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## Liberalizing and Re-Regulating Telecommunications in Europe: A Common Framework and Persistent Differences

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# **Liberalizing and Re-Regulating Telecommunications in Europe: A Common Framework and Persistent Differences**

**Peter Holmes**

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# **Liberalizing and Re-Regulating Telecom- munications in Europe: A Common Framework and Persistent Differences**

**Peter Holmes**

**Alasdair R Young**

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## **Abstract**

This paper analyses the role of the European Union in promoting liberalisation among its member states and in crafting the multilateral regime for telecommunications services. It begins by analysing the origins of the EU regime, describing its contours and assessing its implementation. It then examines the interaction between the EU and the multilateral regime, examining the Uruguay Round and post-Uruguay Round negotiations on telecommunications services and outlining the issues under consideration in the GATS 2000 negotiations. It then proceeds to assess how the regulatory developments at the national, European and multilateral levels coexist and interact.

## **Zusammenfassung**

Dieses Papier analysiert die Rolle der Europäischen Union bei der Liberalisierung der Telekommunikationsmärkte ihrer Mitgliedstaaten und bei der Formung des multilateralen Regimes für Telekommunikationsdienstleistungen. Es beginnt mit einer Darstellung der Ursprünge des EU-Regimes, beschreibt seine Merkmale und beurteilt seine Umsetzung. Dann untersucht das Papier die Zusammenhänge zwischen dem EU- und dem multilateralen Regime, analysiert die Uruguay-Runde und die Folgeverhandlungen bezüglich der Telekommunikationsdienstleistungen und skizziert einige Themen der neuen GATS 2000-Runde. Schließlich beschäftigt es sich mit der Frage, wie die nationalen, europäischen und multilateralen Entwicklungen bei der Regulierung der Telekommunikationsmärkte verlaufen und wie sie aufeinander einwirken.

**JEL Classification:** F02, F13, L96

**Keywords:** International Economic Order, European Union, Trade Negotiations, Telecommunications





## I. Introduction

This paper focuses on the role of the European Union in promoting liberalization among its member states and in crafting the multilateral regime liberalizing telecommunications services. The EU is particularly worthy of study for six main reasons. First, the EU is itself the most highly developed and institutionalized regulatory regime for liberalizing telecommunications services between countries. Second, the EU is the core of the world's largest regional telecommunications regulatory regime. The EU's telecommunications regulatory regime already embraces 19 countries and is being extended to the applicant countries of central and eastern Europe.<sup>1</sup> Third, despite the adoption of a common regulatory framework, significant differences persist in the member states. Fourth, the EU is a major player in the global market. It is home to or host of all of the major international telecommunications operators. Fifth, the EU and its member governments have been leading proponents of multilateral liberalization in telecommunications services. Sixth, the EU's regime has served as a model for aspects of the multilateral regime.

In this study, we examine each of these factors and explore their implications both for the EU's member states and for the multilateral regime. The core of the study consists of three main sections. The first analyses the origins of the EU regime, describes its contours and assesses its implementation. We pay particular attention to the interaction between the EU and the domestic regimes of France, Germany, Italy and the United Kingdom, because not only are they the largest European telecommunications markets, they have also been the key players in shaping the European regime. The second section focuses on the interaction between the EU and the multilateral regime, examining the Uruguay Round and post-Uruguay Round negotiations on telecommunications services and outlining the issues under consideration in the GATS 2000 negotiations. The third main section assesses how the regulatory developments at the national, European and multilateral levels coexist. In the concluding section we draw together our main findings.

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1 These 19 countries are comprised of the 15 member states of the EU, the other three members of the European Economic Area, and Switzerland.

## II. European Liberalization: The EU as Catalyst

### A. The point of departure and the pressures for reform

Until the 1980s, the provision of telecommunications services was widely assumed to be a natural monopoly. This assumption, particularly in Europe, was underpinned by the view that public telephone operators should implicitly or explicitly serve a number of public policy objectives — including providing universal service, cross-subsidizing services to support local communications and subsidizing social and/or economic needs — rather than just maximize profits.<sup>2</sup> These factors were held to justify a high degree of government ownership in EU member states.

Beginning in the 1980s and intensifying into the 1990s, a combination of interrelated push-and-pull forces started to exert pressure on existing regulatory structures in Europe and elsewhere. The development and spread of neo-liberal economic ideas from the US, including in telecommunications, found resonance in Europe and in the single European market programme.<sup>3</sup>

In Europe telecommunications came to be seen as both an important and growing industry in its own right and as a key input into other industries, particularly in the service sector.<sup>4</sup> Consequently, a low-cost and efficient telecommunications sector was considered vital to European competitiveness in the global economy and to the completion of the single European market.

The emergence of new technologies, combined with growing acceptance of neo-liberal economic ideas, also undermined the assumption that telecommunications represented a

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2 *E Noam, Telecommunications in Europe* (Oxford: Oxford University Press, 1992); *M Thatcher, 'Regulatory Reform and Internationalisation in Telecommunications,' Industrial Enterprise and European Integration: From National to International Champions in Western Europe*, ed. *J Hayward* (Oxford: Oxford University Press, 1995)

3 *K Armstrong and S Bulmer, The Governance of the Single European Market* (Manchester: Manchester University Press, 1998); *G Majone, 'Cross-National Sources of Regulatory Policymaking in Europe and the United States,' Journal of Public Policy* 2/1 (1991); *M Thatcher, 'The Europeanisation of Regulation: The Case of Telecommunications,' EUI Working Paper RSC 99/22* (San Domenico (FI): European University Institute, 1999); *A R Young and H Wallace, 'The Single Market: A New Approach to Policy,' Policy-Making in the European Union*, 4th ed., eds *H Wallace and W Wallace* (Oxford: Oxford University Press, 2000).

4 *Bangemann Group, Europe and the Global Information Society: Recommendations of the High-Level Group on the Information Society to the Corfu European Council, Bulletin of the European Union, Supplement 2/94* (Brussels: Office for Official Publications of the European Communities, 1994); Commission, 'Towards a Dynamic European Economy: Green Paper on the Development of the Common Market for Telecommunication Services and Equipment,' COM (87) 290 final (30 June 1987); Commission, 'Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century,' COM (93) 700 (5 December 1993).

natural monopoly.<sup>5</sup> Technological changes also made possible the provision of new services, such as mobile communications, which were not reserved to the incumbent telecommunications operators. By the early 1990s, these new services had begun to compete with traditional voice telephony and had created new markets into which the established operators wanted to move.<sup>6</sup> The successful break-up of AT&T and the privatization of British Telecommunications (BT), as well as the introduction of liberalization in the UK, gave credence to the liberalization agenda in Europe.<sup>7</sup>

These pressures, however, did not fall on equally fertile soil in all of the EU's member states.<sup>8</sup> The British, Danish, Finnish and Swedish governments introduced competition. The Belgian, Dutch, German, French and Luxembourg governments embarked on less radical regulatory reforms, such as separating the operational and regulatory functions of the national telecommunications operator and liberalizing some of the newer services. Other member governments, particularly those of Greece, Italy, Portugal and Spain, did not really grapple with the new challenges.<sup>9</sup>

The situation, however, was changing very rapidly during the early 1990s. In particular, support for liberalization was building among users, in governments, and even in telecommunications operators.<sup>10</sup> Thus, when the Commission consulted widely before advancing its proposals on liberalizing voice telephony, it found stronger support, even from the incumbent operators, for more far-reaching liberalization than it had suggested.<sup>11</sup>

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5 M C E J Bronckers and P Larouche, 'Telecommunications Services and the World Trade Organisation,' *Journal of World Trade* 31/3 (June 1997); K Dyson and P Humphreys (eds), 'Introduction: Politics, Markets and Communications Policies,' *The Political Economy of Communications: International and European Dimensions* (London: Routledge, 1990); Thatcher, 'The Europeanisation of Regulation.'

6 On this competition, see Commission, *Telecommunications: Liberalized Services, The Single Market Review II/6* (London: Kogal Page, 1998).

7 K Dyson and P Humphreys (eds), conclusion, *The Political Economy of Communications: International and European Dimensions* (London: Routledge, 1990); F McGowan, 'Competition Policy: Converging Ideas and Diffuse Implementation,' *Policy-Making in the European Union*, 4th ed., eds H Wallace and W Wallace (Oxford: Oxford University Press, 2000); Noam, *Telecommunications in Europe*.

8 On the institutional path-dependence of reforms in France, Germany, Italy and the UK, see Thatcher, 'The Europeanisation of Regulation', and in Finland and Sweden (and Norway), see E W Smith, 'Re-Regulation and Integration: The Nordic States and the European Economic Area,' diss. University of Sussex, 1999.

9 Noam, *Telecommunications in Europe*; Thatcher, 'Regulatory Reform and Internationalisation in Telecommunications.'

10 Thatcher, 'The Europeanisation of Regulation'; V Schneider et al., 'Corporate Actor Networks in European Policy-Making: Harmonizing Telecommunications Policy,' *Journal of Common Market Studies* 32/4 (December 1994).

11 Commission, 'Communication to the Council and European Parliament on the Consultation on the Review of the Situation in the Telecommunications Services Sector,' COM (93) 159 final (28 April 1993).

## B. The politics and process of European reform<sup>12</sup>

The EU's telecommunications services regime developed remarkably rapidly, from an initial proposal to implementation in about ten years. The Commission's efforts to liberalize services did not begin until 1987,<sup>13</sup> but by 1993 the member governments had reached a political agreement on the liberalization of voice telephony, which the Commission operationalized in 1996 and which was implemented in most of the member states at the beginning of 1998. The process was driven by the Commission, which made extensive use of its powers to implement competition policy in order to pry open the member states' markets.<sup>14</sup>

Significantly, the Treaty of Rome does not mention a specific role for the EU in telecommunications. It took the European Court of Justice (ECJ) to open the door. In 1985 the ECJ, in the *British Telecom* case,<sup>15</sup> held that the general provisions of the Treaty, including competition policy, apply to the telecommunications sector. This judgement coincided with both the launch of the single European market programme and the intensification of technological changes in the telecommunications sector. As discussed earlier, the combination of technological change, demand for new and better services, neo-liberal economic ideas and the economic challenges posed by the US and Japan led the EU's member governments to rethink their domestic regulations.<sup>16</sup> It was against this backdrop that the Commission began to advance the liberalization of telecommunications services.

The promulgation of the EU's telecommunications regime began with the Commission's 1987 Green Paper on 'The Development of the Common Market for

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12 This section draws heavily on *L Cram, Policy-Making in the European Union: Conceptual Lenses and the Integration Process* (London: Routledge, 1997); *W Sandholtz, 'The Emergence of a Supranational Telecommunications Regime,' European Integration and Supranational Governance*, eds *W Sandholtz and A Stone Sweet* (Oxford: Oxford University Press, 1998); *S K Schmidt, 'Commission Activism: Subsuming Telecommunications and Electricity under European Competition Law,' Journal of European Public Policy* 5/1 (1998); *Thatcher, 'Regulatory Reform and Internationalisation in Telecommunications'*; and *Thatcher, 'The Europeanisation of Regulation.'* Although these authors generally share the interpretation of events presented here, *Sandholtz* and *Schmidt* particularly emphasize the Commission's agency, while *Cram* and *Thatcher* stress the way the Commission's initiatives resonated with reform pressures and processes already underway in the member states.

13 *M Carpentier*, introduction, *Telecommunications in Europe: Free Choice for the User in Europe's 1992 Market: The Challenge for the European Community*, by *H Ungerer* and *N Costello* (Brussels: Office of Official Publications of the European Communities, 1990).

14 *Cram; Sandholtz; Schmidt.*

15 'Italy v. Commission,' Case 41/83, *European Court Report* (1985), 873.

16 *Dyson and Humphreys*, 'Introduction: Politics, Markets and Communications Policies'; *Dyson and P Humphreys*, conclusion; *Noam, Telecommunications in Europe; Thatcher, 'Regulatory Reform and Internationalisation in Telecommunications'; Thatcher, 'The Europeanisation of Regulation.'*

Telecommunications Services and Equipment’,<sup>17</sup> which was endorsed by the Council in June 1988.<sup>18</sup> The Commission proposed open competition for the provision of all services except voice telephony. Although the member governments generally supported the objective of limited liberalization, the Commission pressed ahead faster than many of them wanted to go.<sup>19</sup> It did so on the basis of Article 86 (ex.-90) of the Treaty of Rome, which states that the member governments cannot allow state enterprises, or enterprises to which the government has granted ‘special or exclusive rights,’ to engage in practices that violate the Treaty’s competition rules (Articles 81 and 82 (ex.-85 and 86)).

Specifically, in June 1990 the Commission issued Directive 90/388/EEC to the member states requiring them to withdraw all special or exclusive rights for the supply of ‘value-added’ telecommunications services;<sup>20</sup> that is, all services except voice telephony, telex, mobile radiotelephony, paging and satellite services.<sup>21</sup> The Commission began with ‘value-added’ services because there was less political opposition to the introduction of competition in them, in part because there were no incumbent operators providing these services.<sup>22</sup> The Commission, however, subsequently amended the directive to encompass satellite communications (1994),<sup>23</sup> cable television networks (1995),<sup>24</sup> and mobile and personal communications<sup>25</sup> and voice telephony<sup>26</sup> (1996).

The Commission’s early reforms largely followed reforms at the national level.<sup>27</sup> The British government had ended BT’s monopoly on ‘value-added’ services and mobile telecommunications in the early 1980s. In France and Germany, monopolies in ‘value-added’ services had already been limited and liberalization of mobile communications had begun, although the Commission’s proposals extended the scope of liberalization. Even in Italy some limited reforms had begun in parallel with the development of European policy.

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17 Commission, ‘Towards a Dynamic European Economy.’

18 Council, ‘Council Resolution of 30 June 1988 on the Development of the Common Market for Telecommunications Services and Equipment,’ 88/C 257/01, *Official Journal of the European Communities* C257 (4 October 1988).

19 Sandholtz.

20 Commission Directive 90/388/EEC of 28 June, *Official Journal* L 192 (24 July 1990).

21 The directive does not use the term ‘value-added’ services. Instead it applies to all telecommunications services except certain ‘reserved’ services, including voice telephony.

22 Thatcher, ‘Regulatory Reform and Internationalisation in Telecommunications.’

23 Commission Directive 94/46/EU, *Official Journal* L 268 (19 October 1994).

24 Commission Directive 95/51/EU, *Official Journal* L 256 (26 October 1995).

25 Commission Directive 96/2/EU, *Official Journal* L 20 (26 January 1996).

26 Commission Directive 96/19/EU, *Official Journal* L 74 (22 March 1996).

27 Thatcher, ‘The Europeanisation of Regulation.’

The pace and mode of liberalization, however, were controversial. In particular, the French and Italian governments fought hard to exclude voice telephony from liberalization. Further, the Belgian, Italian and Spanish governments, supported by the French government, challenged the Commission's use of Article 86 (ex.-90) directives to liberalize services.<sup>28</sup> The ECJ, however, supported the Commission.

Subsequently, the Commission pursued a somewhat more conciliatory approach.<sup>29</sup> At the Council's request, the Commission consulted widely before pushing ahead with the full liberalization of telecommunications services.<sup>30</sup> As noted earlier, it found greater support than it had anticipated for liberalization.<sup>31</sup> Even the French and Italian telecommunications operators and governments were willing to accept full liberalization, although they retained reservations about the pace of liberalization and the degree of re-regulation.<sup>32</sup> Support for liberalization was particularly strong from large companies.<sup>33</sup> There was also support from potential entrants and liberalizing factions within member governments. The managements of some incumbent telecommunications operators (including some senior managers in France Telecom) also favoured liberalization, as it would enable them to enter new and more dynamic service markets.<sup>34</sup>

Encouraged by this support, the Commission proceeded to address domestic liberalization as well as the liberalization of services between the member states.<sup>35</sup> In July 1993 the member governments unanimously adopted Council Resolution 93/C 213/01,<sup>36</sup> which approved the Commission's intention to achieve the liberalization of all public voice telephony services by 1 January 1998, with additional transition periods of up to five years for countries with less-developed networks — Greece, Ireland, Portugal and Spain — and up to two years for countries with very small networks, essentially Luxembourg.

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28 Spain, Belgium and Italy v. Commission, Joined Cases C-271/90, C-281/90 and C-289/90, *European Court Report* (1992), I-5833.

29 Sandholtz; Schmidt.

30 Council, 'Council Resolution of 17 December 1992 on the Assessment of the Situation in the Community Telecommunications Sector,' 93/C 2/05, *Official Journal of the European Communities* C2 (6 January 1992).

31 Commission, 'Communication to the Council and European Parliament on the Consultation on the Review of the Situation in the Telecommunications Services Sector.'

32 Thatcher, 'The Europeanisation of Regulation.'

33 Cram; Sandholtz; Thatcher, 'Regulatory Reform and Internationalisation in Telecommunications.'

34 Cram; Thatcher, 'The Europeanisation of Regulation.'

35 Commission, 'Communication to the Council and European Parliament on the Consultation on the Review of the Situation in the Telecommunications Services Sector.'

36 Council, '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,' *Official Journal of the European Communities* C 213 (6 August 1993).

In addition to setting the timetable for internal liberalization, the Council's Resolution also provided one of the foundations for the EU's negotiating position in the GATS 'basic' telecommunications services negotiations.<sup>37</sup> Another foundation for both internal liberalization and external negotiation was the Council's December 1994 resolution (94/C 379/03)<sup>38</sup> liberalizing telecommunications infrastructures.<sup>39</sup> It set the same timetable with the same scope for additional transition periods as did the 1993 Resolution on services.<sup>40</sup> Both resolutions asked the Commission to develop the details, which it did in Commission Directive 96/19/EU.<sup>41</sup> Crucially, those member governments that wanted extended transition periods had to seek the Commission's approval.

The EU's regime has subsequently been subject to several waves of revision and consolidation. The first, during 1997-1998, laid down rules for pricing by operators,<sup>42</sup> addressed the issue of universal service,<sup>43</sup> established a common framework for general authorizations and individual licences,<sup>44</sup> and guaranteed that new entrants should be able to access incumbents' networks at cost-based prices.<sup>45</sup>

In addition, the Commission modified its rules on leased lines as market structures changed. It liberalized pricing where competition existed and imposed tight cost-base rules where an incumbent had market power. The Commission also issued notices regarding the way it would apply competition law with respect to telecommunications. Its aim is eventually to use only competition law rather than sector specific regulation. Market and technological conditions continued to evolve. New issues — such as the importance of the internet, electronic commerce and data protection — arose. These prompted the need for new rules, or, as the Commission saw it, a new approach that was not so tied to specific technologies. In addition, the Commission saw an opportunity to consolidate the 21 separate measures, which had emerged rather haphazardly. The

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37 Commission, 'Proposal for a Council Decision Concerning the Conclusion on Behalf of the European Community, as Regards Matters within Competence, of Results of the WTO Negotiations on Basic Telecommunications Services,' COM (97) 368 final (15 July 1997).

38 Council, 'Council Resolution of 22 December 1994 on the Principles and Timetable for the Liberalisation of Telecommunications Infrastructures,' 94/C 379/03, *Official Journal of the European Communities* C 379 (31 December 1994).

39 Commission, 'Proposal for a Council Decision Concerning the Conclusion on Behalf of the European Community, as Regards Matters within Competence, of Results of the WTO Negotiations on Basic Telecommunications Services.'

40 Council, 'Council Resolution of 22 December 1994 on the Principles and Timetable for the Liberalisation of Telecommunications Infrastructures.'

41 Commission Directive 96/19/EU, *Official Journal* L 74 (22 March 1996).

42 Directive 97/51/EC

43 Directive 98/10/EC

44 Directive 97/13/EC

45 Directive 97/33/EC



Commission's more comprehensive approach culminated in a proposal for an overarching draft directive in July 2000.<sup>46</sup> It is to be accompanied by a series of implementing directives, which we discuss in more detail below.

### **C. The current state of play: implementation, impact and unfinished business**

The impact of the EU's telecommunications regime differs markedly from member state to member state. In part this reflects their starting positions. Liberalization in the UK preceded the European regime, and the UK's regime was largely unaffected by EU rules.<sup>47</sup> By contrast, Greece, because of the underdevelopment of its network, had until the end of 2000 to comply with EU rules. In addition, as the EU's regime was adopted through fairly general directives, the member governments have been left a significant degree of leeway in determining precisely how to implement the objectives set out in the directives. Further, the EU's regime does not address some important aspects of the national regimes, most notably the issue of government ownership.<sup>48</sup>

In addition to these permitted differences, other differences arise from member governments failing to live up to their commitments. For example, as of October 1999 only Germany, Spain and Sweden had transposed the full telecommunications regulatory framework to the Commission's satisfaction.<sup>49</sup> France and the UK were having difficulties with the directives on numbering (97/33/EC) and data protection (97/66/EC). Italy's performance was the worst, having failed to implement the 'New Voice Telephony' Directive (98/10/EC), the amended leased lines directive (97/51/EC) and the data protection directive.

Persistent problems in licensing and the ease and cost of interconnection, as well as costs of mobile phone roaming between different EU member states,<sup>50</sup> may be transition problems, but there are also underlying differences of national attitudes. This is illustrated by the marked difference in how governments have chosen to allocate licences for third-generation mobile communications, all of which are telling for

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46 Commission, 'Proposal for a Directive of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communications Networks and Services,' COM (2000) 393 (12 July 2000).

47 *Thatcher*, 'The Europeanisation of Regulation.'

48 Applicant countries, however, have been instructed to privatize their networks.

49 Commission, 'Fifth Report on the Implementation of the Telecommunications Regulatory Package,' COM (1999) 537 final (10 November 1999).

50 Commission, 'Sixth Report on the Implementation of the Telecommunications Regulatory Package,' COM (2000) 814 (7 December 2000).

national markets. Different government approaches reveal radically different national philosophies, ranging from allocation via beauty contests to auctions aimed solely at maximizing revenue.

### *1. National regulatory authorities*

The National Regulatory Authorities (NRAs) have a crucial role in determining how the EU's regime and the national rules implementing it actually apply on the ground. They are charged with supervising licensing, interconnection, leased lines, universal service, tariff principles, numbering, frequencies and rights of way. In other words, they are responsible for enforcing the provisions of the EU regime.

The EU's regime, however, provides relatively little guidance as to how these bodies are supposed to interpret common requirements or perform their duties.<sup>51</sup> One of these few requirements stipulates that the NRA must be formally separate from both network operators and service providers and, where the government retains ownership, from the ministry or department responsible for the shareholding in the incumbent operator. The NRAs are also obliged to operate in accordance with general EU principles: non-discrimination and proportionality.

The Commission is particularly concerned about disparities in the powers and resources of NRAs in different member states.<sup>52</sup> In particular, there are concerns about the independence of national regulators in Belgium, France and Portugal. The Commission considers inadequate the powers, particularly in terms of being able to intervene in interconnection disputes, of the Belgian, French, German and Luxembourg NRAs. There are also reports that the Spanish and Swedish NRAs are reluctant to exercise their full powers in relation to interconnection. NRAs in Austria, the Netherlands, Sweden and the UK are not considered sufficiently proactive by new entrants.<sup>53</sup>

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51 *Thatcher*, 'The Europeanisation of Regulation.'

52 Commission, 'Sixth Report on the Implementation of the Telecommunications Regulatory Package.'

53 Commission, 'Sixth Report on the Implementation of the Telecommunications Regulatory Package.'

## 2. *Privatization and market opening*

Although the EU's regime does not require privatization, it does have indirect implications for the public ownership of telecommunications operators.<sup>54</sup> The EU's regime, centred on 'fair and effective competition,' undermined traditional justifications for public sector supply. Privatization also appealed to the managements of telecommunications operators, because it would help them restructure in response to EU-imposed competition and changing market conditions and escape from the constraints of the public sector.<sup>55</sup> In addition, public ownership was seen as an impediment to the desired strategy of internationalization (see below). Public ownership prevented cross-shareholdings, made it difficult to value operators and created concern about political interference. In addition, regulators in some countries, including crucially the US, take a dim view of alliances involving publicly owned operators.<sup>56</sup> Governments, meanwhile, wanted to encourage changes that would help their operators internationalize and succeed. Privatization also offered an important source of revenue. In Germany and Italy, where funds were not available for essential investment, privatization held out the additional carrot of access to capital. The privatization of Telecom Italia did get an additional shove from the European Commission, but not within the context of the telecommunications regime.<sup>57</sup> It was privatized in order to reduce the debts of the state holding company IRI, which was in danger of falling foul of EU state aids rules.

In response to these considerations, a truly dramatic wave of privatizations occurred during the latter half of the 1990s (see Table 1). They even occurred in many of the countries with traditionally less liberal governments, including Greece, Portugal and Spain.

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54 *Thatcher*, 'The Europeanisation of Regulation.'

55 *Thatcher*, 'The Europeanisation of Regulation.'

56 *Thatcher*, 'The Europeanisation of Regulation.'

57 *Thatcher*, 'The Europeanisation of Regulation.'

**Table 1: Share of Public Ownership in Incumbent Operators (per cent)**

Member state	December 1994	August 2000
UK	0	0
Denmark	51	0
Ireland	100	0
Spain	33	1 share
Italy	62	4
Portugal	100	11
Netherlands	majority	44
Belgium	100	50% + 1 share
Greece	100	51
Finland	100	53
France	100	54
Germany	100	58
Austria	100	75% – 1 share
Sweden	100	70
Luxembourg	100	100

Sources: EC&MS [The European Community and its Member States], 'Response to Questionnaire on Basic Telecommunications: Revision,' S/NGBT/W/3/Add.15/Rev.1 (27 March 1995); Commission, 'Sixth Report on the Implementation of the Telecommunications Regulatory Package,' COM (2000) 814 (7 December 2000).

Another change in market structure involved the entry of new operators. Following the introduction of liberalization, there has been a sharp increase in the number of firms offering a variety of telecommunications services in EU member states (see Table 2) although these numbers vary widely between the member states. Despite the large numbers of operators, incumbents still dominate all markets, particularly the local.<sup>58</sup> In 1999, only in Austria and the UK did the incumbent account for less than 90 per cent of local calls. The picture is better for long-distance and significantly better for international calls.

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58 Commission, 'Proposal for a Directive of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communications Networks and Services.'

### 3. *Internationalization of the European industry*

Often these market entrants are established operators from other member states. BT, for example, has wholly-owned subsidiaries in France, Ireland, the Netherlands and Spain and is engaged in joint ventures in Germany, Italy, the Netherlands, Spain and Sweden.<sup>59</sup> Deutsche Telekom has wholly-owned subsidiaries in France and the UK and joint ventures in France and Italy.<sup>60</sup> France Telecom, which calls Europe its 'new home market,' has operations in Austria, Belgium, Denmark, Germany, Italy, the Netherlands, Portugal, Spain and the UK.<sup>61</sup> Telecom Italia has investments in Austria, France, Greece and Spain.<sup>62</sup>

Other new market entrants are non-EU (particularly US) firms, many of which are collaborating with non-incumbent European companies, including non-telecommunications companies, such as British Aerospace, Mannesman (Germany), and Olivetti (Italy). Initially, these firms tended to invest in mobile services and alternative networks, which were more open to competition. In the latter half of the 1990s, however, foreign companies began to invest in the telecommunications operators of some of the smaller member states: Belgium, Denmark and Ireland.

Even as foreign firms began to penetrate EU markets, so EU firms dramatically increased their non-EU operations. In part this was a strategic response to real and anticipated increases in domestic competition.<sup>63</sup> Although some European telecommunications operators, such as France Telecom and Spain's Telefonica, were internationally active by the early 1990s, there was a profound increase in European operators' engagement in non-EU markets during 1992-96.<sup>64</sup> There was also a shift in the destinations of the European telecommunications operators' investments away from markets where national links are strong.<sup>65</sup> As a result, as of early 2000, Deutsche Telekom had representative offices, affiliated companies and joint ventures in over 65

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59 British Telecommunications, *2000 Annual Report and Form 20F* (2000), available at <http://www.bt.co.uk>.

60 Deutsche Telekom, *1999 Annual Report* (2000).

61 France Telecom, 'France Telecom International Development' (2000), available at <http://www.francetelecomna.com>.

62 *J Clegg and S Kamall*, 'The Internationalization of Telecommunications Services Firms in the European Union,' *Transnational Corporations* 7/2 (August 1998).

63 *Clegg and Kamall*; Commission, *Telecommunications: Liberalized Services*; *Thatcher*, 'The Europeanisation of Regulation.'

64 *D Elixmann and H Hermann*, 'Strategic Alliances in the Telecommunications Services Sector: Challenges for Corporate Strategy,' *Communications and Strategies* 24/4 (1996).

65 *Elixmann and Hermann*.

countries;<sup>66</sup> France Telecom had operations in 75 countries;<sup>67</sup> BT had subsidiaries, joint ventures and associates in 18 countries.<sup>68</sup>

**Table 2: Competition in European Telecommunications Markets: Actual Operators 2000**

Country	Calls		
	Local	Long-distance	Inter-national
B	11	19	19
Dk	15	15	15
D	53	86	86
El	--	--	--
E	40	53	51
F	17	44	45
Irl	9	9	10
I	31	60	60
L	5	9	9
NL	36	36	36
A	16	21	21
P	4	11	--
Fin	85	42	11
S	30	30	39
UK	36	26	66
Total	388	461	468

Source: Commission, 'Sixth Report on the Implementation of the Telecommunications Regulatory Package' COM (2000) 814 (7 December 2000).

Another important change in corporate behaviour during the 1990s was the emergence of transnational and even global strategic alliances. A number of the European telecommunications operators — BT, Deutsche Telekom, PTT Telecom, France Telecom, Telefonica and Telia — entered such alliances during the mid-1990s. Many of

66 *H-W Hefekäuser*, 'Meeting the Challenge of a Global Telecommunications Market,' address to the European-American Business Council, Washington DC, 9 February 2000.

67 France Telecom, 'France Telecom International Development.'

68 British Telecommunications, *2000 Annual Report and Form 20F*.

these alliances were very fragile, and there was a significant degree of realignment during the latter half of the 1990s.<sup>69</sup> Deutsche Telekom, for one, has shifted away from strategic alliances (it sold its stake in Global One to France Telecom in January 2000) in favour of concentrating on acquisitions and majority shareholdings.<sup>70</sup>

#### **4. *The proposed regulatory framework***

Although the EU has made great and rapid strides in liberalizing telecommunications services, the Commission's 1999 review identified a number of areas where further action is needed. Particular problems it identified included:<sup>71</sup>

- the low levels of harmonization of the EU's licensing and interconnection regimes
- wide divergences in national implementation
- disparities in the powers and resources of NRAs
- improper national implementation of the framework for cost accounting
- the lack of competition in the local access market
- inappropriate universal service funding schemes
- disparities in consumer protection
- no rules addressing internet access or possible distortions of competition arising from the integration of voice/data and fixed/mobile services

In order to address these shortcomings, the Commission proposed in July 2000 a new regulatory framework for electronic communications. The proposed package of measures aims: (i) to promote more effective competition, (ii) to react to technological and market developments, (iii) to remove unnecessary regulation, (iv) to simplify associated administrative procedures, (v) to strengthen the internal market and (vi) to protect consumers.<sup>72</sup> The package consists of six proposed measures addressing:<sup>73</sup>

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69 See the study by *Andreas Knorr* in the present volume.

70 *Hefekäuser*.

71 Commission, 'Fifth Report on the Implementation of the Telecommunications Regulatory Package,' 2-3.

72 Commission, 'Results of the Public Consultation on the 1999 Communications Review and Orientations for the New Regulatory Framework,' COM (2000) 239 (26 April 2000).

73 Commission, 'Proposal for a Directive of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communications Networks and Services.'

- a common regulatory framework (deals primarily with the practices and procedures of NRAs)
- authorization of electronic communications networks and services (harmonization)
- access to, and interconnection of, electronic communications networks and associated facilities
- universal service and users' rights relating to electronic communications services and networks
- the processing of personal data and the protection of privacy in the electronic communications sector
- unbundled access to the local loop

Once again, the debate over these reforms will coincide with the next stage of development of the multilateral system.

### **III. The EU and Multilateral Regime**

Two persistent (and related) features of the EU's telecommunications regime have been that it has developed in parallel with multilateral negotiations and that it has been outward looking. The early development of the EU's telecommunications regime occurred while the Uruguay Round was underway. The liberalization of EU voice telephony occurred as the 'Basic' Telecommunications Agreement was being negotiated. Now, the new regulatory framework is being advanced as the GATS 2000 negotiations proceed. This synchronicity between the development of European and multilateral regimes has facilitated the interaction between them.

#### **A. The external dimension of the internal regime**

Although directed towards liberalizing telecommunications services among the member states, the development of the EU's regime has always had implications for how the member governments treat third-country firms. Specifically, the internal liberalization process coupled with the right of establishment enshrined in the Treaty of Rome (Article 43 (ex.-52)) raised the prospect that member governments would not be able to exclude non-EU firms from their markets if they had previously established themselves



in another member state.<sup>74</sup> An external dimension of the EU's regime was further supported by the perception that telecommunications is a global industry in which European firms should play an active role.<sup>75</sup>

Consequently, there has been an external dimension of the EU's telecommunications regime from the outset. The Commission's first communication on telecommunications policy, its 1983 six 'lines of action',<sup>76</sup> stressed the importance of having a common position on the 'new international trade issues in telecommunications' in order to 'assure the effective defence of the Community's industrial and economic interests.' The Commission's 1987 Green Paper also stressed the external dimension. Looking inward, it argued that it would be a 'mistake' to undertake liberalization in a way that 'would insulate the Community market from the outside world'.<sup>77</sup> Looking outward, it called for achieving a consensus in time for the negotiations in the Uruguay Round.<sup>78</sup> The Commission also expressed the aspiration that the EU become a major telecommunications services exporter. The Council's resolution on the Green Paper picked up 'fully taking into account the external aspects of Community measures on telecommunications [...]' as one of eleven policy goals.<sup>79</sup>

As the EU's regime developed, the conditions of access for third-country operators became a recurring theme. In particular, there was strong support for creating a link between opening the EU's market to third-country firms and comparable access to their home country markets.<sup>80</sup> The Commission and Council's preferred means of achieving this objective was via multilaterally agreed liberalization rather than through the

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74 There is a difference of opinion within the EU about whether a third-country firm, by establishing in one member state, is considered an EU firm. The Commission and several member governments think it is, but some governments, particularly those of France and Portugal, disagree. For a fuller discussion see *A R Young*, 'Institutional Evolution and Multiple Modes of Cooperation: Explaining Adaptation in European Foreign Economic Policy,' diss. University of Sussex, July 2000.

75 See, for example, *Bangemann Group*; Commission, 'Towards a Dynamic European Economy'; Commission, 'Growth, Competitiveness, Employment.'

76 Commission, 'Communication from the Commission to the Council on Telecommunications: Lines of Action,' COM (83) 573 final (1983), 10.

77 Commission, 'Towards a Dynamic European Economy,' 150.

78 Although the Uruguay Round officially began in 1986, the telecommunications negotiations did not start until 1987.

79 Council, 'Council Resolution of 30 June 1988 on the Development of the Common Market for Telecommunications Services and Equipment,' 3.

80 Commission, 'Communication to the Council and European Parliament on the Consultation on the Review of the Situation in the Telecommunications Services Sector'; Council, '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'; Council, 'Council Resolution of 22 December 1994 on the Principles and Timetable for the Liberalisation of Telecommunications Infrastructures.'

imposition of reciprocity requirements.<sup>81</sup> The successful conclusion of the ‘basic’ telecommunications talks in February 1997 made this politically possible, and the EU and its member governments did not table any exceptions to the most-favoured-nation (MFN) principle (so-called Article II Exemptions), which would be necessary to require bilateral reciprocity.

## **B. Mixed competence, common approach<sup>82</sup>**

Although the external dimension of the EU’s telecommunications regime was clearly important, realizing it was complicated by the awkward allocation between the EU and its member states of responsibility for international negotiations on services. During the Uruguay Round, the Commission and member governments agreed to disagree about whether the EU or its member states could conclude international services agreements. Subsequently (in November 1994), the ECJ ruled that they shared competence. The cross-border supply of services falls within the Treaty of Rome’s common commercial policy, which conveys exclusive EU competence. Establishment, however, does not, although the member governments may not conclude international agreements that undermine common EU rules. Thus as the EU’s internal telecommunications regime has developed, so the EU’s external authority has expanded. Nonetheless, trade in telecommunications services will remain a shared competence until the Treaty of Nice (agreed December 2000), which will make trade in all but a few services a matter of exclusive EU competence, comes into force.

Shared (or even disputed) competence did not, however, prevent the EU and its member governments from participating collectively in multilateral services negotiations. During the Uruguay Round and subsequently, the member governments agreed to negotiate collectively on all service issues. In part this is because in the Uruguay Round services were part of a much wider set of negotiations in which the EU’s competence was much greater. Collective participation in the Uruguay Round paved the way for subsequent common approaches, even when the focus has been just on services or even just on telecommunications services. The member governments are also well aware of the increased negotiating weight that comes from speaking with ‘one voice’.<sup>83</sup> In addition,

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81 Council, ‘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.’

82 This section draws heavily on *Young*, ‘Institutional Evolution and Multiple Modes of Cooperation.’

83 Council, ‘Council Resolution on 30 June 1988 on the Development of the Common Market for Telecommunications Services and Equipment’; *H Paeman and A Bensch, From the GATT to the*

agreement about the development of the internal regime provided the basis for external negotiating positions.

Two implications of shared competence and the member governments' response to it are particularly significant for our analysis. First, as part of the decision to negotiate collectively, the member governments chose to utilize the traditional procedures of trade negotiations, which made the Commission the negotiator. The Commission thus became a crucial intermediary between the development of the EU regime and the negotiation of the multilateral regime. Second, because external competence for telecommunication services is shared between the EU and the member states, all of the member governments individually have to ratify any international agreement. Due to the shadow of the future, this implies that negotiating positions had to command the unanimous support of the member governments.

### C. The Uruguay Round: 'value-added' services

When the US government first proposed bringing services within the framework of the multilateral trading system, the EU's member governments were not sure where their interests lay.<sup>84</sup> After assessment of their service industries revealed that they were net exporters, however, they, particularly the British and French governments, backed the inclusion of services in the Round.<sup>85</sup> In fact, the inclusion of services in the agenda was seen as offering potential benefits to France, the world's second-leading exporter of services in 1987, to offset the anticipated costs associated with the inclusion of agriculture in the Round.<sup>86</sup>

Telecommunications and financial services were the most important sectors covered by the GATS negotiations.<sup>87</sup> The negotiations on telecommunications during the Uruguay Round, however, concentrated on only 'value-added' services (such as e-mail, voice mail and data processing) and commitments largely left 'basic' telecommunications

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*WTO: The European Community in the Uruguay Round* (Leuven: Leuven University Press, 1995); *S Woolcock and M Hodges, 'EU Policy in the Uruguay Round,' Policy-Making in the European Union*, 3rd ed., eds *H Wallace and W Wallace* (Oxford: Oxford University Press, 1996).

84 *W J Drake and K Nicolaïdis, 'Ideas, Interests and Institutions: Trade in Services and the Uruguay Round,' International Organization* 46/1 (Winter 1992); *R B Woodrow and P Sauvé, 'Trade in Telecommunications Services: The European Community and the Uruguay Round Service Trade Negotiations,' Telecommunications in Transition: Policies, Services and Technologies in the European Communities*, eds *C Steinfeld et al.* (London: Sage, 1994).

85 *Drake and Nicolaïdis, 'Ideas, Interests and Institutions'; Woodrow and Sauvé.*

86 *Paeman and Bensch.*

87 *Drake and Nicolaïdis, 'Ideas, Interests and Institutions.'*

(especially voice telephony) to one side.<sup>88</sup> This distinction was drawn in part because the prevalence of monopolies in ‘basic’ telecommunications would make liberalization difficult and in part because some participants, including the EU, insisted that the public service obligations of the telecommunications operators needed to be preserved.<sup>89</sup> The distinction also reflected US regulatory practice and, roughly, the way in which liberalization was progressing in the EU.<sup>90</sup>

The need for unanimity implied by the mixed allocation of competence did not present as big a problem for the EU during the Uruguay Round telecommunications services negotiations. This was due in part to the GATS negotiations being relatively unambitious. The participants, rather than committing themselves to opening their markets further, simply committed (‘bound’) themselves not to introduce measures less liberal than those already in place. For the EU, this meant linking the collective negotiating position in the GATS to the nascent internal liberalization.<sup>91</sup> Thus the member governments agreed that Commission Directive 90/388/EEC on services and Council Directive 90/387/EEC on ‘open network provision’ would provide the underlying base for any EU negotiating position.<sup>92</sup> This approach would be echoed in the post-Uruguay Round negotiations on ‘basic’ telecommunications services and in GATS 2000.

The outcome of the Round, particularly with respect to telecommunications, was rather disappointing. Not only had the agreement not advanced liberalization, but the scope of the agreement excluded the most important aspect of telecommunications services. Given the importance of the telecommunications sector, both in its own right and as a facilitator of other activities, and in the light of the global spread of domestic liberalization, there was a strong desire among a core group of governments, including the US and EU, to tackle ‘basic’ telecommunications services thoroughly.<sup>93</sup> This led to

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88 Only eight countries included any aspects of basic telecommunications in their Uruguay Round schedules. See WTO, ‘Telecommunications Services,’ background note by the secretariat (S/C/W/74) (8 December 1998), available at [http://www.wto.org/english/tratop\\_e/serv\\_e/w74.doc](http://www.wto.org/english/tratop_e/serv_e/w74.doc).

89 *Drake and Nicolaidis*, ‘Ideas, Interests and Institutions.’

90 The Commission stresses that the term ‘basic’ telecommunications services does not have meaning in the EU, but agreed to equate it with the services still ‘reserved’ for special and exclusive rights in the EU, essentially voice telephony. See EC&MS [The European Community and its Member States], ‘Response to Questionnaire on Basic Telecommunications: Revision,’ S/NGBT/W/3/Add.15/Rev.1 (27 March 1995).

91 *Woodrow and Sauvé*.

92 *Woodrow and Sauvé*.

93 WTO, ‘Background Note on the WTO Negotiations on Basic Telecommunications’ (22 February 1996), available at <http://www.wto.org/archives/ta3-tel.htm>.

an agreement under which voluntary negotiations continued after the Round without endangering the conclusion of the GATS or the establishment of the WTO.<sup>94</sup>

#### **D. The WTO ‘Basic’ Telecommunications Services negotiations<sup>95</sup>**

Only 33 of the 125 governments that had signed the Uruguay Round Agreement, counting the EU’s member governments individually, participated in the first round of negotiations in May 1994. Although the number of participating governments would gradually increase to 69 by the end of the negotiations in February 1997, the EU-US relationship was the fulcrum and the driving force of the negotiations.

##### ***1. The Europeans’ initial position***

Early in the negotiations, even before detailed negotiating objectives and strategies had been agreed, there was agreement among the member governments and the Commission that ‘external negotiations cannot proceed faster than the internal process of liberalisation’.<sup>96</sup> Further, the Council had adopted unanimously the two resolutions (93/C 213/01 and 94/C 379/03) establishing the liberalization framework and setting the deadline of 1 January 1998, with longer transition periods for some member states.<sup>97</sup> There was thus a two-tiered consensus behind the EU’s negotiating position: the external negotiating position would be based on the agreed internal framework, and the internal framework had been agreed unanimously. As we shall see, however, the internal framework developed significantly during its implementation in ways that accelerated the pace and enhanced the scope of liberalization in some member states.

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94 ‘Decision on Negotiations on Basic Telecommunications’ adopted 15 April 1994, <http://www.wto.org/archives/mindec-e.htm>.

95 This section draws heavily on *Young*, ‘Institutional Evolution and Multiple Modes of Cooperation.’

96 Commission, ‘Report by the Commission on the GATS Negotiations on “Basic” Telecommunications,’ Ref: SKR/skr — 9411p001-rev (Brussels: Commission DG XIII.A.6, 16 November 1994), 1; Council, ‘Council Resolution of 18 September 1995 on the Implementation of the Future Regulatory Framework for Telecommunications,’ 95/C 258/01, *Official Journal of the European Communities* C258 (3 October 1995).

97 Commission, ‘Commission Directive 96/19/EC of 13 March 1996 Amending Directive 90/388/EEC with Regard to the Implementation of Full Competition in Telecommunications Markets,’ *Official Journal of the European Communities* L74 (22 March 1996).

The EU and its member governments' initial (October 1995) negotiating offer firmly reflected the agreed internal framework.<sup>98</sup> It indicated their willingness to bind the liberalization process underway at the Union level on a most-favoured-nation basis. The Europeans expressed their 'readiness' to improve their negotiating offer, particularly with respect to foreign ownership restrictions, if their negotiating partners made offers 'balanced and comparable' to theirs.<sup>99</sup> In the absence of such commitments, they reserved the right to table MFN exemptions, which would enable them to require reciprocal market access opportunities on a bilateral basis.

Reflecting both the allocation of competence within the EU and the structure of the GATS negotiations, the EU and its member governments' single initial offer was really a composite of the member governments' individual qualifications (where made) to liberalization. These qualifications fell largely into two categories: existing national ownership restrictions and additional transition periods for implementing EU liberalization (see Table 3). The offer also specified, at the behest of the Belgian and French governments, that broadcasting services were not part of 'basic' telecommunications services.<sup>100</sup>

Almost half of the member governments — those of Austria, Denmark, Finland, Germany, the Netherlands, Sweden and the UK — tabled no reservations.<sup>101</sup> The Irish government tabled a shorter transition period than the maximum to which it might be entitled under EU rules, while the Greek, Portuguese and Spanish governments tabled the maximum. The Luxembourg government did not officially include an individual offer, apparently because it did not want to concede ground in the EU negotiations about its request for an extended transitional period for implementing EU rules.<sup>102</sup> The Italian government was the only member government with ownership restrictions in place that did not seek to exempt them. It did, however, reserve the right to impose restrictions on the provision of telegraph services, which were not subject to EU rules, by third-country firms.

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98 EC&MS [The European Community and its Member States], 'Draft Offer on Basic Telecommunications,' S/NGBT/W/12/Add.10 (16 October 1995).

99 EC&MS, 'Draft Offer on Basic Telecommunications,' 1.

100 *W J Drake and E Noam*, 'The WTO Deal on Basic Telecommunications: Big Bang or Little Whimper?' *Telecommunications Policy* 21/9-10 (1997).

101 EC&MS, 'Draft Offer on Basic Telecommunications.'

102 *Financial Times* (4 October 1995).

**Table 3: The EU's and its member states' changing market access exceptions (Mode 3 Commercial Presence)**

	Initial offer 16 October 1995	Renewed offer 13 November 1996	Final schedule 15 February 1997
<u>Ownership/incorporation restrictions</u>	All MS: provision of radio-based services subject to the availability of frequencies B: direct or indirect non-EU participation limited to 49%; B: number of licences offered may be limited in order to guarantee universal service P and Sp: provision of international services restricted to companies established within their borders; P and Sp: direct or indirect non-EU participation limited to 25%; Fr: direct or indirect non-EU participation in radio-based infrastructure limited to 20% Gr: must be registered limited companies engaged exclusively in providing telecoms services.	Public ownership is not a market access limitation <sup>a</sup> P: direct or indirect non-EU participation limited to 25%. <sup>b</sup> Fr: direct non-EU participation in radio-based infrastructure limited to 20%. Firms legally established in a member state are considered EU juridical persons. Gr: must be registered limited companies engaged exclusively in providing telecoms services.	Public ownership is not a market access limitation <sup>a</sup> P: direct or indirect non-EU participation limited to 25%. <sup>b</sup> Fr: direct non-EU participation in radio-based infrastructure limited to 20%. Firms legally established in a member state are considered EU juridical persons. Gr: must be registered limited companies engaged exclusively in providing telecoms services.
<u>Deferred liberalization</u>			
Voice, fax, data transmission <sup>c</sup>	Ir: 1.1.2000 Gr: 1.1.2003 P: 1.1.2003 Sp: 1.1.2003	Ir: 1.1.2000 Gr: 1.1.2003 P: 1.1.2003 Sp: 30.11.1998 + another licence 1.1.1998	Ir: 1.1.2000 Gr: 1.1.2003 P: 1.1.2000 Sp: 30.11.1998 + another licence 1.1.1998
Mobile communications	Ir: 1.1.2001 (duopoly in GSM until 2003) Gr: 1.1.2001	Ir: 1.1.1999 P: 1.1.1999	Ir: 1.1.1999 P: 1.1.1999
Alternative infrastructure	P: 1.1.2003 Sp: 1.1.2003	P: 1.1.2003	P: 1.7.1999
Telegraph	Ir: 1.1.2000 Gr and P: 1.1.2000 Fr, I and Sp: unbound		
Satellite	B: (ground segment infrastructure) unbound Ir: 1.1.2000 Gr, P, Sp: 1.1.2003		

Notes:

<sup>a</sup> A 'footnote for clarification purposes' states that public ownership is not a market access limitation. It makes specific reference to government ownership of Belgacom.

<sup>b</sup> The Portuguese government made an 'additional commitment' to introduce legislation to remove this limitation partially.

<sup>c</sup> The schedules note that Luxembourg had requested a delayed liberalization date of 1 January 2000, but that the Commission had not yet made its decision.

Source: EC&MS [The European Community and its Member States], 'Draft Offer on Basic Telecommunications,' S/NGBT/W/12/Add.10 (16 October 1995); EC&MS, 'Offer on Basic Telecommunications,' S/GBT/W/1/Add.1 (13 November 1996); EC&MS, 'Schedule on Basic Telecommunications,' S/GBT/W/1/Add.1/Rev.2 (15 February 1997).



The central negotiating objective of the EU and its member governments was securing 'effective and comparable' market access to third-country markets.<sup>103</sup> This reflected a desire to facilitate the internationalization strategies of many of the European telecommunications operators. The markets of developed countries, especially those of the other 'Quad' countries (Canada, Japan and the US), were particular priorities.<sup>104</sup> The Europeans particularly wanted national ownership restrictions removed, especially in the US.<sup>105</sup>

The EU and its member governments' other main negotiating objective was to secure agreement on the EU's type of regulatory approximation, as embodied in the ONP directive, at the multilateral level.<sup>106</sup> The 'Reference Paper' also appears to have assuaged the concerns of some of the EU's more cautious member governments. In particular, it permitted the redefinition of some specific national qualifications into general principles. Thus, for example, the initial reservation lodged by a number of member governments concerning the allocation of frequencies could be dropped, as the 'Reference Paper' laid down rules for the allocation of 'scarce resources'.<sup>107</sup> The 'Reference Paper,' by legitimating universal service obligations, also enabled the Belgian government to drop its initial reservation concerning limiting licences in order to ensure universal service.<sup>108</sup> On the whole, the EU was satisfied with the Reference Paper as it set up a set of model commitments for others to commit to the EU's own system of using competition policy as the basis of the regulatory framework for telecoms, although in certain detailed aspects the categories and definitions corresponded more closely to the US framework.

## 2. *The negotiations*

Not much progress, apart from on the 'Reference Paper,' was made during the initial phase of the negotiations up to the original deadline of 30 April 1996. Relatively few

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103 Commission, 'Report by the Commission on the GATS Negotiations on "Basic" Telecommunications'; EC&MS, 'Draft Offer on Basic Telecommunications.'

104 *Bronckers and Larouche*.

105 Commission, 'Agenda 2000: Summary and Conclusions of Opinions of the Commission Concerning the Applications for Membership to the European Union Presented by the Candidate Countries,' COM (97) 2000 final (15 July 1997); EC&MS, 'Draft Offer on Basic Telecommunications.'

106 Commission, 'Report by the Commission on the GATS Negotiations on "Basic" Telecommunications.'

107 *L Tuthill*, 'The GATS and New Rules for Regulators,' *Telecommunications Policy* 21/9-10 (1997).

108 Telephone interview with a Commission official, 20 March 2000.

governments tabled even initial proposals,<sup>109</sup> and most of the others did not budge much from their starting positions. In an effort to shift the negotiations, the US government had tabled an improved offer in February 1996, which brought local telephone services within the scope of its offer<sup>110</sup> and clarified its rules limiting direct foreign ownership of companies holding common carrier radio licences.<sup>111</sup> The US indicated that it would withdraw its offer unless other participants — particularly Canada, the EU and Japan — made similar offers.<sup>112</sup>

The Commission sought to respond positively to this initiative by proposing (internally) that the Belgian, French, Italian, Portuguese and Spanish governments abolish their foreign ownership restrictions; the Spanish government accelerate liberalization; and the Belgian government abandon its economic needs test for radio communications licences.<sup>113</sup> The concessions, however, were unacceptable to the governments in question. As a result, the best the EU could do was restate its opening position and promise to work harder for a deal.

Although a number of countries made offers in the run-up to the deadline, the US government was dissatisfied with the quality of the commitments, including those of the EU and its member governments.<sup>114</sup> As it did not consider that a ‘critical mass’ of commitments had been reached,<sup>115</sup> it refused to conclude the agreement.<sup>116</sup> The other negotiators nonetheless agreed to adopt the ‘Fourth Protocol on Trade in Services.’<sup>117</sup>

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109 *R Ruggiero*, ‘WTO Director-General’s Statement on Basic Telecommunications Negotiations,’ Press/45 (22 March 1996), available at <http://www.wto.org/wto/archives/press45.htm>.

110 This represented delivery on the pledge made in the initial offer to bind the results of a then ongoing federal legislative review of market access limits for intra-state services. See US, ‘Draft Offer on Basic Telecommunications,’ S/NGBT/W/12/Add.3 (31 July 1995).

111 US, ‘Draft Offer on Basic Telecommunications: Revision,’ S/NGBT/W/12/Add.3/Rev.1 (26 February 1996).

112 *European Report* (9 March 1996).

113 *Agence Europe* (21 March 1996); *Financial Times* (13 March 1996).

114 The only improvements tabled in the EU and its member governments’ 30 April offer were the Belgian government binding liberalization in satellite services and the French and Italian governments binding liberalization in telegraph services. See EC&MS [The European Community and its Member States], ‘Draft Offer on Basic Telecommunications: Revision,’ S/NGBT/W/12/Add.10/Rev.1 (30 April 1996).

115 *Bronckers and Larouche*.

116 The notion of critical mass became crucial to the negotiations because, unlike under the GATT where antidumping can be used to keep out allegedly unfair competition, under GATS commitments (subject only to initial MFN exceptions) have to be extended to all parties on an MFN basis regardless of what they scheduled. Although there are means of redress in theory, they are extremely cumbersome. The US government therefore wanted to insist on being sure that there would be no more than a minimum of ‘free riders’.

117 ‘Fourth Protocol to the General Agreement on Trade in Services,’ S/L/20 (30 April 1996), available at <http://www.wto.org/archives/4prto-e.htm>.

During the period from 15 January to 15 February 1997, the WTO members could improve (or submit) their schedules and lists of exemptions.

It was during the latter half of 1996 into 1997 that real progress was made. The EU was able to play a crucial role because internal negotiations between the Commission and several member governments significantly clarified the implementation of the EU's regime and cleared the way for improvements in the EU and its member governments' offer in the GATS negotiations.<sup>118</sup> These internal negotiations hinged on two aspects of the Commission's powers: approval of corporate mergers and alliances with European significance and oversight of the additional transition periods requested by some member governments for the implementation of the directives liberalizing services and infrastructure.

The Commission's activity in its capacity as regulator of mergers was triggered by the formation of a number of alliances among European telecommunications operators and between European and American operators during late 1995 and early 1996. The most important alliance development with respect to the 'basic' telecommunications services negotiations was Spanish operator Telefonica's request to join the Dutch-Swedish-Swiss alliance Unisource, which was also seeking to take a state in the AT&T-led alliance WorldPartners. The conditions the Commission imposed for approving Telefonica's accession to Unisource required the Spanish government to drop its restriction on foreign ownership; accept an additional transition period for full liberalization of only 11 months until 30 November 1998; and make an additional operating licence available from 1 January 1998.<sup>119</sup>

Meanwhile, the adoption of Commission Directive 96/19 in March 1996 cleared the way for settling the specific durations of the additional transition periods to which some of the member governments were entitled. The Irish government was the first to submit its request. The Commission granted the Irish government slightly shorter transition periods than requested for the liberalization of alternative infrastructures and the direct international interconnection of mobile networks (see Table 4).<sup>120</sup>

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118 Commission, 'The Commission Approves Timetable for Full Telecommunications Liberalisation in Ireland,' IP/96/1089 (27 November 1996).

119 Commission, 'Commission Indicates a Favourable Position in Respect of Unisource-Telefonica and Uniworld and Invites Comments,' IP/96/1231 (20 December 1996). Reflecting the extra-territorial reach of the EU's competition policy, the Commission also required that the Swiss government liberalize its telecommunications market by the EU's deadline of 1 January 1998.

120 Commission, 'The Commission Approves Timetable for Full Telecommunications Liberalisation in Ireland.'

**Table 4: Deadlines for Implementing EU Directives and WTO Commitments**

Member state	Derogation requested	Directive deadline	Deadline		
			Requested	Granted	WTO
Greece	Alternative infrastructure	1.7.1996	1.7.2001	1.10.1997	—
	Voice telephony/networks	1.1.1998	1.1.2003	31.12.2000	1.1.2003
Ireland	Alternative infrastructure	1.7.1996	1.7.1999	1.7.1997	—
	Voice telephony/networks	1.1.1998	1.1.2000	1.1.2000	1.1.2000
Luxembourg	Alternative infrastructure	1.7.1996	1.7.1998	1.7.1997	—
	Voice telephony/networks	1.1.1998	1.1.2000	1.7.1998	1.7.1998
Portugal	Alternative infrastructure	1.7.1996	1.7.1999	1.7.1997	—
	Voice telephony/networks	1.1.1998	1.1.2000	1.1.2000	1.1.2000
Spain	Voice telephony/networks	1.1.1998	30.11.1998	30.11.1998	30.11.1998

Sources: Commission, 'Greece Has to Complete the Liberalisation of its Telecommunications Market Before January 2001,' IP/97/539 (18 June 1997); Commission, 'Proposal for a Council Decision Concerning the Conclusion on Behalf of the European Community, as Regards Matters within Competence, of Results of the WTO Negotiations on Basic Telecommunications Services,' COM (97) 368 final (15 July 1997).

During the early autumn, the Commission also sought to persuade the Belgian and French governments to improve their negotiating offers. As a result, the Belgian government accepted its reservation regarding public ownership in Belgacom being recast as a general statement that public ownership did not constitute a market access barrier, and was convinced that its reservation concerning universal service obligations was unnecessary as it was addressed by the 'Reference Paper'.<sup>121</sup> The French government also eased its ownership restrictions on radio-based infrastructure, eliminating the ban on indirect investment and accepting that, in this case, companies legally established in an EU member state are considered EU juridical persons, and they therefore enjoy the right of establishment under EU law.<sup>122</sup> This change was prompted by and echoed the US government's February 1996 'clarification' of its restrictions on foreign ownership of holders of common carrier radio licences.<sup>123</sup>

On the basis of these developments, the EU and its member governments, in an agreed move with the US government, tabled an improved offer on 12 November 1996.<sup>124</sup> The

121 Commission, 'The Commission Approves Timetable for Full Telecommunications Liberalisation in Ireland'; EC&MS [The European Community and its Member States], 'Offer on Basic Telecommunications,' S/GBT/W/1/Add.1 (13 November 1996); telephone interview with a Commission official, 20 March 2000.

122 EC&MS, 'Offer on Basic Telecommunications.'

123 Telephone interview with a Commission official, 20 March 2000. The US government's 'clarification' indicated that entirely foreign-owned US subsidiaries could wholly own a company holding a common carrier radio licence. See US, 'Draft Offer on Basic Telecommunications: Revision,' S/NGBT/W/12/Add.3/Rev.1 (26 February 1996).

124 Commission, 'The Commission Approves Timetable for Full Telecommunications Liberalisation in Ireland'; EC&MS, 'Offer on Basic Telecommunications'; and see Table 3.

US government's improved offer pledged national treatment for the landing of submarine telecommunications cables and included commercial satellite services,<sup>125</sup> both key EU demands.<sup>126</sup> This joint initiative brought a favourable response from other participants in the negotiations.<sup>127</sup>

The EU and its member governments made one more substantive improvement in their offer at the final hour. This improvement, like the one in November, followed internal developments. In this case it was the Commission's decision on 12 February on the Portuguese government's request for an extended transition period,<sup>128</sup> which was incorporated into the EU and its member governments' (final) schedule of commitments submitted on 15 February 1997.<sup>129</sup>

All told, 69 governments submitted 55 schedules by the 15 February deadline. As a result, the EU and its member governments secured significantly better access to the world's most important telecommunications markets — those of the US, Japan and Canada — as well as to some developing ones.<sup>130</sup>

## **E. GATS 2000**

Although the 'Basic' Telecommunications Agreement marked real progress, much remains to be done at the multilateral level. Although all industrialized countries committed either fully or partially on all basic services, only seven per cent of them made offers covering 14 or 15 of the possible 15 sub-sectors in telecommunications. Developing countries, not surprisingly, tended to be even less comprehensive. Only 18 per cent of developing countries made offers covering 14 or more sub-sectors.<sup>131</sup>

Although the EU would like to see improvements in existing commitments and more countries make commitments, its apparent priority is to ensure implementation of

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125 US, 'Conditional Offer,' S/GBT/W/1/Add.2 (12 November 1996).

126 *Financial Times* (14 November 1996).

127 *European Report* (16 November 1996). Based on a search under 'S/GBT/W/' of the WTO's document dissemination facility, <http://www.wto.org/wto/ddf/ep/public/htm>.

128 Commission, 'Communications from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the Implementation of the Telecommunications Regulatory Package,' COM (97) 236 final (29 May 1997).

129 EC&MS [The European Community and its Member States], 'Schedule on Basic Telecommunications,' S/GBT/W/1/Add.1/Rev.2 (15 February 1997).

130 WTO, 'The WTO Negotiations on Basic Telecommunications: Informal Summary of Commitments and MFN Exemptions,' informal background note (6 March 1997), available at <http://www.wto.org/wto/archives/bt-summ3.htm>.

131 WTO, 'Telecommunications Services.'

existing commitments.<sup>132</sup> This focuses on closing the gap between domestic practice and multilateral commitments. These priorities echo EU industry's emphasis on further liberalization and improved implementation.<sup>133</sup> In particular, European telecommunications operators would like to see more countries make commitments, all participants sign up to the 'Reference Paper' and all countries eliminate foreign investment limits.<sup>134</sup>

Although the EU and US (and other developed countries) generally share these aims, there are a few potential areas of conflict, some profound and some specific. The more profound issues concern whether the EU or US regime will provide the model for the multilateral framework. In this respect, two aspects of the EU's proposed regulatory framework will potentially be of particular significance in the GATS 2000 negotiations. The first is a move away from regulating different technologies in different ways, as is the case now, to a technologically neutral (non-sectoral) approach.<sup>135</sup> This is significant because the GATS (and the US) currently distinguishes between 'value-added' services and 'basic' telecommunications services. The WTO secretariat, however, has noted that the exact definition of value-added services will need to be kept under review as technology changes.<sup>136</sup> In addition, it is increasingly anomalous that basic telecommunications are covered by the rules of the Reference Paper while value-added services are not.

Another difference concerns the role of negotiations versus dispute settlement to clarify international rules, including possibly some of the terms in the Reference Paper, notably 'anti-competitive' behaviour and cost-based pricing.<sup>137</sup> The US has a domestic tradition of leaving the final say in anti-trust, including telecommunications policy, to the courts (the break-up of AT&T was compelled by a court ruling in favour of MCI), and has

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132 Private communication with Commission official.

133 EABC [European-American Business Council], 'EABC 2000 Issue Priorities' (Washington DC: EABC, April 2000).

134 EABC [European-American Business Council], 'World Trade Organization Seattle Ministerial and the Launch of a New Trade Round' (Washington DC: EABC, June 1999).

135 Commission, 'GATS 2000: Telecommunications Proposal from the EC and their Member States' (December 2000), available at <http://europa.eu.int/comm/trade/services/nspw03.htm>.

136 WTO, 'Telecommunications Services.'

137 An illustration of the kind of problem that can arise if these matters are left to courts to decide was the case in which the UK Privy Council as the ultimate Appeal Court for New Zealand was obliged to decide on the appropriateness of the so-called 'Baumol-Willig' pricing rule for interconnection between new operators and the network incumbent. For the judgement, see Privy Council, *Telecom Corporation of New Zealand v. Clear Communications Limited*, from the Court of Appeal of New Zealand, Judgment of the Lords of the Judicial Committee of the Privy Council, London, 19 October 1994. Commentaries include *M Armstrong* and *C Doyle*, 'The Economics of Access Pricing,' OECD Conference on Competition and Regulation in Network Infrastructure Industries, 1995, available at [http://www.oecd.org/daf/clp/non-member\\_activities/BDPT205.HTM](http://www.oecd.org/daf/clp/non-member_activities/BDPT205.HTM).

been an enthusiastic user of the WTO dispute settlement system. The EU would prefer to see these matters clarified in advance through negotiation.<sup>138</sup>

In addition to these major issues, there are a number of more specific, but still significant outstanding bilateral issues that will likely figure in the multilateral negotiations. For the EU, these include issues that were not satisfactorily resolved during the 'Basic' Telecommunications Agreement negotiations.<sup>139</sup> Of particular concern are US limits on foreign ownership.<sup>140</sup> In particular, foreign direct investment in common carrier radio licences is limited to 20 per cent, although indirect investment is allowed up to 100 per cent. This issue gained additional heat during the summer of 2000 when Congress began considering legislation that would prevent the transfer of telecommunications licences to a company that is more than 25 per cent owned by a foreign government or its representatives. Another issue unresolved during the 'basic' telecommunications negotiations was Comsat's monopoly on satellite-based services. Although legislation to remove the monopoly was adopted in March 2000, there are still conditions imposed on foreign entry into the US market. Foreign-owned US operators also seem to face additional obstacles in obtaining licensing for radio transmission stations, satellite earth stations and microwave towers.

The principal issues for the US primarily concern EU member state practices, some of which are also incompatible with EU law.<sup>141</sup> The US is, for example, concerned that the Belgian NRA is not sufficiently independent and that competition rules are not adequately enforced. Several new entrants to the German market have complained that Deutsche Telekom is not providing interconnection in a timely fashion or on terms, conditions and cost-oriented rates that are transparent and reasonable. US carriers have also charged that Germany's proposed licensing fee structure is exorbitant. The US government has also expressed some concern about regulatory due-process, transparency and general even-handedness in Italy. The US is also reacting to a formal complaint from Covad that the granting to BT of an exclusive right to supply DSL (digital subscriber line) services until 1 July 2001 violates the UK's WTO commitments.

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138 Private communication with Commission official.

139 Commission, *2000 Report on United States Barriers to Trade and Investment* (Brussels: Commission, 2000).

140 EABC, 'EABC 2000 Issue Priorities.'

141 USTR [United States Trade Representative], *National Trade Estimate Report: Foreign Trade Barriers 2000* (Washington DC: USTR, 2000).

## **IV. The Coexistence of Three Levels**

### **A. The EU regime and national policy convergence**

The EU regime has certainly been a contributing factor to the degree of policy convergence we now see among the member states of the EU. As of the start of 2001, all of the EU's member states have opened their telecommunications markets to competition. There is also a degree of convergence in regulatory structures, with independent National Regulatory Authorities in every member state responsible for overseeing the implementation of EU rules. There has also been a marked shift in almost all member states towards privatization.

There are two important caveats to this depiction, however. First, the European regime was not the only factor pressing for liberalization and privatization. Technological and market developments were also important factors. As a consequence, similar political processes were underway within the member states that resonated with the development of the EU regime and, through it, the multilateral framework. Second, although there is a fair degree of convergence at the macro-policy and institutional levels, significant national variations persist in the details of policy implementation and institutional design. It is the most disruptive of these that the Commission hopes to address with its new regulatory framework.

Nonetheless, some of these persistent differences in policy implementation reflect profound differences among the member states. Some are a product of differences in the countries' physical characteristics (size and population density in particular) or the extent of development of their telecommunications infrastructure. Other policy differences, such as those reflected in universal service obligations, reflect different political values. Such differences mean that strictly uniform rules would be inappropriate.

### **B. The EU role in shaping the multilateral regime**

The EU has also clearly played an important role in shaping the multilateral regime. Along with the US, it was one of the driving forces behind the 'Basic' Telecommunications Agreement. Arguably it pushed harder and offered more than the US, which always seemed less willing to offer unilateral concessions. In addition, the EU framework, particularly the Commission in its dual role of external negotiator and



internal enforcer of competition rules, pressed some of the member governments faster than they wanted to go in liberalizing their domestic markets. As a result, the EU as a whole was able to offer more and play a leading role at the multilateral level.

In the GATS 2000 negotiations, the EU will again be seeking to shape the multilateral regime in a quite fundamental way. The direction of the new EU regulatory framework makes clear the emphasis on technology-neutral approaches. Translating this into the multilateral framework will be an uphill battle. It implies a quite dramatic departure from the existing multilateral framework. The US does not yet seem ready for such a change.

### **C. The compatibility of the EU regime with global liberalization**

In part because of its role in shaping the multilateral regime, but more importantly because of the nature of its internal liberalization process, the EU's regime is, by and large, compatible with global liberalization. The focus and ethos of the EU regime has been the introduction of competition. This has involved the elimination of exclusive rights and enshrining non-discrimination in national regulatory practice. In addition, internal liberalization was not accompanied by the adoption of common rules that exclude or discriminate against third-country firms. The member governments did not, as they did in air transport, adopt a common definition of an EU operator and restrict access to the single market to such firms. Nor did the member governments incorporate reciprocity clauses into the directives liberalizing telecommunications, as they did in financial services. In large part this was made possible by agreement on liberalization at the multilateral level, which reduced the need for explicit reciprocity. The EU underpinned its rejection of reciprocity at the multilateral level by not taking any MFN exceptions.

Somewhat curiously, however, tensions are emerging as the result of the extension of the EU regime to the applicant countries of central and eastern Europe. The Commission is insisting that they put their obligations to the EU in the Europe Agreements (as interpreted by the EU) ahead of any independent freedom of manoeuvre or their multilateral obligations.<sup>142</sup> The EU stresses that there is likely to be no incompatibility between the accession process and the candidates' multilateral

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<sup>142</sup> Commission, 'Agenda 2000.'

commitments. Other members of the WTO, however, may resent the fact that the candidates are effectively bound to support the EU.

## V. Conclusion

In Europe, national, EU and multilateral regimes have developed in sync with significant interplay across the three levels. The latter half of the 1990s represented a particularly intense period of adjustment in corporate strategies, national policies, European regulation and multilateral negotiation. Although a number of factors were at play during this period and subsequently, the EU played a crucial role in refracting them and was a vital intermediary between national policies, international pressures and multilateral negotiations.

The process of change has not stopped, but it has changed character across all three levels, from innovation to implementation and improvement. At the national level, governments are still digesting the raft of legislation agreed at the European level. The focus now is on transposition and implementation. In the EU, this is evident in the new regulatory framework's emphasis on ensuring even implementation of already agreed rules and plugging the gaps that have been revealed. At the multilateral level, too, the focus is on ensuring implementation of what has already been agreed, as well as bringing others more fully into the fold. It also appears as though the crunch issues will have less to do with *de jure* market access than with ensuring that regulatory practices permit agreed liberalization to produce real competition.

This brings us to a key issue that is relevant to the whole research agenda underlying the contributions to this book and to the wider trade agenda. The EU moved a long time ago, under the influence of the ECJ, away from treating as barriers to trade only regulations that explicitly disadvantaged foreigners. The philosophy of the EU has long been that any differences in regulations could amount to an 'obstacle.' The multilateral trading system was built around the notion that non-discrimination was the key to market opening; but with respect to services this was found not to be enough. Nicolaïdis and Trachtman, for example, argue that although both the North American Free Trade Agreement and the GATS have focused on discriminatory barriers, non-discriminatory

differences in rules also pose substantial barriers which may need to be addressed by negotiators.<sup>143</sup>

This is a daunting prospect. It implies that all aspects of domestic regulation are a matter for international negotiation and potentially dispute settlement. Yet regulatory regimes differ for many reasons other than the desire to exclude new entrants. As a consequence, there is a limit to how far trade concerns should override differences in national objectives. This difficult balancing act contributed to harmonization within the EU being a slow, delicate and incomplete process. Given the higher congruence of social conditions and preferences within the EU than in the global system and the EU's more highly developed institutional framework, this suggests that there are real limits to how far harmonization should be pursued at the multilateral level.<sup>144</sup>

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143 *K Nicolaidis and J Trachtman*, 'Liberalization Regulation and Recognition for Services Trade,' *Services Trade in the Western Hemisphere*, ed. *S M Stephenson* (Washington DC: Brookings Institute, 2000).

144 See *P Holmes and A R Young*, 'European Lessons for Multilateral Economic Integration: A Cautionary Tale,' *Globalization under Threat: The Stability of Trade Policy and International Agreements* (Cheltenham: Edward Elgar, 2001).

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