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Commission activism: subsuming telecommunications and electricity under European competition law

Susanne K. Schmidt

ABSTRACT: Under European competition law the Commission has far-reaching competences. The article asks about the conditions under which the Commission may use these rights against the member states, focusing on the most powerful provision – the right of the Commission under Article 90 to issue directives by itself in those cases where member state governments have endowed undertakings with rights conflicting with the Treaty's rules. In European telecommunications policy the Commission has used this competence very successfully, with all liberalization directives being based on Article 90. But for European electricity policy the Commission has shrunk away from using these powers in favour of initiating Council legislation. The article analyses the conditions of the Commission's ability to act under European competition law in a multi-level framework, drawing on a principal-agent approach. It presents Article 90 as an example of governments regaining control over their agent.

KEY WORDS: Commission; competition law; electricity; liberalization; single market; telecommunications.

INTRODUCTION

European competition law allocates far-reaching rights to the European Commission. In particular, measures taken by the member state governments, in the form of financial aids or the granting of special rights, can be overseen and regulated by the Commission quite independently. These rights are a major reason for the often criticized bias of European integration in favour of negative integration at the expense of positive measures. Commission action under these rights is accused of imposing serious constraints on member states' ability to act which add to the already declining possibilities of state action under the pressures of economic interdependence and globalization (Scharpf 1996).

In this article I aim to analyse the conditions under which the Commission may apply its rights under competition law. I shall focus on a particular aspect of these rights – the Commission's prerogative to intervene against the granting of special rights by member states to 'undertakings', which gives the Commission the unusual possibility
under Article 90.3 of the Treaty to issue its own directives aimed at all member states. Other bodies, including the Council of Ministers, do not have any formal decision rights under this provision. In addition, the Commission has case-specific opportunities to act, for instance via decisions under Article 90.3 or through infringement procedures under Article 169, which will also be analysed. European telecommunications policy is the sector which so far has been most strongly impacted by these competences of the Commission. In fact, all European liberalization measures, transforming national telecommunications systems from integrated monopolies in the late 1980s to full liberalization in 1998, were taken unilaterally by the Commission.

The success of a single case may be due to extraordinary circumstances and have little meaning for other areas in which governments have allocated special rights (Schmidt 1996). An example of the Commission encountering greater difficulties is the case of European electricity policy. Taken together the two cases enable us to draw some conclusions about the Commission’s ability to act under European competition law. As will be shown, Commission directives are an example of the Commission not being able incrementally to expand its powers, as some would argue that it often has in other areas (Pierson 1996: 147). Instead, member state governments have stayed firmly in control.

I will begin with the Commission’s competences and discuss the factors on which they may be contingent. Then I will present the two case studies and examine the conditions under which the Commission is able to use its powers.

THE COMMISSION AS AN ACTOR IN THE EUROPEAN POLITY

The Commission is an actor of central importance for the development of integration and the European polity. Given the continuing debates on European integration theory (Marks et al. 1996; Moravcsik 1993), there are very different views on its ability to act, depending on the importance allotted to supranational actors. European competition law is an area in which the Commission enjoys extraordinary rights. Neither governments, private actors nor other European institutions have notable co-decision rights.

On the one hand, the Commission has rights vis-à-vis private enterprises (e.g. McGowan and Wilks 1995). Article 85 prohibits cartels and Article 86 the abuse of a dominant position. In the use of these rights the member state governments only participate in an advisory committee, giving the Commission the final say. On the other hand, the competition rules of the Treaty – rarely analysed so far – circumscribe the actions of the member state governments. Article 92 and Article 93 concern the control of state aids (Lavdas and Mendrinou 1995). While the Commission discusses its measures against state aids each semester with the governments, these are even less institutionally involved in the last provision of competition law, Article 90, which is my focus in this article. Article 90 deals with the cases in which governments have granted special rights to undertakings which conflict with the rules of the Treaty. Most exceptionally, the Commission has the right to take direct decisions independently or even to issue generally binding directives to the governments in this event. The Treaty lacks procedural prescriptions for the use of Article 90, providing the Commission with a very powerful instrument against state interventions.
Why have the member state governments delegated such far-reaching rights? Partly, this can be explained on the basis of agency theory. Such a principal-agent perspective on the Commission has been advocated by several scholars (Majone 1996; Moravcsik 1995; Pollack 1997). By delegating certain rights to an independent agent, principals can evade various problems of collective action. The commitment to co-operate may be strengthened among the partners, and the credibility of policies can be increased vis-à-vis third parties. Sometimes, the political costs of regulatory decisions can be alleviated since blame avoidance becomes possible (Fiorina 1982: 47; Weaver 1986).

The Commission's rights under European competition law facilitate binding commitments to co-operation. The independent competences of the Commission in the enactment of the cartel law against private actors allow transaction-cost savings and avoid inconsistent decisions. With regard to state action, the rationale of delegation is particularly apparent since commitments may be made credible through delegation. Otherwise, the concerned governments could simply evade control via promises of 'turn-taking'. For the inclusion of these rights in the EEC Treaty in 1957, considerations of equal treatment dearly played a role. Article 90 was created, and specific powers were allocated to the Commission, partly because the public sectors in the founding member states differed so greatly in size. Without a Treaty provision, the Benelux countries and Germany feared that Italy and France could gain unfair competitive advantages by granting special rights to public firms (Page 1982).

European competition law cannot be wholly regarded as explicit, intentional delegation. At the time, the implications of the rules were opaque because competition law played an insignificant role on the national level. Moreover, an exception was included in the second paragraph of Article 90 directed at public sectors which in recent years have been impacted by the rule, among them telecommunications and energy.

Although the degree of actual control through the principals is in dispute, agency theory delineates the scope of agency loss precisely, seeing it rooted in the problem that agency bureaucrats are committed not only to their 'mission' but to their own institutional and career interests as well (Moe 1990: 143). Three major structural reasons can be singled out for agency loss. First of all, bureaucrats and politicians have a different capacity for long-term planning (Moe 1990: 124; Pierson 1996). The fact that politicians may play down future disadvantages in order to obtain monetary benefits can give the Commission scope to realize its own interests. Second, the neutral agent may profit from information asymmetries (McCubbins et al. 1987: 247). As the analysis by Héritier and collaborators on European air quality policy has revealed, the Commission can use its privileged knowledge of the situation in all member states to influence decision-making in its favour (Héritier 1993: 441). Third, the agent can exploit differences in interests among multiple principals.

Assuming some preference heterogeneity, an agency in a multiple-veto-point system has a number of possible protectors: . . . for any change in agency policy that one veto-point might demand, there is always some other veto-point which prefers the status quo (or even prefers a move in the opposite direction).

(Hammond 1996: 143)
There are two sides to this possibility. Either the agent can use a lack of ‘policy clearness’ in documents to further its own interests based on the inability of principals to draw up a clear agreement in view of their divergent interests. Or the agent may diverge from clearly delineated political compromises, making sure that it favours the interests of at least one principal (Torenvlied 1996: 27). In the European Union, where a strong sanction of the Commission requires the unanimous consent of member state governments for a Treaty revision, the Commission thus has considerable opportunities to influence the fifteen member states.2

Much of the relevance of the Commission’s structural advantage lies in the fact that European integration is not a one-shot game. This may allow the Commission to expand its powers incrementally (Pierson 1996), building on agency loss. How could the Commission profit in this way when exercising its rights under Article 90? This provision was not used until 1980 when a first directive was issued requiring the member states to give information on financial relations with public enterprises. The fact that Article 90 was not used until this late date shows that, despite the lack of procedural safeguards for its application, the article does not permit the Commission to proceed without constraints. Since the mid-1980s, Article 90 has seen its main usage in telecommunications policy, where the Commission successfully established its own directives as a new instrument which was employed for all liberalization measures. To analyse the conditions under which the Commission may use its powers, telecommunications will be compared in the following with electricity policy, where the Commission failed to build on its previous success. Other rights of the Commission, such as the right to issue decisions or to initiate infringement procedures, which may complement or replace its directives, will be included in the analysis.

For the Commission its relationship to the governments is only one consideration, whose primary importance is, however, also acknowledged by those arguing against a state-centric approach (Marks et al. 1996: 246). Because it operates in a multi-level system of governance (Scharpf 1994), other actors are also relevant for the Commission. According to several studies, the support of private actors, such as operators and manufacturers, can be crucial if the Commission is to overcome the resistance of member state governments to its proposals (e.g. Sandholtz and Zysman 1989). In addition, the European Parliament and the European Court of Justice are very important actors. The Parliament has no institutionalized rights under Article 90, and the fact that it is bypassed when Commission directives are issued may make it highly critical of the provision. The Court, in contrast, is the actor who may most effectively constrain the Commission. When called upon it can limit the Commission just as much as the governments could through a Treaty revision. The case studies3 will show, moreover, how the specificities of the policy field involved or situational factors can be crucial for the Commission’s exercise of its rights.

**EUROPEAN TELECOMMUNICATIONS POLICY**

The successful launch of the Commission’s telecommunications policy had an important prelude in the *British Telecom* case of 1985, in which the Court had
established that the provision of telecommunications services was subject to the competition rules of the EC Treaty and had to be regarded as a normal economic sector with no exceptional status (Ellger 1992). Because of the supremacy of European law and because of its direct effect, this implied that private actors could call upon the Commission or upon national courts to complain about existing restrictions imposed by the telecommunications monopolies. This 'policy window' (Kingdon 1984) was used immediately by the Commission, which followed up on private complaints about the existing equipment monopolies in several member states (Germany, the Netherlands, Belgium, Italy and Denmark). Even before the Commission published its first policy programme, several governments and national monopolists had thus been confronted with the uncertain longer-term impact of European law.

The Commission took its first major step toward a European telecommunications policy with the publication of its 'Green Paper on the Development of the Common Market for Telecommunications Services and Equipment' in 1987 which called for an ambitious general reform of the regulatory framework. The document triggered a broad consultation process among relevant organizations in the field (Schneider et al. 1994). Even before the governments endorsed the plans through a Council resolution in June 1988, the Commission issued a directive for the liberalization of terminal equipment based on Article 90.3 of the Treaty of Rome, which at the time had been used only once before. Thus, the Commission seized extraordinary powers in telecommunications policy.

Though the liberalization of terminal equipment was not contentious among the governments, France—with the support of Italy, Belgium, Germany and Greece—called upon the Court. They argued that the Council alone could adopt directives under Article 100A of the Treaty. Notwithstanding this legal conflict, the Commission soon started to define another directive on the basis of Article 90.3 to liberalize telecoms services. This measure was also materially contentious, since the Commission wanted to restrict the monopoly to the telephony service while several southern European governments, including France, wished to maintain restrictions on data services. Throughout 1989 the governments tried to negotiate a more favourable solution with the Commission, which took a harsh stand. Finally, a compromise was reached between the Commission and the Council of Ministers in December 1989 allowing licensing conditions for data services. But when the directive was published in June 1990, it was again challenged before the Court, this time by Spain (with the support of France), Belgium and Italy. In early 1991, the Court backed the Commission's choice of Article 90.3 in the terminal case. In 1992, the services case was also upheld by the Court.

Based on this legal support of the Court, the Commission has repeatedly had recourse to Article 90 to liberalize aspects of telecommunications systems. In fact, all liberalization directives have been based on this provision. The strategy of the Commission has been to change incrementally the existing two directives to include further areas. Thus, the liberalization of satellite services and equipment was included in October 1994; the liberalization of cable TV networks in October 1995; and the liberalization of other alternative networks followed in early 1996 as well as the full liberalization of services and networks from 1998 onwards. This early
liberalization of alternative networks was particularly contentious among the member states, but the Commission acted nevertheless.\(^4\)

All these uses of competition law have been accompanied by broad consultations with the national governments, the European Parliament and private actors. In fact, the Commission has aptly exploited its opportunities to influence informal agenda-setting (Pollack 1996: 449) by repeatedly publishing Green Papers (five altogether). It could circulate its analysis of ongoing changes, detail existing Treaty obligations, and put forward comprehensive policy programmes. Thereby, the Commission raised the awareness of private actors to their existing rights under European competition law, and emphasized reform pressures for the national governments and monopolists.

Both parallel actions complemented and strengthened each other. Through the Green Paper discussions the Commission recruited potential complainants who opposed existing legal restrictions. Complaints could either lead to legal proceedings culminating in a judgment of the Court, or to infringement procedures or single decisions against isolated governments by the Commission. This possibility of case-specific enforcement of European law played a crucial role. In procedures initiated by the Commission national governments are isolated, and therefore cannot block the demands as effectively as when all governments are confronted at once. The Commission is thus in a relatively good position to pursue single cases if it has the support of private actors for liberalization. This helps significantly when it subsequently attempts to broaden the policy to all member states. Having been forced to alter their domestic legal frameworks despite the fact that other governments continue with comparable though not quite identical restrictions, the concerned governments generally have the incentive to support the Commission in order to see reciprocal conditions realized in the other member states.

However, policy change based on case-specific measures is very cumbersome and drawn out, leading to a fragmented and uncertain legal order. Thus the Commission’s ability to impose a unitary policy on the member states through the use of Article 90 directives was at least as important. The Council of Ministers would not have agreed to realize a similar extent of liberalization through different directives within such a short period of time. Telecommunications liberalization raises significant concerns about employment losses and about a geographically even development of infrastructure. The resulting domestic opposition to reform, which has been remarkable even in highly developed member states such as Germany and France, would have made a qualified majority in the Council difficult to obtain.

Establishing Commission directives as a policy instrument placed very high demands on the Commission’s skills. The one time it had been used before only specific information was required from the governments. This time, national monopolies were abolished and organizational requirements (the separation of regulatory and operational functions) mandated. For the Commission, and more specifically for the relevant units in DG IV (Competition) and DG XIII (Telecommunications), this meant that broad support for this bold measure was necessary both within and outside the Commission. In this respect it was crucial that the governments backed the liberalization of terminal equipment.
It can even be said that the strong material interest of the national governments in a European telecommunications policy provided the opportunity for the Commission to take the procedural risk with the first Article 90 directive – since the governments did not want to jeopardize the policy programme, not even for institutional reasons. At the meeting of the Telecommunications Council just after the directive, no legal proceedings were announced. The fact that soon afterwards five countries (France supported by Italy, Belgium, Denmark and Greece) did call upon the Court shows that in this case the Council represented functionally specific rather than national interests.

But the Commission directive for services liberalization issued in mid-1990 (before the Court's ruling in March 1991) was contentious among the governments. In this case the Commission relied on the fact that divergent interests among the governments would prevent them from imposing sanctions. Some governments such as the UK and Germany secretly supported the Commission, knowing that this was the only way to realize their interests in European-wide liberalization.

When the conflict on the services directive was resolved at the December 1989 meeting of the Council, an institutional compromise was also achieved that ensured that the Commission would consult with the member state governments when taking recourse to Article 90 directives in future. The governments took this compromise to imply that the Commission would henceforth only use Article 90 under their assent. With such an accord its use became acceptable. That some governments nevertheless appealed to the Court seems to have been motivated mostly by interests of consistency with the still ongoing terminal equipment case. Thus France, the main initiator of the earlier case, felt that otherwise it would weaken its position in this dispute. In addition to having the support of national governments it was crucial for the Commission to be backed by the Court's judgments in 1991 and 1992 regarding the use of Article 90.3, without which the Commission could not have continued its push for liberalization.

With its next directives the Commission aimed to consolidate the use of its instrument. Procedural rules for the adoption of Article 90 directives were institutionalized in order to strengthen legitimacy and facilitate a future application in other sectors. The directives were published now before their final acceptance by way of separating a first reading from a second one by the Commission so that the Parliament, the Council and other concerned actors could be consulted.

With its last directives to liberalize alternative networks ahead of general liberalization, the Commission even proceeded without a previous Council resolution. For most of the earlier directives such a resolution endorsing a package of measures had helped to legitimize liberalization. The resulting criticism by some governments emphasized how much the Commission was seen to be dependent on their prior agreement for a directive to be issued. Nevertheless, the Commission did not back down. Liberalization was expedited, however, by rapid technical change, which has left national governments with the choice between the co-ordinated, European liberalization under the purview of the Commission and the de facto circumvention of restrictions which cannot be enforced any more.

In sum, in telecommunications policy the Commission has used its competition law rights quite forcefully to enact measures by itself. It has shown a significant
ability to act, furthered by adroit strategic action, for which it has combined rallying for internal Commission support with the publication of Green Papers aimed at gaining the support of external actors, while pursuing case-specific applications of competition law. The Commission has, however, enjoyed exceptionally favourable circumstances for its actions – the significant pressure for reform of telecommunications and the technical change that effectively broke existing regulatory restrictions. Thus, to a remarkable extent, telecommunications liberalization is overdetermined. Because of the significant interests in liberalization, the Commission received strong support from private actors who issued complaints or lobbied governments for acceptance. Nor were the governments bypassed. Rather, the analysis shows considerable support from national governments, despite the fact that their constitutional interests were violated. Partly, the Commission relied on the defection of single governments who refused to sanction the Commission since they could realize immediate self-interests. This was most clearly the case with the UK and Germany, but these were only the most obvious cases. Simultaneously, less developed countries were being compensated by linking liberalization with re-regulatory and developmental measures, and by granting suspensions. National officials and ministers with sectoral interests as well as interested private actors were keen to evade Council decisions on liberalization, knowing that the existing political costs would prevent their being able to capitalize on all the potential benefits of liberalization. By having the Commission decide, blame could be avoided.

Precedents based on such short-term interests can imply high future costs. In fact, telecommunications seems like an ideal example of the way the Commission can exploit the exceptional circumstances of a case to build up permanent new competences. How much the Commission was strengthened, and how constrained it is in its activism can be assessed on the basis of the electricity case.

EUROPEAN ELECTRICITY POLICY

In European electricity policy the Commission encountered many more difficulties. The policy started with the 1988 Commission report on ‘The Internal Market for Energy’. It took stock of the major barriers to the internal market in the different segments of the energy sector, emphasizing the need to apply existing Community law – in particular, the rules for competition and state aid – to network-based energy (electricity and gas). In contrast to telecommunications, there was no central judgment of the Court to which the Commission could refer supporting these obligations (Slot 1994). The document was welcomed only by the UK, Portugal and large industrial users. France initially also supported the Commission because of its desire to export its surplus electricity, and in fact helped to introduce the Commission’s proposals by lodging a formal complaint with the Commission about German coal subsidies.

The Commission foresaw a series of liberalization proposals to open electricity and gas networks gradually to third-party use, to help increase trade and to establish the internal market (Dohms 1994). In particular, the document’s reference to an obligation of network owners to give third parties the opportunity to use their
networks for the transport of electricity and gas, called ‘common carriage’,\(^5\) aroused European-wide controversy. Most governments as well as the electricity supply industry were profoundly opposed to the plan. Given that price differentials were mostly caused by different national political regulations and levies, harmonization measures (instead of liberalization) were being called for. Moreover, the strengthening of the existing collaboration of suppliers in the UCPTE, which organizes exchanges among the operators of the national high-voltage grids, could further trade.\(^6\)

The overall plan of the Commission was gradually to abolish or adapt the existing monopolies for the import and export of electricity and gas, followed by those for production, transmission and – ultimately – distribution, while establishing a European-wide regulatory framework on rights for production and access to networks. But only modest measures could be agreed upon, increasing the price transparency for large energy users as well as the transit possibilities of suppliers through each other’s networks (Ritter 1994: 139f.). Thus, after its significant success before the Court with the telecommunications terminal directive, the Commission drafted Article 90 directives in the summer of 1991 as a way of sidestepping the resistance to the liberalization of electricity and gas networks. In addition, it announced infringement proceedings based on Article 169 against existing monopolies for the export and import of electricity and gas in France, Denmark, Spain, Italy, Ireland, the Netherlands, Belgium, Greece, Portugal and the UK (Slot 1994: 525). By this time France had already ceased its support of European policies, correctly perceiving that it would not only benefit but also be forced to enact considerable domestic changes. In view of the strong opposition of governments, the European Parliament and electricity suppliers, the Commission dropped its plan to use Article 90 and presented proposals for Council directives in February 1992. These included the liberalization of the networks for large consumers of electricity and gas, now called third-party access (TPA), the permission to build networks and the organizational unbundling of production, transport and distribution (Hancher and Trepte 1992: 155–9).

In the Council, the TPA proposal remained very controversial, and after a highly critical opinion expressed by the European Parliament, the Commission presented an amended proposal with a weaker, negotiated TPA in 1993. The infringement procedures, now only against import and export monopolies in France, Spain, Italy, Ireland and the Netherlands, were just as slow and not brought before the Court until 1994. The Competition Commissioner had tried repeatedly to use them as a lever to move the governments to make advances in the Council. Under pressure, France, the major opponent of the liberalization policies, presented an alternative proposal to the TPA system in the Council discussions during 1994, called the Single Buyer concept. This proposal left the monopoly of Electricité de France (EdF) basically intact, but gave third parties the right to buy cheaper electricity from alternative sources and sell it to the network operator (for instance, EdF) as the ‘Single Buyer’. Users would profit from these transactions instead of from liberalized electricity. In addition, French actors in particular made a determined effort to use the talks on the Treaty revision begun in 1996 as a way of delimiting the future impact of the Commission’s
competences under Article 90.3 by integrating a concept of public services into the Treaty. The new Article 7d was a result of this.

It took the Council the determined attempts of four presidencies (German, French, Spanish and Italian) finally to reach a compromise in June 1996. Until the very end agreement was uncertain as several countries backing the modified TPA proposal (the UK, Germany, Portugal, Sweden, Finland and the Netherlands) wanted further liberalization, while France was reluctant to concede more alterations to the Single Buyer proposal, which was also backed by Belgium, Spain, Italy, Greece and Ireland. Questions of reciprocal market opening were paramount in the deliberations. To put pressure on the Council the Commission had threatened to issue an Article 90 directive should the Council drag its feet, but missed its self-set deadline of December 1995. That a compromise could be found was due to Franco-German endeavours to overcome their contrary positions. France had been very eager to find an agreement before the Court could submit its ruling. Similarly, the European Parliament had tried to exert pressure by its criticism that a court ruling was in danger of becoming decisive in such a politically contentious area.

In the end an incremental opening of the market was agreed upon, based on the two models of negotiated TPA and the Single Buyer. Starting in 1999 the market share equivalent of users with more than 40 GWh\(^7\) per year consumption will be opened, a level which is to be lowered after three years to 20 GWh per year, and after a further three years to 9 GWh per year. Because of different national consumption patterns, governments will designate eligible users until the agreed market share is achieved with only users above 100 GWh qualifying automatically. Greece, Belgium and Ireland gained exemptions for one to two years. In 2006 it is foreseen that the Council will negotiate further steps. Following pressure from the German electricity suppliers a reciprocity clause was included in the compromise to avoid too many asymmetries in the opening of markets caused by the two different models. With this compromise – which received the backing of all the governments and the Commission in the Council, as well as the European Parliament – the long discussions on the internal market for electricity could be brought to an end, before the Court of Justice gave its interpretation of the Treaty obligations in the infringement procedures in October 1997.

Electricity policy altogether paints a very different picture of the Commission’s use of its powers than the telecommunications case. Despite several threats, the Commission did not dare to overcome the clear lack of support in the Council with unilateral action, although it stood good legal chances on the basis of the telecommunications precedent. Instead it only pursued reluctantly a limited aspect of the existing monopolies through single cases.

Heterogeneous national systems and few reform pressures hampered the Commission’s attempt in 1991 to realize the internal market on the basis of an Article 90 directive. The strong opposition of the national governments against the Commission’s attempt to enact far-reaching changes that did not have their prior consent implied that the draft already failed to attract enough support inside the Commission for the idea to be pursued any further. Consequently, the legislative proposals were handed over to the Council. Only a two-option approach there could match the heterogeneous national conditions, imposing difficulties of
reciprocal market access between the countries. With both its political importance and many countries dependent on its electricity exports, France could not be isolated. The eventual solution that was found by including a reciprocity clause in the directive has the drawback of partly violating the logic of the internal market so that it may not withstand legal action.

In the electricity case, as well as in the earlier case of telecommunications, the Commission tried to use case-specific measures to increase the support for the internal market policy and initiated infringement procedures against existing import and export monopolies. Because of the drawbacks of a case-based policy change to all parties concerned in terms of legal certainty and Community-wide coherence, these cases exerted considerable pressure. But in view of opposition from member states the Commission repeatedly postponed its steps, demonstrating some control of the governments also on case-specific measures.

To explain the Commission’s relative inability to act it is necessary to consider the parallel discussions in the Council. These meant that with any action taken the Commission would have had knowingly to disturb the difficult process of searching for a compromise and oppose openly some governments’ interests. Given the Commission’s responsibility as initiator, this was inappropriate as long as national governments earnestly searched for a compromise and did not simply obstruct the Commission’s proposals. In addition, the Commission had already had to take sides on the litigation of the import and export monopolies. Because of the heterogeneous situation in the member states, only the five countries which had codified monopolies were affected, notwithstanding the fact that such monopolies de facto existed everywhere. The Commission therefore had to balance its disturbance of the Council discussions with the need to keep up some pressure and safeguard its own credibility as an independent agent. Its double role as initiator and enforcement agent was partly in conflict, and the Council discussions allowed governments a check on the case-specific enforcement they normally do not enjoy.

Nevertheless, the Commission did not fail totally. Because of the infringement procedures, France could no longer stick to its initial strategy of simple opposition in the Council and proposed the alternative Single Buyer system. Since the Commission could not drop the cases if no reform was agreed upon without losing its credibility, some changes were looming with the Court’s ruling. Had an acceptable compromise in the Council been reached in 1994, it is realistic to assume that the Commission would have discarded the cases, as there would have been no need for the Court to draw out Treaty obligations for reform.

The Commission’s relative difficulties with case-specific measures cannot be explained without taking the actions of the electricity suppliers and the large-volume users into account. The suppliers were interested in the maintenance of their monopolies, and their well-established links in the organization of grid operators (UCPTE) allowed them to block most case-specific measures under European law quite effectively. Generally, external suppliers declined contracts with users located in another supply area. Given their significant exchanges it is not rational for EdF, for instance, to supply a customer of the German Rheinisch-Westfälisches Elektrizitätswerk (RWE), because this could harm its established links to that utility. Whenever the Commission pursued complaints from third parties eager to
push electricity liberalization, the responsible supplier made a matching special offer to the user.

High-volume users, in contrast, who would profit from case law loosening the existing monopolies, have faced a collective-action problem in bringing their cases before the Commission or the Court. For each affected user it is individually rational to agree to counter-offers. Thus, the Commission had little support from third-party complaints that could have strengthened its position against national governments. In this respect, electricity policy is significantly different from telecommunications, where complaints are generally based on the interest to compete with the dominant suppliers, giving the latter no opportunity to buy off the complaints.

In sum, the Commission long lacked support from governments and third parties in electricity policy. Under these conditions the mere existence of the precedent of telecommunications and the confirmation of its rights through the Court did not suffice to prompt the Commission to use its powers under Article 90.3. Thus, the electricity case shows that national governments can be well placed to compensate for the long-term planning capacity of the Commission. However, by initiating the infringement procedures the Commission could spark governments' interest in pre-empting the impending court ruling with a political compromise. To do this, the Commission relied heavily on diverging interests among the governments. The governments could have agreed to exempt the sector from the Treaty – as was quite clearly the intention when the exception of Article 90.2 was drafted originally – in view of the difficulties of arriving at a common policy. But they did not, owing to the interests of the UK, and later of Finland and Sweden, in having their national liberalization spread via the Community, and of governments under reform pressure standing to profit from Community requirements as they enacted domestic changes. Accordingly, the new Article 7d is a rather weak commitment to a public-service concept.

CONCLUSION

The Commission has played very different roles in telecommunications and electricity policy. In telecommunications, the Commission found highly favourable conditions because of the strong rationale for liberalization owing to technical change and sectoral growth. Under these circumstances, the Commission managed to combine its various rights for agenda-setting and the application of competition law very successfully. Green Papers pointed to the need for liberalization, and case-specific measures prepared the ground for Commission directives. The different actions complemented and strengthened each other. In this way, the support of private actors could be garnered as much as the willingness of influential governments to co-operate with the Commission. Political costs could be minimized and governments' commitment to reform reinforced with the help of the Commission. Had all governments objected to the first Commission directive, by putting pressure on 'their' Commissioners or appealing in unison to the Court, it is doubtful whether the institutional balance could have been altered to this extent. As it was, the Court too supported the Commission's innovative interpretation of the
long-existing Article 90.3. Thus, the Commission successfully went well beyond what the founding members envisaged, and what many contemporary observers believed to be possible.

Under these favourable conditions, the Commission could establish a precedent using the different sources of agency loss. It exploited its structural advantage in long-term planning and its information asymmetries in preparing the use of Article 90.3, and fundamentally relied on the defection of some principals. Had it not acted at least in the interest of some governments, the Commission could have been sanctioned. The Commission was unable, however, subsequently to exploit this precedent, as the electricity case shows. Despite having given in to a short-term planning horizon in telecommunications, the national governments enjoyed sufficient control over the Commission and could compensate for possible consequences. The legal backing of the Court for Commission directives did not provide adequate support in this instance. Thus, on the basis of the electricity case it becomes apparent that the Commission’s use of Article 90 directives can be better understood as a controlled delegation of rights than as a significant example of agency loss.

In electricity policy the Commission encountered difficult conditions. National systems were heterogeneously structured and faced relatively little independent pressure from the private sector for reform, a role played by technical change and sectoral growth in telecommunications. Neither governments nor private actors gave the Commission much support for its plans, so it had to give up on a Commission directive. Its other instruments also met with difficulties. Having initiated Council discussions, the Commission would have put itself in an untenable situation had it tried simultaneously to enforce the competition law in single cases, as this would have pre-empted attempts to arrive at a political compromise. Next to this conflict between its different functions, the cartel-like co-operation of electricity suppliers could undermine the support of large users for such enforcement. But eventually its interdependence with the other European organs helped the Commission’s policy. Under the shadow of an impending judgment against the import and export monopolies, agreement in the Council finally became possible. Because of the greater independence of the European Court of Justice, governments can have less influence on it than they do on the Commission. Moreover, once a judgment has been given, the unanimity required to change the Treaty implies very high costs for the losing party. Since it is unlikely that the Court’s interpretation of the Treaty would openly contradict an agreement of the governments drawn up shortly before, the court cases originated by the Commission were a major incentive for agreement.

Thus, less direct and apparent than its far-reaching rights to issue directives under Article 90.3, the Commission’s opportunity to examine isolated cases helps it considerably to further its policy plans. Here the sources of agency loss come into full play as governments are incompletely informed about ongoing examinations and have difficulty assessing their long-term consequences. Because the governments are unlikely to agree unanimously on explicit limits to the Commission’s rights in view of their diverse interests, the Commission is well placed to enact changes incrementally.
Compared to the unusual right of directives based on Article 90.3, case-specific measures are much easier for the Commission to employ. Because of the extent of agency loss there is little control by the governments. Even if governments have more influence through parallel Council negotiations, as in the electricity case, the Commission’s need to maintain its credibility as an independent agent shields it against excessive demands. In this respect, the infringement procedures against the import and export monopolies could not be dropped. The support from private actors through complaints or court proceedings based on European competition law helps the Commission in its case-specific procedures but is not indispensable, as these infringement procedures show.

For the use of Article 90.3 directives, the two cases reveal that the Commission cannot act with the support of the Court alone. Beyond this, the fact that the Commission had widespread support for its use from governments and private actors for telecommunications liberalization, while both kinds of actor opposed its use in the case of electricity liberalization, makes it even more difficult to establish the conditions of the Commission’s actions. The experience of other sectors is helpful here. For both the liberalization of postal services and of ground handling in airports the Commission planned on using Article 90.3. Here, it enjoyed stronger support from private actors but faced opposition from governments, so that a directive by the Council was preferred again over one by the Commission (Schmidt 1997: 268). Thus, the position of governments is the most important determinant for directives based on Article 90.3. Despite many attempts by the Commission to bolster its independence with this instrument, its principals have stayed in control. It is unlikely that the Commission will be able to build on its telecommunications success and use this precedent to issue directives in other areas in the future. Its strength lies in implementing weaker, case-specific measures. In confronting isolated governments the Commission benefits from the supranational character of the European legal system that largely operates independently of inter-governmentalist control (Weiler 1981).

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NOTES

1 Previous versions of this article were presented at the European University Institute in Florence (June 1996), at the German and American Young Scholars’ Institute on ‘The Political Economy of European Integration’ at the University of Bremen, 4–16 August 1996, and at the HCM Conference on ‘The European Policy Process’, Brussels, 17–18 October 1996. I would like to thank all participants for the useful discussions, and the GAAC for generous support. I am grateful to Michelle Egan, Philipp Genschel, Adrienne Héritier, Philip Manow, Fritz W. Scharpf and two anonymous reviewers for comments.

2 In addition to these structural advantages agents can profit from unintended consequences of action arising from decision-making under uncertainty and, for instance, from issue density that leads to repercussions of decisions on other sectors (see Pierson and Leibfried 1995 for such an argument). I do not consider these possibilities
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separately since there is no reason why unintended consequences—in principle—could not work both ways, requiring a symmetrical argument: issue density and uncertainty could further or hamper the Commission's cause. Only when combined with a structural advantage, such as information asymmetry, could the Commission generally be seen in an advantageous position.

These case studies are based on an analysis of press reports, documents and fifty-seven interviews at the national (D, F, GR, NL, UK) and European level (Schmidt 1997: 8f).

Spain and Portugal called again upon the Court against the precipitated liberalization of alternative networks. In view of the time lag and the previous judgments, however, this is unlikely to alter much.

The Commission failed to specify the obligations implied by 'common carriage'. Later the term was substituted by third-party access (TPA).

The following countries belong to the Union pour la Coordination de la Production et du Transport d'Electricité (UCPTE): Albania, Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain, Switzerland, and the countries of the former federal state of Yugoslavia.

7 Hours of gigawatt (i.e. 40,000,000,000 watt).

REFERENCES


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