992: on the harmonized provision of a minimum set of
gateway-switched data services (PSDS) in accordance with open network provision (ONP) principles,
des services de telecommunication dans la reglementation europeenne" (1989) DIT 77 et 64.


See the Council Resolution of 17 December 1992 on the assessment of the situation in the
Community telecommunications sector [1993] OJ C 225, the Council Resolution of 22 July 1993 on
the review of the situation in the telecommunications sector and the need for further development in
that market [1993] OJ C 213:1, the Council Resolution of 22 December 1994 on the principles and
instrumental for the liberalization of telecommunications infrastructures [1994] OJ C 379:4 and the
Council Resolution of 14 September 1995 on the implementation of the future regulatory framework
C. THE LEGAL ASSESSMENT OF THE ECJ

The "Compromise of December 1989" was very much a political compromise, which did not rest on any firm legal basis. At that time, the legal situation was not very clear, since Directive 88/301 on competition in the markets in telecommunications terminal equipment, the first directive adopted on the basis of Article 86(3) EC (ex 90/3) in the wake of the 1987 Green Paper, had been challenged by a number of Member States before the ECJ, and the case was still pending. Following the compromise, the Council proceeded quickly with the adoption of Directive 90/387 on the establishment of the internal market for telecommunications services through the implementation of Open Network Provision (ONP), based on Article 95 EC, on 28 June 1990, and in order to underscore its willingness to move in step with the other Community institutions, the Commission adopted on the same day Directive 90/388 on competition in the markets for telecommunications services, as modified in view of the compromise. Some Member States still contested the validity of Directive 90/388 before the ECJ.40

The ECJ ruled on Directive 88/301 on 19 March 1991 (Terminal Equipment case),41 and on Directive 90/388 on 17 November 1992.42 These two cases are of prime importance for the interpretation of Article 86 EC (ex 90); they have been discussed by many authors.43 Since, on the issue of the proper legal basis, the ruling on Directive 90/388 essentially followed the Terminal Equipment case, the following discussion will refer to Terminal Equipment.

Perhaps the main breakthrough in Terminal Equipment is the statement by the Court that "even though [Article 86(1) EC ex 90(1)] presupposes the existence of undertakings which have certain special or exclusive rights, it does not follow that all the special or exclusive rights are necessarily compatible with the Treaty."44 The Court thus found that the powers of the Commission under

40 Spain (supported by France), Belgium and Italy. Their cases were joined. See ECJ, Judgment of 17 November 1992, Cases C-271, C-281 and C-289/90, Spain v Commission [1992] ECR I-5833.
41 Supra, note 21.
42 Supra, note 40.
44 Supra, note 40 at 20. In the Service case, supra, note 40, the ECJ also dismissed the argument that Article 86(3) EC did not extend so far as to allow the prohibition of specific or exclusive rights. It did not repeat the wording of Terminal Equipment in its judgment, however. It even recalled in traditional position that exclusive rights are "not as such incompatible with the Treaty,
Article 86(3) EC (ex 90(3)) were not limited to ensuring that exclusive or special rights were exercised in compliance with the other rules of the Treaty. On the basis of that Article, the Commission could go further and require Member States to remove special or exclusive rights, if such rights were "not compatible" with the Treaty. The holding of the Court in Terminal Equipment changed the balance of Community law as regards the relationship between Member State intervention in the economy and the rules concerning the internal market or competition.42 According to Advocate-General Pesaresi, Article 86 EC (ex 90) treated this "fundamental contradiction in the entire Community plan" with "clear obscurity."43 Before Terminal Equipment, it was thought, on the basis of the Sacchi decision of 1974, that the grant of exclusive or special rights was "not as such incompatible" with the EC Treaty.44 The Advocate-General would have found that the grant of special or exclusive rights should at least benefit from a presumption of validity,45 the ECJ in the above statement was even drier and did not allude to such a presumption. In the context of the current Chapter, the Terminal Equipment case is also significant because of the dispute between the institutions as to the appropriate legal basis for the liberalization measures was put before the ECJ. As it turned out, the Court did not opt for either of the approaches put forward by the Commission or the applicant Member States (which followed the Council position as outlined above).46 The Court first dealt with the relationship between Articles 226 and 86 EC (ex 169 and 90).47

It must be held in that regard that Article 90(3) (now 86(3)) of the Treaty empowers the Commission to specify in general terms the obligations arising under Article 90(1) (now 86(1)) by adopting directives. The Commission exercises that power, without taking into consideration the particular situation existing in the various Member States, it defines in concrete terms the obligations imposed on them under the Treaty. In view of its very nature, such a power cannot be used to make a finding that a Member State has failed to fulfill a particular obligation under the Treaty.


42 Blum and Loges, supra, note 43 at 1-4; a "fundamental change" and divide the history of the interpretation of Article 86 (ex 90) in the pre- and post-Terminal Equipment periods.

43 See Terminal Equipment, supra, note 21; Conclusions of AG Pesaresi at paras. 11.

44 ECI, Case 155/73, Judgment of 30 April 1974, Sacchi (1974) ECR 409 at Rec. 14. In Sacchi, the ECJ was concerned solely with the compatibility of special or exclusive rights with Articles 82 and 12 EC (ex 80 and 61), but commentators agreed that the holding was valid as regards compatibility with the Treaty in general, except in specific cases where the existence of a monopoly as such might violate Article 31 EC (ex 37). See Blum and Loges, supra, note 43 at 1-4, referring to ECI, Case 155/73, Judgment of 3 February 1976, Moneghini [1975] ECR 91.

45 Id at Rec. 29.

46 Centro P. Pavolotti, supra, note 4 at 118-9, who concludes that the ECJ has broadly supported the Commission's position. Since the European Parliament did not intervene in the proceedings and its views on the issue of legal basis corresponded to the Council's, it will not be mentioned in the discussion below.

47 Supra, note 21 at paras. 17-18.
However, it appears from the context of the directive at issue in this case that the Commission merely determined in general terms obligations which are binding on the Member States under the Treaty. The directive therefore cannot be interpreted as making specific findings that particular Member States failed to fulfil their obligations under the Treaty, with the result that the plea in law relied upon by the French Government must be rejected as unfounded.

On this point, the Court did not follow the argument of the Commission, according to which Article 86(3) empowered the Commission to act against infringements of the Treaty. For the ECI, findings of infringement directed at a Member State cannot be made through Article 86(3) directives.53 Having refused the Commission's interpretation, the ECI did not by the same token adopt the applicants' view, which would have restricted the ambit of directives under Article 86(3) EC to supervisory measures such as Directive 80/723 on the transparency of financial relations between Member States and public undertakings.54 Rather, the ECI characterized in its own way the powers of the Commission under Article 86(3) EC as "the specification in general terms of obligations arising under Article 86." It is not easy to see how the "specification in general terms" of Article 86 EC (ex 90) fits within the general framework of Community law. On the one hand, the ECI in the excerpts above distinguishes it from a finding of infringement. Yet the main provisions of the EC Treaty to which Article 86(1) EC could refer in the telecommunications area, namely Articles 28, 31, 49, 81 and 82 (ex 30, 37, 59, 85 and 86), were all found to have direct effect,55 meaning that they are clear, unconditional and not requiring any implementing measures. In theory, Directive 88/301 could not add any normative value to the Articles it purported to apply (Articles 28, 49 and 82) which was not already there.56 To the extent

53 They should presumably be made either by the ECI or on the basis of an action under Article 226 SC (ex 109) in, in the specific case of infringements of Article 86(1) EC (ex 90)), through a decision pursuant to Article 86(3) EC. The ECI has later confirmed that the Commission could not again bring before the 3rd Article 86(3) EC by way of decisions under Article 86(3) EC directed at Member States; see Judgment of 12 February 1992, Cases C-48 and C-66/90, Netherlands v. Commission [1992] ECR 1.5-55.

54 [1980] GL J 195/35. The power of the Commission to enact order that had been challenged by a member of Member States at the time; see Judgment of 6 July 1982, Cases 188 to 190/80, France v. Commission [1982] ECR 2545.


57 In practical terms, Directive 88/301 represented a break with past policy, since it sought to extend the reach of Article 86 EC (ex 90) to require the abolition of exclusive or special rights. Before the 1987 Green Paper and the ensuing discussion, it was certainly not accepted that Article 86 EC (ex 90) extended that far, and accordingly the applicants argued before the ECI that Directives
that the situation in a Member State did not correspond to the substance of Directive 88/301, that Member State was thus infringing the EC Treaty. Such was certainly the opinion of the Commission, since it explained in the recitals of the Directive how the grant or maintenance of exclusive rights concerning telecommunications equipment was "not compatible" with certain provisions of the EC Treaty.56 The ECJ agreed with that point of view in its review of Directive 88/301.57 The interpretation given by the ECJ to Article 86(3) EC is thus difficult to square with the doctrine of direct effect.

The key factor for the ECJ to conclude that Directive 88/301 does not amount to a finding of infringement appears to be that this Directive is addressed to all Member States and does not make any specific findings, ie does not identify any individual Member State as having failed to fulfil its Treaty obligations.58 In the end, thus, it would appear that Directive 90/388 was validly enacted as a directive pursuant to Article 86(3) EC because of rather formal considerations: It was enacted in general terms and addressed to all Member States, ie in the format usually associated with a directive.59

Having found that Directive 88/301 constituted a valid "specification in general terms" of the obligations of Article 86 EC, and thus could be enacted under Article 86(3) EC, the ECJ then went on to consider how such "specification" of Treaty obligations related to the harmonization of laws under Article 95 EC. Here as well, the ECJ did not follow any of the submissions made to it. Both the applicant States and the Commission had argued that Articles 86(3) and 95 EC were exclusive of one another, disagreeing only on which one was the appropriate legal basis for Directive 88/301. The ECJ found that60 Article 100a (now 93) is concerned with the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market... As for Article 90 (now 86), it is concerned with measures adopted by the Member States in relation to undertakings with which they have specific links referred to in the provisions of that article. It is only with regard to such

88/301 reflected policy choices (to be made under Article 95 EC and not a mere application of provisions from the Treaty. It is not easy to reconcile the possibility of changes in policy (other than through the cost-law of the ECJ itself, as in the judgment of 24 November 1993, Cases C-267 and 268/91, Advani (1993) ICR 1-6907) in the interpretation of central provisions of the Treaty with the doctrine of direct effect.

56 See Directive 88/301, Recital 5 (for Article 3) (ex 37) and 13 (for Article 82 (ex 85)).
57 See Terminal Equipment, supra, note 21 at Recs. 31-44, in particular Rec 39 and 45, where the Court also concluded that exclusive rights over the importation, connection, bringing (into service and maintenance of telecommunications terminal equipment were "incompatible" with Article 29 EC (ex 30).
58 Even if the Commission had provided sufficient reasoning for its conclusion that exclusive rights were not compatible with the Treaty, the Court stated in Terminal Equipment, ibid at Rec 59-62.
59 Article 240 EC (ex 180) allows directives to be addressed to one, many or all Member States: Gonzalez-G. Schmidt, Article 189 at 49048, paras. 36. In practice, the vast majority of directives are addressed to all Member States.
60 Terminal Equipment, supra, note 21 at Rec. 24-6.
measures that Article 90 [now 88] imposes on the Commission a duty of supervi-
sion which may, where necessary, be exercised through the adoption of directives and
decisions addressed to the Member States. It must therefore be held that the subject-matter of the power conferred on the Commission by Article 90(3) [now 86(3)] is different from, and more specific than, that of the powers conferred on the Council by... Article 100a [now 95].

It should also be noted that... the possibility that rules containing provisions which impinge upon the specific sphere of Article 90 [now 88] might be laid down by the Council by virtue of its general power under other articles of the Treaty does not preclude the exercise of the power which Article 90 [now 86] confers on the Commission.

It appears from the above excerpt that, while Article 86(3) EC has a specific scope, it is not exclusive of Article 95 EC. The ECJ refused to pick the "right" legal basis among those proposed by the parties, although the two legal bases put forward followed different decision-making procedures. In its case-law on the choice of legal basis, the ECJ usually emphasizes that, when the choice has an impact on the decision-making procedure, the correct basis must be found, so that the rights of the institutions are safeguarded.68 In contrast, in Terminal Equipment, it appears that for the ECJ Directive 88/301 (or at least parts thereof) could have been enacted on the basis of Article 95 EC as well. The Commission could not therefore argue, as it had, that it had to choose between Articles 86(3) and 95 EC. The Council could not either contend that the Commission made an incorrect choice.

The position of the Commission and of the Council, as well as the judgment of the ECJ, is summarized in Figure 2.2.

At the end, the decision of the ECJ may have been politically sound, since striking down Directive 88/301 (or Directive 90/388) would have been a major setback for the liberalization of the EC telecommunications sector, but it suffers from legal weaknesses. Firstly, the characterization of directives under Article 86(3) EC as the "specification in general terms" of obligations arising from the Treaty (in order to distinguish them from actions under Article 226 (ex 169) or decisions under Article 86(3) EC) is not fully consonant with the doctrine of direct effect. Secondly, the ECJ does not bring the debate much further as far as the relationship between Articles 86(3) and 95 EC is concerned, since it finds that the two overlap.

68 A few weeks after Terminal Equipment, ibid., in a judgment of 11 June 1991, Case C-80/89, Commission v. Council (Titanium Dioxide) [1991] ECR I-2887, the ECJ found that, where two legal bases involving different procedures came in question (in that case Article 100a [now 95] and 139a) (modified and now 170) EC Treaty, which at the time followed the cooperation and consulta-
tion procedures respectively), a choice had to be made between the two bases if they could not be combined without depriving their respective decision-making procedures of their substance. That judgment has been consistently applied in the subsequent case-law on the choice of legal basis for a recent example, see Judgment of 23 February 1999, Case C-164 and C-165/97, European Parliament v. Council (Forest Protection), not yet reported.
D. The use of Article 86(3) EC as a legal basis after 1990

The Terminal Equipment decision, confirmed and applied to telecommunications services in a subsequent decision bearing on Directive 90/348, strengthened the Compromise of December 1989. On the one hand, by acknowledging the power of the Commission to proceed with the abolition of exclusive rights on the basis of Article 86(3) EC (ex 90(3)), the ECJ preserved the position of the Commission as the "driver" of the Community’s liberalization effort. On the other hand, by holding that Articles 86(3) and 95 EC (ex 90(3) and 100a) were not exclusive of one another, the ECJ emphasized the narrow relationship between these two legal bases in EC telecommunications policy. The ECJ therefore comforted the cooperative approach of the Council and the Commission, as it was embodied in the Compromise of December 1989.

The Compromise of December 1989 seems to have been more or less followed in the next instance where Article 86(3) was used, namely for the liberalization of the satellite communications sector through Directive 94/46. The content of Directive 94/46 was generally agreed to, since it had been preceded by a Green Paper, a consultation, a Council Resolution and

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62 supra, note 49.
63 Towards Europe-wide systems and services: Green Paper on a common approach in the field of Satellite Communications in the European Community, COM(90)460final (22 November 1990).
accompanied by a second round of discussions regarding space segment capacity.

On the following three liberalization directives based on Article 86(3) EC, however, the Compromise of December 1989 appeared to break down on one common issue, known as the "early liberalization of alternative infrastructure" (hereinafter ELAI). It will be recalled that the term "alternative infrastructure" refers to the use of other infrastructure providers than PTOs for the purpose of providing liberalized services. As early as 1993, the Commission proposed ELAI for 1996, while the future of telecommunications infrastructure in general would still be discussed. The Council refused to endorse that objective in its Resolution of 22 July 1993 and recalled the Compromise of December 1989, so as to remind the Commission that it endeavoured to obtain the agreement of Council before using Article 86(3) EC to abolish exclusive or special rights. In 1994 the Green Paper on the Liberalization of Telecommunications Infrastructure and Cable Television Networks, the Commission put forward once more its proposal for ELAI in 1996, ahead of full liberalization. Here as well, the Council did not agree with the Commission on that point, and did not mention ELAI in its Resolution of 22 December 1994; in that Resolution the Council also recalled once more the Compromise of December 1989, implicitly requesting the Commission not to move ahead on that issue. The position set out in the Resolution of 22 December 1994 was reaffirmed in a subsequent Resolution of 18 September 1995.

In essence, the Commission and the Council disagreed on the construction of the Compromise of December 1989. For the Commission, the Compromise meant that "liberalization" measures under Article 86(3) EC (ex 90(3)) would be taken in step with "harmonization" measures under Article 95 EC (ex 100a), so that the two sets of measures can be coordinated. The Commission saw no need for specific harmonization measures for ELAI, given that it involved a relatively small step and the crucial issues of interconnection and universal service would

48 Communications on Satellite Communications: the Provision of -- and Access to -- Space Segment Capacity, COM(94)210final (10 June 1994) and Council Resolution of 22 December 1994 on further development of the Community's satellite communications policy, especially with regard to the provision of, and access to, space segment capacity [1994] C 379/3.

49 For a general explanation of the issues, see supra, Chapter One, III.2.

50 In the Communication on the Consultation on the Review of the Situation in the Telecommunications Services Sector, COM(93)399final (28 April 1993).

51 Supra, note 39.


53 Supra, note 39. In addition, the Council also referred to the Resolution of 22 December 1994 when it voiced its opinion on the three draft Articles 86(3) directives put forward by the Commission in 1994-1995: see the conclusions of 13 June 1995, Council Press Release 95/173 (on the draft directives on cable TV networks) and 27 November 1995, Council Press Release 95/540 (on the draft directives on mobile and personal communications as well as full competition).

54 ELAI meant opening up the use of alternative infrastructure for already liberalized services, which do not represent the bulk of telecommunications services, as seen supra, Chapter One, III.2.
be dealt with in the run-up to full liberalization on 1 January 1998. Accordingly, it could treat ELA1 as a simple exercise of its powers under Article 86(3) EC. The Council, in contrast, considered that, pursuant to the Compromise, the Commission would not use its power to issue directives under Article 86(3) EC unless the Council agreed with the substance of the directive in question.

Despite the opposition of the Council, the Commission imposed ELA1 in three directives based on Article 86(3) EC, namely:

- Directive 95/51, which provided that the use of cable TV networks as "alternative infrastructure" for the provision of liberalized telecommunications services had to be allowed as of 1 January 1996;
- Directive 96/2, which provided that mobile communications operators could have recourse to "alternative infrastructure" to build the networks used to provide their services as of 15 February 1996;
- Directive 96/29, which provided that the use of "alternative infrastructure" in general for the provision of liberalized services had to be liberalized as of 1 July 1996 (six months later than the original proposal).

Even if it was the Commission considered that it could dispense with the Compromise of December 1989, in fact it managed to remain more or less within that Compromise (even as understood by the Council) by "convincing" enough Member States not only to support ELA1, but also to carry through with concrete implementation measures, including first and foremost the grant of licenses to alternative infrastructure providers.

At the time of the debates surrounding the Council Resolution of 22 December 1994, six Member States had already broken ranks and issued a separate declaration asking the Commission rapidly to present proposals regarding the use of alternative infrastructure. Of those, three — the United Kingdom, Sweden and Finland — had already liberalized the telecommunications sector or were in the process of doing so independently of developments at Community level. They accordingly supported ELA1 and had licensed or were going to license alternative infrastructure providers.

The other three — France, Practically speaking, ELA1 meant that providers of liberalized services could obtain leased lines from third parties in order to build their networks, a change which did not compensate the financial balance of PTTs or the security of their networks.

17 See the Greens Paper on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks, Pan One, supra, note 69 at 27-30.
18 Directive 95/51, Article 1(2), adding a third paragraph to Directive 90/388, Article 4, entry into force as provided in Directive 95/51, Article 4.
19 Directive 96/2, Article 1(3), adding an Article 3c to Directive 90/388, entry into force as provided in Directive 96/2, Article 5.
21 That declaration was made by Germany, France, the Netherlands and the United Kingdom, which were joined by Sweden and Finland (at the time about to accede the Community).
22 For the UK, following the decision announced in the White Paper of March 1991 (Competition and Choice: Telecommunications Policy for the 1990s, Cm 1461) to end the BT/Mercury duopoly see Colin D. Long (ed.), Telecommunications Law and Practice, 2nd ed. (London: Sweet & Maxwell, 1995) at 50-1, paras. 2.11 and 2.12. In Sweden, there was never any legal monopoly over
Germany and the Netherlands — had followed the first three in issuing a parallel declaration to the Council Resolution of 22 December 1994, asking the Commission to put forward proposals for the liberalization of alternative infrastructure; that did not mean, however, that these Member States would necessarily agree with the concrete ELAI proposals of the Commission and implement them. 79 A third group of Member States — comprising at least Italy, Spain and Portugal — was opposed to ELAI as it was proposed by the Commission. 80 It can be assumed that the remaining Member States (Greece, Ireland, Belgium, Luxembourg, Austria and Denmark) entertained some reservations about ELAI at that point in time, since the matter was not included in the main resolution.

The Commission ensured that ELAI was agreed to (including the licensing of alternative infrastructure providers) by a sufficient number of Member States by establishing links between individual cases examined under the competition rules and ELAI, as shown in the following paragraphs.

As concerns France and Germany, the Commission used the Atlant case, where it had to rule on the request of France Telecom (FT) and Deutsche Telekom (DT) for an exemption pursuant to Article 81(3) EC (ex 85(3)) for their joint venture Atlas. Atlas was meant to offer advanced telecommunications services to corporate customers in Europe. 81 The Commission argued that the competition would only meet the conditions of 81(3) EC (ex 85(3)) — in particular the fourth condition, according to which the operation must not enable the parties to eliminate competition — if and once France and Germany liberalized alternative infrastructure. 82 Since FT and DT at the relevant time were being restructured in view of the liberalization of the telecommunications sector and in order to prepare them for partial privatization, 83 the French and German governments — telecommunications, and a liberalized regulatory framework was put in place with the Telecommunications Act 1993 (DSF 1993:597): see infra at 632-3, para. 20-25 and 29-06. In Finland, the telecommunications sector was progressively liberalized, and the Telecommunications Act of 1996 completed the process: see Public Network Europe, 1998 Yearbook (London: The Economists, 1997) at 71.

79 In fact, in the declaration mentioned supra, note 77, France had indicated that it considered that the liberalization of «alternative infrastructure should take place through a measure adopted by the Council (presumably on the basis of Article 95 EC).”

80 It is certain that these Member States opposed the Commission proposals, since they either challenged Article 86(3) Directives opposing ELAI before the ECJ (in the case of Portugal and Spain) or needed to be “convinced” by the Commission through linkages with competition law procedures (in the case of Italy).

81 See Decision 96/546 of 17 July 1996, Atlant (1996) OL L 239/23 at 24-26, Rec. 7-15. The Commission also found that the operators concerned the matter for packet-switched data communications services in France and Germany.

82 See Atlant, infra at 46, Rec. 63.

83 DT was turned from an administrative entity into a public limited company pursuant to German law (Aktiengesellschaft or AG) through the Gesetz zur Umwandlung der Unternehmens der Deutschen Bundespost (die Rechtsformen der Aktiengesellschaften von 9 Juli 1994, bezw. Art. 3 of the Gesetz zur Neuregelung des Postwesens and der Telekommunikation of 9 July 1994, BGBL 1,2325, § 1. Its capital was first 100% owned by the German State, but it made its IPO in November 1996. Similarly, FT was turned from a “public operator” (exploitant public” into a public limited company pursuant to French law (société anonyme or SA) through the Loi 96-560 relative à l’entreprise équivalente (1996).
ments were keen to ensure their success and pick up the Commission's suggestion. As a consequence, the French and German governments were brought to undertake towards the Commission that ELAI would take place on 1 July 1996, including the actual grant of licenses for alternative infrastructure. Moreover, in order to provide additional incentives for the fulfillment of these undertakings, the entry into force of the exemption decision was set at the date where two such licenses would be granted in each of France and Germany.

With respect to the Netherlands, the same reasoning was used in the course of the Unisource proceedings. Unisource was a joint venture between Koninklijke Post Nederland (KPN),[93] Telia AB of Sweden[94] and Switzerland,[95] whose business scope was similar to Atlas', as described above. Here as well the Commission's position was that the liberalization of alternative infrastructures was necessary to ensure that the fourth condition of Article 81(3) EC (ex 85/33) was fulfilled.[96] That was already the case in Sweden, as mentioned before. Like the French and German governments, the Dutch government was anxious to support KPN in its international expansion, and in the course of the proceedings, it confirmed that it was agreeing to ELAI by 1 July 1996, and that two licenses for alternative infrastructure had been granted on that date. As a fall-off of the proceedings, the Commission was also able to obtain the agreement of the Swiss government to follow the Commission's liberalization programme and timetable.[97] Since the decision in Unisource was issued later than in Atlas, the required number of alternative infrastructure licenses had already been granted at the time of the decision: accordingly, the decision came into effect as of 1 July 1996.[98]

As far as Italy was concerned, the Commission made a link with another type of competition law proceedings, this time an individual case under Article 85 EC. In 1993, following prompting by the Commission, the Italian government
decided to grant a second GSM license, in addition to the one already given to Telecom Italia.99 The granting process took place in the first half of 1994: one of the selection criteria was how much the candidates were willing to disburse by way of lump-sum payment in return for the license.100 No such payment had been required from Telecom Italia for its GSM license. The Commission took up the case against Italy under Article 86 EC (ex 90), arguing that if the Italian government imposed a lump-sum payment on Omnitel, the second GSM operator, but not on Telecom Italia, it would further strengthen the already very advantageous position of Telecom Italia as the first GSM operator and would enable Telecom Italia to pursue commercial strategies that would run against Article 82 EC.101 In Decision 93/489, the Commission required Italy to correct the impact of that lump-sum payment by either imposing a similar payment on Telemòno Italy or adopting compensatory measures to be approved by the Commission.102

Italy opted for the second alternative. Among the compensatory measures suggested by the Commission in Decision 93/48999 and discussed thereafter, one finds ELAI, ie Italy's agreement with the Commission's timetable and actual implementation through the grant of licenses for alternative infrastructures. There is some indication that ELAI was part of the final compromise over the compensatory measures.103 However, neither the text of Decision 93/489 nor subsequent documents indicate how ELAI would constitute an appropriate measure to compensate Omnitel for the lump-sum payment.104 It can be presumed that the ability to use other infrastructure than Telecom Italia's may reduce Omnitel's network costs, but it is difficult to quantify such reduction, since the availability and pricing of alternative infrastructure depend on third parties. Furthermore, any reduction in network costs brought about through ELAI would presumably benefit Telecom Italia's GSM subsidiary as well, since it could also use alternative infrastructure (at least if it behaves like a rational economic operator). Nevertheless, the Commission was able to obtain Italy's consent to ELAI through those proceedings.105

99 At the time Società Italiana per l'Esercizio Telefonico (SITP).
100 The winner was Omnitel Pronto Italia, a joint venture involving Olivetti SpA and Bell Atlantic (among others).
101 Knowing that its competitor Omnitel Pronto was burdened with this lump-sum payment, Telecom Italia could either seek to extend its dominant position to the GSM sector by lowering its prices below what Omnitel Pronto can afford to or, as done by Omnitel Pronto, lower its prices towards the lump-sum payment, knowing that this could only benefit its analog mobile services, where it held a monopoly. See Decision 93/489, supra, note 94 at 53-4, Rec. 15-8.
102 Ibid at 57, Art. 1.
103 Ibid at 56, Rec. 2.
105 The Decision mentions Telecom Italia's monopoly over network infrastructure only to underline that it enables Telecom Italia to obtain information on the traffic flows of Omnitel by examining Omnitel's requests for infrastructure (leased lines); supra, note 94 at 53, para. 16.
106 This did not prevent Italy, Telecom Italia and its GSM subsidiary Telecom Italia Mobile from challenging Decision 93/489 before the ECI and the CPF: see Cases C-466/95, Italy v. Commission
The Commission almost achieved the same result with Spain. First of all, the incumbent Spanish operator, Telefónica, was a party to the Unionside joint venture discussed above, and in the course of the pre-examinations, it appears that the Commission also obtained a commitment from the Spanish government to ELAI according to the Commission's timetable.101 However, in the spring of 1997, Telefónica abandoned the Unionside joint venture,102 and the commitments became without effect. Secondly, the case concerning the grant of a second GSM license in Spain, where the factual background was almost identical with the Italian case discussed above, came too late, since Spain had already lifted the infrastructure monopoly and grasped at least one license by the time the decision was taken.103 It should be noted that, in that case, the Commission ruled whether the availability of alternative infrastructure could compensate for the disadvantage created by the lump-sum payment imposed on the second GSM operator, and found that it did not, because in fact there was no real alternative to Telefónica's network infrastructure.104

In the end, therefore, in addition to the support of the United Kingdom, Sweden and Finland, which had already complied with the Commission's ELAI proposals, the Commission was able through linkages with competition law proceedings to obtain the consent of France, Germany, the Netherlands and Italy to ELAI by 1 July 1996 (excluding the grant of licenses). Other Member States were less strongly opposed to ELAI, since they could obtain additional implementation periods:105 for Portugal, Ireland and Luxembourg, the deadline was eventually pushed to 1 July 1997,106 and for Greece to 1 October 1997.107 As a result, when the Commission actually imposed ELAI through Directives 95/51, 96/2 and 96/19, the Council 4 all did what it dared not protest and only Spain,

102 Ibid. at 22 and 25, Recs. 9 and 20.
103 See Directive 96/2, Article 4 and Directive 96/19, Article 1(2), replacing Article 2 of Directive 90/338. An interesting issue arises as to whether, by allowing for differentiated deadlines for implementation for Member States with small or less developed networks, Directives 96/2 and 96/19 do not run against the rationale of the ECJ in Territorial Ehiome, supra, note 21. There the ECJ concluded that a directive was validly enacted under Article 85(3) EC (see supra, I.C.) if it constituted a specification in general terms of obligations incumbent upon Member States under Article 86 EC (see 90); “without taking into consideration the particular situation existing in the various Member States” (as Rec. 17).
E. The Integration of Articles 86(3) and 95 EC in an Original Legislative Procedure

It is common to speak of the relationship between directives based on Articles 86(3) and 95 EC (ext 90(3) and 100a) as one between “liberalization” and “harmonization” respectively. 

112 Many authors see them as distinctive but complementary thrusts of EC telecommunications policy. 

As was seen above in relation to the two legal bases, the reality is more complex. In light of the ECJ decision in the Terminal Equipment case, the Liberalized Model

Table 2.3 “Liberalization” and “harmonization” directives

Model of the 1987 Green Paper

<table>
<thead>
<tr>
<th>Commission “liberalization” directives</th>
<th>Council “harmonization” directives</th>
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<tr>
<td>Directive 90/388</td>
<td>Directive 90/387</td>
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<td>Directive 92/44</td>
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<td>Directive 95/82</td>
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Fully Liberalized Model

<table>
<thead>
<tr>
<th>Commission “liberalization” directives</th>
<th>EP and Council “harmonization” directives</th>
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<tbody>
<tr>
<td>Directive 90/388, as amended by Directives 94/46, 95/51, 96/2 and 96/19</td>
<td>OCP Framework</td>
</tr>
<tr>
<td></td>
<td>Directive 90/387, as amended by Directive 97/55</td>
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<td></td>
<td>Directive 92/44, as amended by Directive 97/51</td>
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<td>Directive 98/10</td>
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<td></td>
<td>Licensing</td>
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<td></td>
<td>Directive 97/13</td>
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110 It should be noted that Spain did not come into consideration for an additional implementation period, since it had already liberalized alternative infrastructure of its motion in 1996, probably to honor commitments made in the Union proceedings, before Telefónica withdrew from that joint venture. Spain still obtained additional implementation periods for the full liberalization of infrastructure and public voice telephony. Decision 97/603 of 20 June 1997 (Spain) [1997] OJ L 242/48.


114 Sages, UC.
realm of Article 86(3) EC (ex 90(3)) is not clearly delineated vis-a-vis Articles 226 and 95 EC (ex 169 and 100a), and the Commission has been careful to ensure that the exercise of its jurisdiction under Article 86(3) EC is coordinated with the other institutions, at least with the Council (according to the Compromise of December 1989).

1. The “Liberalization” and “harmonization” directives

When it comes to the substantive relationship between the “liberalization” directives adopted by the Commission pursuant to Article 86(3) EC (ex 90(3)) and “harmonization” directives adopted by the European Parliament (after 1993) and the Council pursuant to Article 95 EC (ex 100a), the situation is also less clear-cut than might appear at first sight.

Two main phases can be distinguished, corresponding to the regulatory model of the 1987 Green Paper and to the fully liberalized model.117 The Directives concerned at each phase are briefly recalled in Table 2.3

a. The first phase

In 1990, the two directives implementing the model of the 1987 Green Paper were complementary, their co-ordination being insured through the discussions that led to the Compromise of December 1989. Even if Commission Directive 90/388 had been conceived as an autonomous piece of legislation,118 it made room for the ONP framework in the provisions dealing with the interface between the competitive and reserved areas of the telecommunications sector. Article 4(1) of Directive 90/388 required the conditions of access to telecommunications networks (to the extent Member States chose to leave them under monopoly) to be objective, non-discriminatory and public. Similarly, Article 6(2) stated that there must be no discrimination between service providers (including TOs themselves) as regards conditions of use or charges payable for use of the network, subject to ONP rules. These two provisions thus indicate the role to be played by the ONP framework within the model of the 1987 Green Paper: while competition law principles dictate that, in each Member State, the conditions for access to and use of network and services remaining under monopoly be objective and non-discriminatory, the Member States may further proceed with the harmonization of such conditions throughout the EC within the ONP framework. Article 1 of Directive 90/387, the ONP Framework Directive, echoes that division of

117 The two ONP Recommendations relating to ISDN (Recommendations 92/583 of 5 June 1992 on the provision of harmonised integrated services digital network (ISDN) access arrangements and a minimum set of ISDN offerings in accordance with open network principles (ONP) principles (1992) Od I, 200(10) and PEXL supra, note 37) have been omitted from this table.
118 This Directive was also based on Articles 47(2) and 55 EC (ex 57(2) and 66).
119 See supra, Chapter One, II. and IV.
120 As mentioned supra, I.B., a directive broadly similar to Directive 90/388 had already been adopted by the Commission in June 1989, a year before Directive 90/386. The Commission chose to delay its notification until it could have reached an agreement on its substance with the Council. Following the Compromise of December 1989, that directive was modified slightly and became Directive 90/388.
work. Accordingly, ONP directives were elaborated for leased lines (ie access to and use of the public network infrastructure) and public voice telephony.119 The complementarity between the liberalization and ONP directives was further underlined by their simultaneous adoption on 28 June 1990, reflecting their elaboration in parallel and the care taken to ensure their consistency.

b. The second phase

In the course of adopting the regulatory framework for the fully liberalized model, between 1995 and 1998, the division of work between the Article 86(3) and 95 (ex 90(3) and 100a) directives moved from complementarity to overlap. There was no more synchronization between the adoption of directives under the two respective bases: rather, the Commission took care to introduce all its proposals for the new ONP framework before adopting, pursuant to Article 86(3) EC (ex 90(3)), Directive 96/19 on the full liberalization of the telecommunications sector,120 but it did not wait for the other Community institutions to complete their legislative work pursuant to the co-decision procedure under Article 95 EC. Accordingly, Directive 96/19 was in force throughout the legislative process leading to the adoption of the ONP and Licensing directives for the fully liberalized model.

In Directive 96/19, the Commission expanded its interpretation of the scope of Article 86(3) EC as a legal basis one step further. The traditional view was that Article 86(3) EC enabled the Commission to enact directives concerning the "management of special or exclusive rights, as was done with Directive 80/723 of 25 June 1980 on the transparency of financial relations between member states and public undertakings.122 With Directive 90/388 (and its predecessor Directive

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119 As mentioned above, packet-switched data services and ISDN are placed in an odd position, since they are liberalized (at least as regards data in the use of ISDN) but yet they are subject to ONP recommendations: this reflects the divergence between the Commission and a number of Member States as regards the scope and pace of liberalization in basic data services: supra, n.12.

120 See supra, Chapter One, IV.


122 Supra, note 56.
88/301), the scope of Article 86(3) EC was extended further to include the power to mandate the outright abolition of special or exclusive rights, as was recognized by the ECJ in *Terminal Equipment*.123 Directive 90/388 was used to force Member States to (i) abolish exclusive rights on telecommunications services other than voice telephony; (ii) regulate the access to and use of telecommunications infrastructure and voice telephony, since these services could be left under monopoly; and (iii) separate the operational and regulatory functions of the PTOs, since in a context where markets would be liberalized and PTOs were going to compete on these markets, they could not exert regulatory powers anymore. All of these obligations were closely related to exclusive rights within in the meaning of Article 86(1) EC. With Directive 96/19, the Commission goes further and construes its powers under Article 86(3) EC as extending not only to the “management” of exclusive rights (including their abolition), but also further to the transition to a competitive environment following the abolition of exclusive rights. Whether such extension is justified is discussed further below, in connection with the scope for use of Article 86(3) EC in a liberalized environment.124 In practice, it means that the “liberalization” directives enacted by the Commission pursuant to Article 86(3) EC were going to overlap in substance with the “harmonization” directives enacted by the Council pursuant to Article 95 EC, all the more since the latter, as mentioned before, had evolved into a general regulatory framework for the telecommunications sector.

2. Liberalization directives as the hard core of EC telecommunications law

Given the substantive overlap between liberalization and harmonization directives, it becomes interesting to examine whether the provisions of the two sets of directives coincide and how possible conflicts between the two are solved. A detailed comparative examination of the two sets of directives will not be conducted here; it was done recently by P. Nilholm, who came to the conclusion that the two sets of directives were by and large co-terminous in substance: the “harmonization” directives enacted by the EP and Council pursuant to Article 95 EC (ex 100a) follow to a large extent the principles set out in the “liberalization” directives adopted by the Commission on the basis of Article 86(3) EC (ex 90A).125 Indeed, as will be seen below when some discrepancies between the two sets of directives are studied, the level of detailed description required to set out the scope and significance of those discrepancies bears testimony to the great convergence between the two sets of directives.126

123 Supra, I.C.
124 Supra, II.A.
126 Supra, I.F.
From that observation, one could conclude that the distinction between “competition”—as it would be embodied in the “liberalization” directives—and “regulation”—as it would be found in the “harmonization” directives—does not stand.124 Indeed, at least in the EU context, it is not possible to make a hard distinction between “competition” and “regulation,” as seems to be done in the USA.125 Such a distinction rests on a very close association between a factual state and the applicable regulatory regime. “Competition” means the supposedly natural state of the market, “unimpeded” with regulatory restraints that hamper the free play of market forces; at the legal level, “competition” would thus correspond to “competition law,” i.e., the only form of economic regulation applicable in a such a context. By opposition, “regulation” would describe a state of affairs where government intervention displaces some or all workings of competition; at the legal level, “regulation” would refer to the legal apparatus used thereby. Whether the distinctions between the two factual states have not been over-emphasized and whether they are exclusive of one another might remain open.126 In any event, at the legal level it is often assumed in the USA that regulation is inimical to competition law, so that either one or the other will apply.127 The situation is different in the EU, where competition law and sector-specific regulation are not seen as incompatible.128 Both should rather be viewed

123 This is the conclusion reached in Nilsson’s thesis, supra, note 125, on the basis of a review of a number of elements when competition law and regulation would allegedly be different. These are the time when the intervention takes place (i.e., post for competition law, i.e., at the regulation), the form of obligations (negative for competition law, positive for regulation), the effect on the firm (creation of freedom for regulation, protective of freedom for competition law), the scope and precision of intervention (narrow, detailed and complex for regulation, broad, general and simple for competition law), the aims (efficacy for competition law, realisation for regulation), the circumstance of intervention (specific for competition law, no restrictions for regulation), the objects of intervention (market parameters for regulation, market power for competition law) and the distinctness of intervention in the functioning of firms (direct for regulation, indirect for competition law).

124 See, for instance, one of the leading authors (now a judge of the Supreme Court), S. Breyer, Regulation and Its Reform (Cambridge: Harvard University Press, 1983), in particular at 136-61.

125 The elements concerned here are indeed put forward mainly in US literature, and while they may correspond to the state of affairs in the USA, they cannot withstand examination against the EU experience, as shown by Nilsson. Accordingly, they are of limited direct relevance in the European debate, and care must be taken to use them in the light of differences between the US and EU experience.

126 It could certainly be argued that even the competitive market as described above is not a “natural” state but rather the product of a number of legal constructs (property and contract law, etc.), which are however designed to leave as much freedom as possible to individuals. Against that, the regulated market as described above would be the product of a more restrictive legal framework, so that the difference between the two would be one of degree rather than kind.

127 See Breyer, supra, note 128.

128 Perhaps this is because sector-specific regulation in the EU used to be carried out not so much through detailed regulatory schemes, but rather through direct public-sector provision or nationalisation. The clash was then no so much a “horizontal” legal collision between a stand-alone regulatory scheme and competition law, but rather a “vertical” nature, between the State or a State-controlled undertaking and competition law. Subject to some adjustments, it is quite conceivable that competition law could apply to the State and State-controlled undertakings, as is indeed reflected in Article 86 EC (ex-90). As liberalisation (motivated in part by competition law) replaces direct State intervention with sector-specific regulation, it does not appear unusual that competition law would continue applying to the liberalised sector even in the presence of sector-specific regulation.
as species of economic regulation, which can be applied together. If only because of the peculiar structure given by the EC Treaty to economic regulation in Europe, competition law is bound to co-exist with sector-specific regulation. EC competition law applies across the board to all economic sectors; since sector-specific regulation tends to be found at the Member State level, it cannot exclude the application of EC competition law. Yet the EC Treaty does not deny the existence of sector-specific regulation; rather, such regulation must be designed to avoid conflicts with the provisions of the Treaty, and harmonization mechanisms such as Article 95 EC have been included to promote the recasting of sector-specific regulation in the context of the EC Treaty.

If only because of that significant difference between the US and the EU, it should be expected that, in the EU, "competition" and "regulation" measures would largely converge, especially if they are elaborated at the same time, since they are meant to apply side-by-side. Nevertheless, that does not mean that, as accurate to characterize directives adopted under Article 86(3) EC (ex 90,5)) as "liberalization/competition" directives, as opposed to the "harmonization/ regulation" directives enacted pursuant to Article 95 EC (ex 100a). While Article 86 EC is found in the chapter of the Treaty entitled "Rules on competition", more particularly in the section "Rules applying to undertakings" (Articles 81-86 EC), directives adopted pursuant to Article 86(3) are not necessarily akin to other measures taken pursuant to the provisions of that section. As a matter of construction, Article 86(1) and (2) EC refer to the whole of the EC Treaty, so that measures taken thereunder can relate to other Community policies than competition; indeed, the telecommunications directives enacted under Article 86(3) EC purport to apply not only Article 82 (ex 86), but also Articles 28 and 49 EC (ex 30 and 59). More importantly, directives adopted on the basis of Article 86(3) EC are difficult to fit within the overall framework of EC competition law under takings, as it is outlined in the following Chapter, because they are not

120. Amongst the various economic sectors, coal and steel are not subject to EC competition law, but rather to the rules of competition found at Articles 65 and 66 of the ECSC Treaty. Within the EC Treaty, exceptions are made only for agriculture at Art. 36 (ex 42) EC competition law was made applicable to agriculture, with certain modifications to take into account the common agricultural policy, through Regulation 2682/4 of 4 April 1962 [1962] OJ 993). The transport sector was exempted from the prohibitory framework of Regulation 76/62, while remaining subject to the competition rules of the EC Treaty, through Regulation 1415/2 of 26 November 1962 [1962] OJ 2751 (specific procedure) inas much as it is covered by Regulation 3054/68 [1968] OJ L 1781 for rail, road and waterway transport, Regulation 4013/68 [1968] OJ L 1784 for maritime transport and Regulation 3975/87 [1987] OJ L 374/1 for air transport. As for what sectors, it is in the absence of legislative interventions to the effect at EC level, the EEC has steadily refused to recognize any exception from the application of EC competition law see the judgments of 14 July 1961, Case C-172/80, Zucker v. Bayerische Vereinsbank [1981] ECR 2021 (banking); 20 March 1985, Case 41/85, Italy v. Commission [1984] ECR 873 (telecommunications) and 27 January 1987, Case 45/85, Verband der Sachverständigen v. Commission [1987] ECR 405 (insurance).

121. See in this respect the interesting 'Verband der Sachverständiger case, ibid., whose EC competition law was held to apply to the German insurance sector, which was governed by sector-specific regulation and exempted from the application of German competition law.

122. See infra, Chapter Three, 2. In the figure found there, they would therefore move towards the upper right corner, in an area which is otherwise relatively foreign to EC competition law.
concrete and specific applications of Articles 81 or 82 in the context of an individual case, nor are they derived from the experience gathered from these concrete-specific determinations. Rather, they are based on relatively abstract reasoning on the basis of the broad principles of the EC Treaty,103 as the ECJ said, they are "specifications in general terms" of such principles.104 They are also meant to apply to a relatively large class of cases (the whole telecommunications sector). Moreover, the Article 86(3) directives in the telecommunications sector are the product of a decision-making process than comes much closer to a legislative than a judicial model, and in this respect also differ from EC competition law for undertakings. Accordingly, it would seem preferable to characterize those directives as "sector-specific regulation", albeit coming from a different angle than the Article 95 directives, namely the need to liberalize the telecommunications sector (in view of the basic principles of the EC Treaty) rather than the need to harmonize national laws.

The "liberalization" and "harmonization" directives would thus be but two instances of sector-specific regulation, which still does not indicate how they relate to one another. At first sight, the Article 86(3) directives, in particular Directive 96/19, contain rules of precedence that seem to give priority to Article 95 directives. The last recital of Directive 96/19 sets out the general principle:105

The establishment of procedures at national level concerning licensing, interconnection, universal service, numbering and rights of way is without prejudice to the harmonization of the latter by appropriate European Parliament and Council legislative instruments, in particular in the framework of open network provision (ONP). The Commission should take whatever measures it considers appropriate to ensure the consistency of these instruments and Directive 90/388/EEC.

More specific rules are contained in the amendments to Directive 90/388 which are made through Directive 96/19. As regards interconnection, the new Article 4a of Directive 90/388 binds Member States to ensure that TOs provide interconnection to their competitors, "without prejudice to future harmonization of the national interconnection regimes... in the framework of ONP".106 The Commission undertook to review that Article in light of a harmonization directive on interconnection from the EP and Council.107 Similarly, as regards universal service, the new Article 4c of Directive 90/388, whereby parameters are imposed on universal service financing schemes, applies "without prejudice to the harmonization... in the framework of ONP"108 here as well, the

103 See supra, I.C.
104 Directive 96/19, Rec. 30.
105 Directive 90/388, Art. 4a(1), as introduced by Directive 96/19, Art. 1(6).
106 Ibid., Art. 4a(5).
107 Ibid., Art. 4c(1), as introduced by Directive 90/39, Art. 1(6).
108
Commission undertook to review its directive for consistency within three months of the adoption of a harmonization directive on interconnection and universal service.\(^{141}\) Since the adoption of Directive 96/19, the renewal of the ONP framework has been completed, ending with Directive 98/10; the Commission has not given any indication that it would modify its Article 86(3) directives in light of the new ONP framework.

These rules of precedence not only confirm the substantive overlap between the "liberalization" and "harmonization" directives, they also show once more how artificial the boundary between Articles 86(3) and 95 EC can become, in light of the ECJ ruling in Terminal Equipment.\(^{142}\) Assuming that Directive 96/19 constitutes a valid exercise of the Commission's powers under Article 86(3) EC, the "specificities in general terms" of the obligations derived from Articles 86 in conjunction with 49 and 82 EC (ex 59 and 86) contained therein would thus be liable to change according to the content of "harmonization" measures taken under Article 95 EC. Yet one of the premises of the distinction between these two articles is that measures taken under Article 86(3) are meant to be more or less unequivocal deductions from the basic principles of the Treaty, while measures taken under Article 95 would reflect policy choices. In theory, measures taken pursuant to Article 86(3) should thus remain unaffected by policy choices made by the Council acting under Article 95 EC.

In practice, one should not exaggerate the ambit of these rules of precedence: without doubt, measures taken under Article 95 EC cannot squarely contradict those taken under Article 86(3) EC. Any adjustment should thus be more of an incidental nature.

Furthermore, these rules of precedence belie the true relationship, which is rather the other way around. When the temporal dimension (Directive 96/19 was enacted at the time the new ONP directives were proposed by the Commission) is taken into account, it can be seen that many provisions of Directive 90/388, as amended by Directive 96/19, were used as a sword of Damocles hanging over the legislative process of the new ONP directives under Article 95 EC.\(^{143}\) Since a "hard core" of key principles concerning interconnection, universal service, tariff re-balancing, licensing, etc. were already enacted in Directive 96/19 and Member States were thus already bound to abide by them, there was little point in trying to reverse or alter the course during the discussion of ONP directives. The ONP directives were essentially going to expand upon the principles set out in Directive 96/19 and integrate them within a larger framework. The three concrete examples given below confirm this conclusion.\(^{144}\)

\(^{141}\) Boll, Art. 4c(5).
\(^{142}\) Reviewed Apex, I.C.
\(^{143}\) It could be argued that the same was done in the first phase, since, as outlined above, in June 1989, the Commission adopted on the basis of Article 86(3) EC a directive substantially similar to Directive 90/388. There the directive was not notified to the Member States immediately, but it nevertheless pulled them to move ahead with the legislative process concerning the implementation of the 1987 Green Paper, leading to the Compromise of December 1989.

\(^{144}\) See infra, I.F.
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<td>5a</td>
<td>Date of 14 December 1988</td>
<td>Date of 14 December 1988</td>
<td>Date of 21 December 1990</td>
<td>Date of 14 December 1988</td>
<td>Date of 21 December 1990</td>
<td>Proposal of 19 July 1985 (DA 973), 14 November 1990 (DA 963)</td>
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<td>Date of 21 December 1990</td>
<td>Proposal of 19 July 1985 (DA 973), 14 November 1990 (DA 963)</td>
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In the end, therefore, it may not be quite accurate to refer to the recent evolu-
tion of EC telecommunications policy as liberalization and harmonization going
hand in hand. These two facets of EC telecommunications policy are not
complementary or co-existing beside one another; they would rather be
overlapping, whereby "liberalization" measures taken by the Commission alone
give the impetus and serve as a reference for "harmonization": measures later
enacted by the Council and the European Parliament. Such a description
certainly fits the more recent period, where the fully liberalized regulatory
framework was put in place, and it may also apply to the implementation of the
1987 Green Paper as well. In any event, the ECI, in its decisions on Directives
88/301 and 90/388, did not support the point of view of the Commission on the
relationship between Articles 86(3) and 95 EC; it rather emphasized the overlap
between the two legal bases.

3. Resulting procedure

Putting all the pieces together, an original legislative procedure takes shape,
where Articles 86(3) and 95 EC (ex 90(3) and 340a) are integrated:

1. The Commission publishes a policy document, usually a Green Paper, in
which it proposes a set of objectives to be achieved (liberalization, universal
service, interconnection, etc.) and announces its willingness to act alone on
the basis of Article 86(3) EC in order to realize these aims at least in part (in
addition to the use of Article 95 EC as the legal basis for the more elaborate
measures to develop a harmonized regulatory framework).

2. A round of public consultations is launched, involving, beyond other
Community institutions and the Member States, representatives of the
telecommunications industry (incumbents, new entrants, equipment
manufacturers, industry associations), user groups, large EC umbrella organi-
zations (UNICE, ETUC, etc.), among others.

3. While the consultation is taking place, the European Parliament undertakes
its own examination and adopts a Resolution on the policy document.

4. On the basis of the above, the Commission prepares a Communication on the
results of the consultation, with a proposal for a Council Resolution. At this
point in time, the Commission tries to rally the Council around its objectives
(as they may have been modified in the light of the consultation), among
others in order to ensure that any measures under Article 86(3) EC are
supported, in substance at least, by the Member States. At the same time,
agreement is also reached on the need for measures under Article 95 EC
(including the timetable and the broad outline).

In the course of implementing the 1987 Green Paper, in 1989-1990, the
threat of a directive under Article 86(3) EC brought Member States to reach

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143 In the interest of space, only the dates of the various documents have been given. References
144 can be found in the text of the directives that were ultimately adopted.
145 A directive was adopted but not notified on 29 June 1989.
an agreement on the first stage of liberalization of the telecommunications sector (all services besides public voice telephony), leading to the Compromise of December 1989. In that Compromise, the Commission acknowledged the need to obtain support from Member States before enacting Article 86(3) directives. The same approach was taken for the agreement (in June 1993) on the liberalization of public voice telephony on 1 January 1998 and for the agreement (in December 1994) on the liberalization of telecommunications infrastructure by the same date. The Commission experienced more difficulties in convincing Member States to agree to the early liberalization of alternative infrastructure for 1996: there it had to establish links with individual procedures under Articles 81 and 86 EC (ex 85 and 90) in order to "convince" a substantial number of Member States.

5. a) As the consent of Member States in substance is obtained, the Commission releases a draft Commission directive under Article 86(3) EC, refflecting the core principles on which agreement has been obtained. In some cases (liberalization of satellite communications, mobile communications, cable TV networks), no further measures are proposed.

6. Following a short consultation period, the Commission adopts a Directive under Article 86(3) EC, thereby "setting in stone" the core principles of the regulatory framework.

7. Where applicable, the legislative procedure pursuant to Article 95 EC follows its course, using the directive adopted under Article 86(3) EC as a reference point, as described above.

The procedure described above has proven very successful in the run-up to full liberalization of the telecommunications sector. Table 2.4 above gave an overview of the instances where that procedure was used.

F. Concrete examples

It has been shown elsewhere that, in the fully liberalized model, the substance of the "liberalization" directives adopted by the Commission under Article 86(3) EC (ex 90(3)) (especially Directive 96/19) has been taken over in the "harmonization" directives adopted by the Council and the EP under Article 95 EC (ex 100a), thus evidencing that the former did fulfill their role as the "hard core" of the new EC telecommunications regulatory framework. Such an examination will not be repeated here; instead, three concrete examples will illustrate the overlap and the interplay between the liberalization and the harmonization directives:

147 See Nihoul, supra, note 125.
the set of market players called upon to contribute to universal service mechanisms (1);

- the differentiation between service and infrastructure providers in the interconnection regime (2);

- the range of services for which an individual license can be required by Member States (3).

1. Universal service

This section does not aim to deal with universal service in general, but rather more precisely to show the interplay between measures taken on the basis of Article 86(3) and 95 EC (ex 90(3) and 100a) as regards a specific but significant aspect of universal service, namely the range of market players which can be called upon to contribute to the financing of universal service (contributors).

Assuming for the sake of discussion that costs are shared through a universal service fund, the formula for calculating the contributions of contributor $n$ to the fund is:

$$ \text{Contribution}_n = \frac{M_n}{M_n + T} \times \text{Net Cost of USO} $$

where $TM$ is the total activity on the market whose players are bound to contribute to the fund and $MA$ is the measurement of contributor $n$'s activity on TM. The service provider subject to the USO accordingly must itself bear a proportion of the net costs of the USO equal to its activity on the market. Hence the significance of "market definition" in the context of the USO cost-sharing scheme: enlarging TM may very well result in reducing the value of MA/TM and thus the share of the net costs to be borne by the service provider subject to the USO itself.

In 1996, when it amended Directive 90/388 with Directive 96/19, the Commission defined the range of contributors narrowly. Pursuant to Article 4c of Directive 90/388, only "undertakings providing public telecommunications networks" can be either subject to an USO or forced to contribute to a universal service fund. Consequently the following are not included among the range of contributors:

188 The broad lines of universal service provision under the fully liberalised model are explained supra, Chapter One, I.D.1. The theoretical foundations for universal service obligations (at least from an economic perspective) are reviewed infra, Chapter Four, II.B.4.

189 The results are the same if cost sharing is done through a system of supplementary charges, but the description is more complex. In any event, all Member States which have decided to provide for a universal service financing mechanism have opted for the citation of a universal service fund (France has also introduced temporary supplementary charges, but they are linked to tariff rebalancing and not USO): see the First Monitoring Report on Universal Service in Telecommunications in the European Union, COM(1998)101 final (25 February 1998) at 19.

190 The expression is included in brackets since it is not a case of relevant market definition within the meaning of competition law.
- service providers which do not operate their own infrastructure, even if they offer public services. In fact, these providers must purchase capacity (leased lines) from an operator of public infrastructure that will itself be a contributor to universal service. It can be expected that leased line prices would reflect that contribution, and that the service provider would thus contribute indirectly to the financing of universal service, while being freed from administrative burdens relating thereto;
- providers of infrastructure used for mobile networks, since the general scheme of Directive 90/388 probably implies that "public telecommunications networks" is limited to network infrastructure used for fixed communications;\(^{122}\)
- providers of so-called "alternative infrastructure", since that infrastructure is not used for the provision of public services.\(^{123}\)

While the practical significance of the last two exclusions is limited,\(^{124}\) the first one is crucial: the development of competition in the provision of public network infrastructure usually will lag behind that of competition in service provision (given the costs involved in building out infrastructure), so that the service provider subject to the USO (as a rule the incumbent TO) would in all likelihood account for most of the activity as regards the provision of public telecommunications infrastructure for some time. In sum, Article 4c of Directive 90/388 means that the incumbent would be left to bear a very large share of the net cost of USO for the foreseeable future (even if that burden may be reflected in the infrastructure price and thus partly shifted onto others).

In the recitals to Directive 96/19, the Commission did not explain at length why it had defined the range of contributors so narrowly. In Recital 19, it is stated that only network operators should be called upon "to contribute to the provision and/or financing of universal service". Indeed, it is difficult to conceive from a technical perspective how a service provider without a network could be required to participate in the provision of universal service; hence it would be sensible to limit the range of contributors to those which are in a

\(^{122}\) Unless the service provider which is subject to the USO has in even larger share of the sector which is added to TM than its share (MA) of TM before the addition. As will become clear with the illustrations below, this case is unlikely.

\(^{123}\) Even if there is no explicit statement to that effect in Directive 90/388, as amended, the provisions relating to mobile communications have been introduced in a self-contained fashion by Directive 96/2 (Article 3a deals with licensing for mobile services; 3d with infrastructure for mobile communications and 3d with interconnection as regards mobile communications). These provisions were not affected by Directive 96/19, and a good argument can thus be made that the provisions introduced by Directive 96/19 relating to interconnection (Article 4a) and universal service (Article 4c) do not apply to mobile communications. See supra, Chapter One, I.3.

\(^{124}\) See supra, Chapter One, III.2, for a discussion of the notion of "alternative infrastructure".

\(^{125}\) Indeed, on economic grounds (unless licensing regulations induce artificial barriers), few operators of telecommunications infrastructure would act so, or allow it to be used, for the provision of public telecommunications services, given that these services represent the bulk of the telecommunications sector. As soon as public telecommunications services are provided with it, the infrastructure in question becomes a public telecommunications network according to the definitions found in the liberalisation and harmonisation directives.
position to be obliged to provide universal service themselves. Furthermore, from an economic perspective, if tariffs have been re-balanced, it can be assumed that usage-based costs (e.g. the cost of carrying out a telephone call) are covered by usage-dependent tariffs (e.g. the tariff for the call). The net cost of providing universal service then would originate mostly from the cost involved with giving certain remote or other customers access to the network. In the case of a customer in a remote region, for instance, the costs of laying a line to the customer may exceed any rental and call revenues to be derived from that customer.155 Here as well, since the costs mostly originate in the provision of network access, it seems appropriate to extend the cost-sharing mechanism to all public network providers only, so that the extra cost related to giving network access to unprofitable customers is borne by all those in the business of providing networks.

When it came to laying out a harmonized interconnection framework in Directive 97/33, the Commission accordingly proposed that, in line with Article 4c of Directive 90/388, the range of contributions be limited to providers of public telecommunications networks.156 The EP made no changes to that element of the proposal, but the Council modified it in its Common position of 19 June 1996, extending the range of contributors to providers of public telecommunications services.157 The common position was not further touched on this issue, and accordingly Directive 97/33 states that costs can be shared "with other organizations operating public telecommunications networks and/or publicly available telecommunications services".158 Directive 97/33 is also broader than Directive 90/388 in another way, whereas "public telecommunications networks" within the context of Directive 90/388 probably does not extend to mobile networks, as outlined above, Directive 97/33 does not make a distinction between fixed and mobile, and includes both in its definitions of "public telecommunications networks" and "publicly available telecommunications services".159

155 Given that PSTN use is generally tariffed on a user-pay-all-basis, call revenues may be direct (i.e. sums paid by the customer for calls) or indirect (sums paid by others to call that customer).

156 According to the Commission, all these revenues must be taken into account when determining the net cost of USOs: Communication on Assessment Criteria for National Schemes for the Costing and Financing of Universal Service in telecommunications and Guidelines for the Member States on Operation of such Schemes, COM(96)608 final (27 November 1996) at 15. See also J. Misch, "Network Externalities — the economics of universal access" (1997) 6 Utilities Policy 317, as well as infra, Chapter Four, II.B.

157 See the Commission Proposal, supra, note 121, Art. 5(1).


159 Directive 97/33, Art. 5(1).

160 This conclusion is supported first and foremost by the absence of any specific ONP directive dealing with mobile communications, in contrast with the situation in the Art. 86 (ex 90) directives. Many provisions in Directive 97/33 indicate that it applies to mobile and fixed communications as well, including Art. 3(2), 20(1) and Rec. 5, 22 (obligation to ensure interconnection +sounds to mobile and fixed networks). Under the heading "specific public telecommunications networks and publicly available telecommunications services", Annex I regroups both fixed and mobile networks and services, indicating that the two definitions found in the heading do extend to both fixed and mobile.
The practical implications of the broader range of contributors under Directive 97/33 are as follows. Providers of publicly available telecommunications services (for all intents and purposes, voice telephony) which do not operate a public network are drawn into the range of contributors. This touches first of all resellers of voice telephony, whose business consists in setting up a relatively limited overlay network (sometimes even only switching functions) and then reselling capacity bought at wholesale rates from the incumbent or another provider. Secondly, providers of mobile telephony are also added to the range of contributors, since they offer “publicly available telecommunications services” within the meaning of Directive 97/33.164 This could influence the calculation of contributions (as set out in the equation above) as follows: the total market volume (TM) would be increased by the turnover realized by voice telephony resellers and by mobile telephony providers, without the measurement of market activity (MA) of the incumbent being proportionately increased, since the incumbent’s activity on the resale market is normally negligible and the incumbent’s share of mobile communications is usually lower than its share of fixed communications.165 As a result, the incumbent’s share of universal service funding would be significantly reduced, and voice telephony resellers and mobile telephony providers would be burdened with universal service contributions. Since voice telephony resale is usually the door for newcomers to enter the telecommunications sector, imposing universal service contributions on them could also create a barrier to entry.

The Council did not provide much explanation for the change it introduced in the Common position, saying merely that it was “appropriate” to include the providers of publicly available telecommunications services amongst the range of contributors.166 The rationale for such an extension could be that service providers also incur net costs from providing universal service due to loss-making usage-related tariffs (i.e. the cost of making a call as opposed to the cost of giving access to the network). However, this could well be a consequence of incomplete tariff re-balancing rather than the USO; if all costs related to the access to the network are indeed assigned to access, the actual cost of carrying out a telephone call should not be such that a service provider would incur a loss. Some Member States would even have gone further and imposed universal service contributions on all participants in the telecommunications sector on the

164 As mentioned supra, Chapter One, IV.C., the definition of “publicly available telecommunications services” in the fully liberalized environment may extend to non voice services as well, such as public packet-switched data services.

165 By the same token, providers of mobile communications networks are also included in the range of contributors. However, as mentioned above, significant infrastructure operators will for economic reasons most likely qualify as providers of public telecommunications networks.

166 GSM-based (GSM 900 and GSM 1800) services have now become the majority of mobile communications market, and these services have been introduced on a competitive basis, so that there are always competitors to the incumbent with significant market shares. See the survey to (1999) 9.2 Public Network Europe 38.

167 Common position of 18 June 1996, supra, note 157 at 34.
questionable rationale that they all benefit from liberalization and should accordingly bear part of the burden of providing universal service. 164

As regards the range of contributors to the universal service funding mechanism, the EP and Council, with Directive 97/33, thus strayed from the principles set out by the Commission in Directive 90/388 (as amended by Directive 96/19). In the whole regulatory corpus concerning universal service, this is the main point where the two directives differ,165 which already shows how much influence the Commission could exert by enacting its Article 86(3) directive at the start of the legislative process, even on a very sensitive issue such as universal service, where some Member States and part of public opinion were strongly opposed to the Commission’s proposals. Even on that point where Directive 97/33 diverged from Directive 90/388, the Commission was able to use Directive 90/388 as a basis to put forward a restrictive interpretation of Article 5(1) of Directive 97/33, in a declaration which it issued when the Council agreed on the common position:166

The Commission recalls that Article 4c of [Directive 90/388] states that, where Member States set up mechanisms for sharing the net cost of universal service obligations, they should apply these mechanisms to undertakings providing public telecommunications networks. The Directive further states that the respective burden must be allocated according to objective and non-discriminatory criteria and in accordance with the principle of proportionality. According to the latter principle contributions should, as emphasised in recital 19 of the... Directive, seek only to ensure that market participants contribute to the financing of universal service....

The principle of non-discrimination opposes financing mechanisms for the universal service obligations which lead either to double contributions to the cost of universal service in the same Member State or to all undertakings in the telecommunications markets subsidising the voice telephony operators. Consequently contributions should be limited to services within the scope of the universal service definition.

The Commission will therefore interpret both Article 4c of [Directive 90/388] and 5(1) of [Directive 97/33] as allowing contributions only to be imposed on voice telephony providers in proportion to their usage of public telecommunications networks.

By relying on Directive 90/388 as an interpretative tool, the Commission could therefore diminish the potential scope of the “deviation” introduced by Directive 97/33. The Commission recalls the principles set out in Article 4c(b) of

164 See the declaration made by Belgium to explain its vote against the common position, in Council Press Release 95/56 (21 March 1996).

165 See Nibot, supra, note 125.

166 The declaration was made at the Council meeting of 27 March 1996 where a political agreement was reached on what would become the Commission position of 18 June 1996, supra, note 157. It is found in Annex C to the Communication on Assessment Criteria for National Schemes for the Costing and Financing of Universal Service in Telecommunications and Guidelines for the Member States on Operation of such Schemes, supra, note 157.
Directive 90/388, namely objectivity, non-discrimination and proportionality, in order to conclude that contributions should be limited to those services coming within the USO under EC law (now found in Directive 91/10), the main being access to the PSTN.165 In terms of the equation mentioned above, this means that TM should correspond to the total market for network access, and should not include additional revenues from the provision of public services such as fixed or mobile voice telephony; increasing TM with those revenues (so as to dilute the share of the incumbent) would not be permissible, according to the Commission. Faced with the undeniable fact that the providers of public telecommunications services had been included in the range of contributors in Directive 97/33,166 the Commission went on to limit their participation to a proportion corresponding to their usage of public telecommunications networks; it used its Article 86(3) directive (Art. 4c of Directive 90/388, as introduced by Directive 96/19) in order to limit the effect of the extension of the range of contributors to the financing of universal service in Article 5(1) of Directive 97/33, although it was not able to revert to the original position set out in Article 4c of Directive 90/388.

The practical impact of this whole debate remains limited, since in the end not all Member States chose to set up universal service financing mechanisms, and in only two Member States are such mechanisms operational.167 The issue surveyed next is of more immediate practical relevance, since it involves the differentiation between general classes of market players in the terms and conditions for interconnection with the incumbent’s network.

2. Interconnection

With respect to interconnection, in line with the results observed for universal service, Directive 97/33 follows by and large the core elements contained in Article 4a of Directive 90/388, as introduced by Directive 96/19.170 On one small but significant point, however, Directive 97/33 differs slightly in substance: the possibility of introducing a differentiation in interconnection charges between broad categories of operators (defined a priori).

165 Together with directory services, public payphones and special programmes for disabled users or users with social needs: Directive 91/10, Art. 5-8.

166 Even on the assumption that the Commission acting under Article 86(3) EC could have bound the EP and Council acting under Article 95 EC, Article 4c of Directive 90/388 did not prevent the Council from enlarging the range of contributors in Directive 97/33, since it was enacted “without prejudice to the harmonization, in the framework of ONS”.

167 While nine Member States have provided for universal service funding mechanisms, only two of them (France and Italy) have actually put them in operation: Fifth Report on the Implementation of the Telecommunications Regulatory Package, COM(99)557 (11 November 1999) at 16. The Commission has initiated proceedings against France under Article 226 EC (see 169) on the grounds that certain elements of its universal service financing mechanism (not related to the costs considered here) do not comply with EC law; see “Commission takes issue with the methods of calculation and financing of the net charge for universal service provision in telecommunications fixed by the French government” Press Release IP99/994 (13 July 1999).

170 See here as well Nilsen, supra, note 125.