

**Fragmentation and Policy Coordination
in the
European Commission**

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**The Cases of Audiovisual and
Telecommunications Policy**

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Für Marco und Jacob

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Abstract

This thesis analyses how the internal divisions occurring on the administrative level of the European Commission affect its capacity to prepare and propose legislation. It examines the consequences of the functional specialisation of different Directorates General (DGs) and the principles of mutual consultation on the ways in which the Commission sets policy agendas and formulates policies. Using the insights of the literature on policy coordination that perceives of decision-making processes in fragmented institutions as a process of coordination among semi-autonomous, but interdependent actors, the thesis analyses the interactions between different Commission DGs and the ways in which they seek to cope with conflict and competition. The research design is qualitative and uses process-tracing of major legislative initiatives taken by the European Commission in the telecommunications and the audiovisual sectors between the mid-1980s and the year 2000. The findings of the empirical analysis suggest that while conflict and debate are ever-present features of how the Commission operates, the extent to which Commission actors manage to settle or to overcome such conflict varies across policy sectors. Low fragmentation results in an 'informal' coordination scenario in which actors settle their disputes. Legislative policy-making is rapid and consistent and usually results in the proposition of legislation. In contrast, high fragmentation bears a tendency towards policy-making taking place in formal and more 'politicised' arenas in which actors multiply and find it more difficult to accommodate their differences. Hence, policy-making is slower, more prone to inconsistencies and less likely to result in the proposition of legislation. The insights gained on fragmentation and coordination in the European Commission alter our existing views of the Commission. Challenging the notion that the Commission fulfils a pre-defined function or agenda, I argue that the Commission is capable of playing different roles, depending on the extent to which it is internally divided.

Table of Contents

Acknowledgements	3
Abstract.....	4
Table of Contents	5
List of figures and tables.....	9
Introduction.....	11
Chapter One: Analysing Fragmentation and Coordination in the European Commission.....	19
The European Commission – a fragmented policy-maker	19
The concept of policy coordination	25
Research question and design	28
The administrative fragmentation of the European Commission.....	29
The legislative outputs produced by the European Commission.....	35
A qualitatively-oriented cross-sectoral study.....	38
Conclusion.....	42
Chapter Two: The Context of Organisational Decision-Making in the European Commission	45
Introduction	45
The organisation and procedures of the European Commission	46
The institutional setting	46
Rules, procedures and routines	48
The context of the European Commission’s telecommunications and audiovisual policies.....	55
The national traditions of television broadcasting and telecommunications	57
The emerging EC dimension.....	59
Administrative fragmentation in the audiovisual and the telecommunications sectors.....	63
<i>The setting in the telecommunications sector.....</i>	<i>65</i>
<i>The setting in the audiovisual sector.....</i>	<i>68</i>
Conclusion.....	71
Part One: The Beginnings of the European Commission’s Legislative Activities, 1984 – 1989	75

Chapter Three: Collaboration and Joint Action – Coordination in the Telecommunications and the Audiovisual Sectors.....	76
Introduction	76
Policy coordination in the audiovisual area	79
Setting the policy agenda	79
<i>Growing awareness in the European Commission</i>	<i>79</i>
<i>The drafting of the ‘Interim Report’</i>	<i>83</i>
<i>The preparation of the Green Paper ‘Television without Frontiers’</i>	<i>84</i>
<i>The Green Paper ‘Television without Frontiers’</i>	<i>88</i>
The preparation of legislation	89
<i>The draft directive ‘Television without Frontiers’</i>	<i>92</i>
Policy coordination in the telecommunications sector.....	94
Setting the policy agenda	94
<i>Growing awareness in the European Commission</i>	<i>94</i>
<i>The creation of DG Telecoms.....</i>	<i>96</i>
<i>The preparation of the 1987 ‘Green Paper’ on Telecommunications.....</i>	<i>97</i>
<i>The 1987 ‘Green Paper’ on Telecommunications</i>	<i>102</i>
The preparation of legislation	103
<i>The directive on liberalising terminal equipment.....</i>	<i>104</i>
<i>The directive on liberalising services.....</i>	<i>106</i>
<i>Re-regulation: The Open Network Provision.....</i>	<i>109</i>
Conclusion.....	111
Part Two: The Refinement and Expansion of the European Commission’s Legislative Activities, 1990 – 1996	116
Chapter Four: From Collaboration to Partnership – Coordination in the Telecommunications Sector	117
Introduction	117
The consolidation of existing legislation	119
The implementation of the 1987 ‘Green Paper’ on Telecommunications.....	119
The liberalisation of satellite communications.....	120
The Open Network Provision	123
Setting the agenda for full liberalisation	124
The 1992 ‘Telecommunications Review’	124
The commitment to full liberalisation	128
The liberalisation of mobile telephony.....	131
The liberalisation of network infrastructure.....	134
The preparation of legislation.....	137
The liberalisation directives	138
Re-regulation: Updating and expanding ONP	140
Conclusion.....	144
Tables.....	148

Chapter Five: Battles and Conflict – Coordination in the Audiovisual Sector	150
Introduction	150
The regulation of television standards	153
The first directive	155
<i>Setting the policy agenda.....</i>	<i>155</i>
<i>The preparation of legislation</i>	<i>157</i>
The second directive.....	160
Legislation on media ownership.....	164
Setting the policy agenda	165
<i>The preparation of the 1992 ‘Green Paper’ on media ownership.....</i>	<i>166</i>
<i>The 1992 ‘Green Paper’ on media ownership</i>	<i>170</i>
The preparation of legislation	171
<i>A crowding policy arena.....</i>	<i>173</i>
<i>Preparing a draft directive.....</i>	<i>177</i>
The revision of the ‘Television without Frontiers’ directive.....	181
Setting the policy agenda	182
The preparation of legislation	183
Conclusion.....	187
Part Three: The European Commission’s Changing Policy Agendas, 1997 – 2000.....	192
Chapter Six: From Rivalry to Mutual Avoidance – Coordination in the Audiovisual Sector	193
Introduction	193
Setting the policy agenda	195
The emergence of a new policy paradigm	196
The preparation of the ‘Green Paper’ on Convergence.....	201
The 1997 ‘Green Paper’ on Convergence.....	206
The preparation of legislation.....	208
Legislation on television standards and conditional access	211
(Non-) Action to refine audiovisual legislation	213
Conclusion.....	216
Chapter Seven: An Ongoing Alliance – Coordination in the Telecommunications Sector.....	221
Introduction	221
The consolidation of existing legislation	223
Setting the policy agenda	226
The 1999 ‘Review’	230
The preparation of legislation.....	232
The 2000 ‘Telecoms Package’.....	232

Unbundling the ‘Local Loop’	235
Updating the liberalisation directives.....	239
Conclusion.....	241
Conclusion.....	247
Re-conceptualising the European Commission.....	247
The empirical findings.....	250
Fragmentation and coordination in the European Commission.....	260
Appendix	267
Sources of Evidence.....	267
European Commission documents.....	267
Press reports	269
Interviews.....	270
Unpublished documentary sources	273
Acronyms.....	275
Glossary.....	277
Bibliography	279
Official documents	279
Contributions of Commission officials	286
Literature contributions.....	287

List of figures and tables

Figure 1 The Organisational Structure of a Directorate General	48
Figure 2 Central Levels and Stages of Legislative Policy-Making in the European Commission	50
Table 1 Examples of the themes of legislation addressed by the European Commission in the telecommunications and the audiovisual sector	56
Table 2 Indicators of administrative fragmentation in the audiovisual sector during the 1980s.....	113
Table 3 Indicators of administrative fragmentation in the telecommunications sector during the 1980s.....	113
Table 4 Legislative outputs produced by the European Commission in the audiovisual sector during the 1980s	114
Table 5 Legislative outputs produced by the European Commission in the telecommunications sector during the 1980s.....	114
Table 6 Central consultative and legislative documents adopted by the European Commission in the audiovisual and the telecommunications sectors during the 1980s	115
Table 7 Indicators of administrative fragmentation in the telecommunications sector from 1990 to 1996.....	145
Table 8 Legislative outputs produced by the European Commission in the telecommunications sector from 1990 to 1996.....	147
Table 9 Major ‘Green Papers’ and other consultative documents published by the European Commission in the telecommunications sector from 1990 to 1996.....	148
Table 10 Liberalisation: European Commission directives adopted by means of Article 90 between 1990 and 1996.....	149
Table 11 Re-regulation: European Commission legislative proposals adopted between 1990 and 1996	149
Table 12 Indicators of administrative fragmentation in the audiovisual sector from 1990 to 1996.....	189
Table 13 Legislative outputs produced by the European Commission in the audiovisual sector from 1990 to 1996.....	190

Table 14 Major European Commission consultative documents and legislative proposals adopted in the audiovisual sector between 1990 and 1996	191
Table 15 Indicators of administrative fragmentation in the audiovisual sector from 1997 to 2000.....	217
Table 16 Legislative outputs produced by the European Commission in the audiovisual sector from 1997 to 2000.....	219
Table 17 Central documents and legislative proposals adopted by the European Commission in the audiovisual sector between 1997 and 2000.....	220
Table 18 Indicators of administrative fragmentation in the telecommunications sector from 1997 to 2000.....	242
Table 19 Legislative outputs produced by the European Commission in the telecommunications sector from 1997 to 2000	244
Table 20 Consultative documents, legislative proposals and legal instruments adopted by the European Commission in the telecommunications sector between 1997 and 2002	245
Table 21 Variation on administrative fragmentation in the audiovisual and telecommunications sectors	252
Table 22 Variation on legislative outputs produced by the European Commission in the audiovisual and telecommunications sectors	252
Table 23 The dominant coordination scenarios in the audiovisual and telecommunications sectors	263
Table 24 List of interviewees.....	272

Introduction

There are few governmental institutions that attract as many unfavourable comments as the European Commission. The powers and budgets administered by its 'faceless bureaucrats' have been despised and subject to heated controversies. Having chosen the European Commission as a subject of academic inquiry, you are most likely to encounter these controversies yourself. The chances are high that, whoever you are talking to and whatever the person's social standing, national origin, and political views, you will have a difficult time defending yourself. You unwillingly enter an inquisitional court, urged to justify how you can possibly study a corrupt institution that is busy doing things no one will ever need and that is really nothing more than a big nuisance. The fact that very few people are aware of what the European Commission actually does (and what it does not do) only makes matters worse.

Things do not improve greatly when you enter academic circles where people, raising their eyebrows, point out that 'so much has been written about the Commission already'. Indeed, contributions on the European Commission fill many more pages than do those on the European Parliament, the European Central Bank, or the Economic and Social Committee. After having been largely ignored for more than three decades, the European Commission has found itself facing a surge of academic interest since the mid-1990s.¹ No one now seriously denies that the European Commission matters greatly for the course of European integration and that its activities determine much of our daily lives, including the ways we shop, work, smoke, eat and play. There is little indication that the fascination with its role and functioning will end any time soon.

¹ For early contributions see Coombes (1970); Michelmann (1978); Spierenburg (1979).

However, in spite of the wealth of contributions floating around, we continue to know relatively little about what is going on inside the European Commission. The ways in which the European Commission operates, formulates policies and takes decisions continue to be subject to speculation and dispute. For example, whether the Commission is a 'supranationalist' 'competence maximizer' that constantly seeks to expand its powers or whether it is suffering from administrative overload and inefficient management and therefore largely incapable to act has remained subject to controversy.² This is probably in part due to the fact that the European Commission is a complex institution with so much going on inside that it offers 'a wealth of possible detail' (Page 1997, p. 18). Arriving at any kinds of generalisations is therefore a difficult task. The European Commission fulfils many different and sometimes diverse roles, such as being the guardian of the Treaties and proposing EU legislation, and its approximately 22,000 officials are engaged in very different day-to-day activities. Given the diverse if not contrary images of the Commission there is an ongoing need for more systematic research in order to uncover patterns of policy-making behaviour within the European Commission and to build testable hypotheses in relation to these. This thesis rests on the assumption that the European Commission is a key actor among those comprising the European Union as a political system. Moreover, it argues that the Commission is a highly interesting subject for academic research in and of itself, as it represents an excellent example of decision-making in a complex institutional environment.

The point of departure taken in this thesis is that the European Commission is not a unitary actor, but a fragmented institution representing a variety of actors and organisations. The fragmentation of the Commission has various dimensions, including divisions that result from the Commission's organisational design and the procedures according to which it operates. Due to compartmentalisation, the functional specialisation of different organisational actors and the absence of a central authority, the European Commission often engages in internal conflict over policy problems and solutions rather than

² See, for example, Cini (2001); Hix (1999); Laffan (1997); Majone (1996); Moravcsik (1993 and 1998); Peterson (1999); Pollack (1994 and 2003); Stevens (2001).

pursuing a set of pre-defined preferences.³ An argument found in many empirical as well as theoretical contributions is that this organisational fragmentation is linked to a general tendency towards 'fragmented' Commission behaviour, i.e. incoherent, uncoordinated or slow policy-making.⁴ In this context, fragmentation has lacked a precise definition and tended to be confused with its actual effects, often serving as a catch-all variable with little indication of how exactly it manifests itself and how it varies. In my thesis, I wish to address these shortcomings by selecting a single, but fundamental aspect of fragmentation and by analysing its effects in an in-depth cross-sectoral comparison of the Commission's legislative policy-making.

Seeking to contribute to the body of literature that views the European Commission as a 'multi-organisation' (Cram 1994) which is characterised by divisions and fragmentation, my central research question is how the organisational fragmentation on the administrative level of the European Commission affects its legislative outputs, i.e. the ways in which it prepares and proposes EU legislation. Preparing and proposing legislation is widely acknowledged to represent a cornerstone of the Commission's activities and is undertaken by the Commission's Directorates General (DGs).⁵

In order to establish causal linkages between the Commission's fragmentation and its legislative outputs I conceptualise legislative policy-making in the European Commission as a process of policy coordination. The concepts of policy coordination are used to analyse decision-making in 'fragmented' institutional environments that are composed of a plurality of organisational actors (such as government departments or ministries) maintaining different tasks, interests, goals and strategies.⁶ These actors are not autonomous, but interdependent, for example due to overlapping policy

³ See, for example, Christiansen (2001a); Cini (1996); Coombes (1970); Egeberg (2002); Michelmann (1978); Page (1995 and 1997); Peters (1994 and 2001); Peterson (1999); Spence (1997); Stevens (2001).

⁴ E.g. Christiansen (2001b); Cini (2001); Laffan (1997); Metcalfe (2000); Peterson (1999); Schmidt (1998a); Stevens and Stevens (1996); Stevens (2001).

⁵ E.g. Christiansen (2001a); Cini (1996); Edwards and Spence (1997); Nugent (2001); Peters (1994 and 2001).

⁶ Chisholm (1989); Hanf and Scharpf (1978); Hayward and Wright (2002); Lindblom (1965); March and Olsen (1976); Peters (1998); Rogers and Whetten (1982).

responsibilities and decision-making rules that require collaboration. The existence of a plurality of interdependent actors inevitably leads to conflict and debate among them. In order to realise their goals and to produce policy outputs they engage in coordination, a process which is aimed at preventing, avoiding and repressing conflict and thereby overcoming a given situation of fragmentation.

In my thesis, I do not intend to make assumptions about how much the European Commission 'matters' in the course of overall EU policy-making and the process of European integration. Hence, I do not address the 'European integration' literature nor do I associate myself with any of its schools of thought.⁷ Rather, I seek to demonstrate that conceptualising the European Commission as being composed of different organisational actors that engage in a process of policy coordination provides a useful lens through which to identify and analyse patterns of the Commission's behaviour to prepare legislation and to explain variation on legislative outputs.

The research design is qualitative and uses process-tracing of central legislative initiatives undertaken by the European Commission in two policy sectors over a period of more than fifteen years, stretching from the early 1980s to the year 2000. The chosen policy areas are the telecommunications and the audiovisual sector. They offer interesting case studies for a cross-sectoral comparison because they both stretch across neatly defined sectoral boundaries and cut across various issue dimensions (e.g. technological and economic). They have been subject to long-term legislative efforts by the European Commission that have addressed similar themes of legislation, i.e. liberalisation and market opening as well as the regulation of market entry, user rights et cetera.

In the empirical analysis, the organisational actors (i.e. DGs) that operate on the Commission's administrative level and prepare legislation are identified and the level of administrative fragmentation is assessed using three indicators: first, the number of DGs engaging in the preparation of legislation; second, the

⁷ See, for example, Armstrong and Bulmer (1998); Haas (1958); Hooghe and Marks (2001); Marks, Hooghe and Blank (1996); Kohler-Koch (1996); Moravcsik (1993 and 1998); Peterson (1995); Stone Sweet and Sandholtz (1998).

differences between these DGs on the need for and the primary objectives of EU-level legislation (i.e. the paradigm of legislation); and third their competition for policy authority. As will be shown, high levels of fragmentation are characterised not only by a greater plurality of DGs, but also by a situation of greater interdependence and complexity. They make the management of policy coordination more difficult and lower legislative outputs more likely. Legislative outputs refer to consultative documents, legislative proposals and legal instruments prepared and adopted by the European Commission and are operationalised by using three indicators: the duration of the process through which the Commission prepares and adopts them; the consistency of the legislative propositions; and the decision whether to propose legislation at all.

For each legislative initiative under study, the empirical analysis identifies distinct configurations of administrative fragmentation and examines how these translate into legislative outputs. Sectoral patterns of fragmentation and outputs can be clearly distinguished when comparing the telecommunications and the audiovisual fields, particularly over the long term. The empirical evidence uncovers significant variation in the two policy domains under study, the overall picture being one of high levels of fragmentation and low legislative outputs in the audiovisual field and one of low levels of fragmentation and high outputs in the telecommunications sector. Following an initial period during which both policy areas were characterised by similarly low levels of fragmentation, a central momentum of change occurred in the early 1990s. At that time, the number of participating DGs doubled from two to four in the audiovisual field whereas in the telecommunications sector there were only two DGs. Together with significant differences on the need for and the objectives of legislation and competition for policy authority, the situation was one of high administrative fragmentation. Managing policy coordination was intricate and resulted in low legislative outputs, i.e. slow and inconsistent policy-making that resulted in little legislative action. Quite the opposite was the case in the telecommunications domain where the number of DGs was smaller, the DGs consented on the need for and the primary objectives of legislation and on sharing authority over telecommunications issues. The low level of fragmentation facilitated the coordination process and enabled the participating DGs to overcome debate

and conflict over the details of legislation. Legislative policy-making was fast, consistent and resulted in a large number of decisions to propose legislation. The different configurations of administrative fragmentation observed for the two sectors lasted until the year 2000, the end of the period studied, as did the distinct patterns of policy coordination and legislative outputs.

The main argument emerging from the analysis is that rather than pursuing a pre-defined agenda and a stable set of preferences, the Commission engages in internal debate on policy problems and solutions. While such debates are universal features of Commission policy-making, there is significant variation on how the Commission manages them and whether conflict can be overcome. This variation can be linked with the level of administrative fragmentation. In this context, the number of DGs appears to be the most crucial factor determining the level of administrative fragmentation. Differences in fragmentation result in distinct situations of plurality and interdependence between the actors involved and the emergence of different scenarios of policy coordination. DGs tend to respond to low levels of administrative fragmentation by using coordination of a more 'informal' nature (e.g. preliminary consultations), whereas they usually rely on more 'formal' procedures (e.g. hierarchy) when high levels of fragmentation prevail. The different routes vary in terms of their effectiveness to solve conflict and to accommodate fragmentation. Instead of simply assuming a given 'role' for the European Commission, be it a 'competence maximizer' or a blocked and incoherent policy-maker, we must acknowledge that it may take on different roles that are related to varying patterns of fragmentation and coordination.

The structure of the thesis is as follows. Chapter One reviews the literature relevant to the questions posed in the thesis and sets out the research design, including a discussion of key conceptual and methodological issues. Chapter Two presents the organisational and procedural context underpinning the preparation of legislative proposals in the European Commission, describes central features of the chosen policy areas and indicates variation on the explanatory variable, i.e. administrative fragmentation. Chapters Three to Seven contain the empirical analysis which is organised into three broad parts. Part One (Chapter Three) analyses the first stage of the Commission's legislative

activities in the two domains under study, starting in 1984 and ending in 1989. Part Two (Chapters Four and Five) examines the preparation of legislation underway in the Commission between 1990 and 1996, a period during which Commission actors sought to refine and expand existing legislation. Part Three covers the most recent phase of legislative policy-making completed by the European Commission thus far, stretching from 1997 to the year 2000 and aimed at further refining and consolidating existing legislative frameworks (Chapters Six and Seven).

Chapter Three shows how between 1984 and 1989, in both telecommunications and the audiovisual field two Commission DGs engaged in proposing measures of market opening and regulatory harmonisation. Low levels of administrative fragmentation made policy coordination rather easy and resulted in high legislative outputs that were largely achieved by using 'informal' methods of policy coordination. Chapter Four presents an in-depth analysis of the Commission DGs' efforts to refine and expand legislation for the telecommunications sector between 1990 and 1996 and shows how low levels of fragmentation created a coordination scenario in which informal consensus-building activities prevailed and enabled the Commission to act rapidly, consistently and to adopt a large number of legislative proposals. Chapter Five examines the legislative initiatives taken in the audiovisual field between 1990 and 1996 and demonstrates how, due a significant increase of administrative fragmentation, coordination was troublesome and difficult and mostly took place in the formal arenas of the Commission. This slowed down legislative policy-making, made it more prone to changes of direction and the actual proposition of legislation less likely.

Chapter Six analyses the efforts of the Commission to take legislative action in the audiovisual field between 1997 and 2000 and shows how high levels of administrative fragmentation correlated with low legislative outputs that emerged in a 'formal' coordination arena. Chapter Seven demonstrates how in the telecommunications sector low levels of fragmentation facilitated the policy coordination process and how they resulted in high legislative outputs produced in largely informal coordination arenas. In Chapter Eight, the empirical evidence presented in the preceding chapters is assessed in relation to the key

conceptual issues and arguments raised in the thesis. Presenting conclusions on how administrative fragmentation impacts on policy coordination in the European Commission, I discuss how these challenge existing conceptualisations and alter our views of the Commission, its functions and roles.

Chapter One: Analysing Fragmentation and Coordination in the European Commission

Using insights from the literature on policy coordination, this thesis seeks to analyse how the organisational fragmentation occurring on the administrative level of the European Commission affects its legislative outputs. This chapter presents the main questions addressed, introduces key arguments and sets out the research design. The first section reviews existing concepts of the European Commission that view it as a fragmented decision-making institution and discusses how they have inspired the key questions addressed in my thesis. The second section introduces the concept of policy coordination as a conceptual tool to analyse the ways in which the fragmentation of the Commission manifests itself and affects legislative outputs. The third section sets out the research design, defining the explanatory and dependent variables and establishing a cross-sectoral, qualitatively-oriented research perspective.

The European Commission – a fragmented policy-maker

The European Commission is at the heart of the EU policy process. During the 1990s, its importance as a ‘motor’ of European integration, an agenda-setter and a political actor in its own right was widely acknowledged in the academic

literature.⁸ A growing number of writers have argued that analysing how the European Commission works and functions is central to our understanding of the European Union as a political system. In this context, how the Commission actually fulfils its various roles that include that of a bureaucracy, executive, policy entrepreneur and an agenda-setter has remained much disputed.⁹ Questions such as why the European Commission designs legislation in a particular way and at a given time and why it sometimes refrains from doing so have largely remained unsolved. Hence, there is an ongoing need for more systematic research which uncovers and explains patterns of the Commission's policy-making behaviour.

The point of departure taken in my thesis is that in order to advance our understanding of the Commission we must acknowledge its internal divisions and examine how they affect its policy-making behaviour. Many conceptualisations of the European Commission, particularly those derived from a European integration perspective, have been based on the assumption that the Commission is a 'competence maximizer' pursuing a 'supranationalist' agenda.¹⁰ According to this image, the Commission is a single-minded actor that constantly seeks to expand its powers, budgets and, more generally, EU authority and thereby wants to overcome its role as a mere agent of member states. Apart from rather general conclusions drawn about the European Commission being 'permeated' by national interests (e.g. Héritier 1999; Peterson 1999), these contributions have largely ignored the internal life of the European Commission and the fact that the Commission represents an arena composed of different actors and organisations (e.g. Dimitrakopoulos 2004). They have also left a number of important issues unaddressed, such as how the Commission's internal life affects the use of its agenda-setting powers and why its policy-making behaviour varies quite significantly across different policy domains.

⁸ See, for example, Christiansen (1996 and 2001a); Cram (1994); Dimitrakopoulos (2004); Drake (1997); Ludlow (1991); Morth (2000); Nugent (2000); Peters (2001); Peterson (1995 and 1999); Richardson (2001).

⁹ E.g. Christiansen (1996 and 1997); Cram (1997); Laffan (1997); Peters (1994 and 2001).

¹⁰ E.g. Eichener (1997); Hix (1999); Majone (1996); Moravcsik (1993 and 1998); Peterson (1995); Pollack (1994 and 2003); Radaelli (1999); Stone Sweet and Sandholtz (1998).

My main interest is to further our understanding of how the European Commission operates and functions by analysing the ways in which its internal divisions affect the ways in which it prepares and proposes legislation. Rather than being interested in how much the Commission 'matters' in the course of overall EU policy-making and the process of European integration, I seek to demonstrate that, depending on the extent to which it is internally divided, the Commission may produce different outputs in its function of initiating and proposing EU legislation. Hence, in my thesis I do not address the 'European integration' literature nor do I associate myself with any of its schools of thought.¹¹ Instead my thesis seeks to contribute to the literature which has emerged to address how the European Commission operates as a decision-making institution that is characterised by internal divisions or 'fragmentation' (e.g. Page 1997; Peters 2001).

A growing body of literature has challenged the notion of the European Commission being a 'monolithic entity' (Cram 1997) arguing that the preferences and strategies expressed by the Commission must be regarded as a product of its internal politics.¹² In order to explain how the European Commission operates, how it sets policy agendas and proposes legislation, a large variety of factors have been identified: together, they have been encapsulated in the term 'fragmentation'.¹³ Since the resignation of the Santer Commission in March 1999 following allegations of mismanagement, nepotism and fraud and ensuing attempts to reform the internal management of the

¹¹ In spite of their differing accounts of the pace and scope of European integration and the role played by the European Commission, liberal intergovernmentalists, neo-functionalists and proponents of alternative approaches (such as that of multi-level governance and policy network analysis) share a fundamental assumption. The European Commission is commonly perceived as a unitary actor that, depending on where one stands, acts either as an agent of member states or an autonomous actor (e.g. Armstrong and Bulmer 1998; Haas 1958; Hooghe and Marks 2001; Marks, Hooghe and Blank 1996; Kohler-Koch 1996; Moravcsik 1993 and 1998; Peterson 1995; Stone Sweet and Sandholtz 1998). Underlying these perceptions is the assumption that the European Commission is an essentially 'integrationist' or 'supranationalist' actor and a competence-maximizer in the 'Downsian' sense (e.g. Downs 1967; Majone 1996; Moravcsik 1998; Pollack 1994, 2000, 2003). Little account has been taken of the variation the Commission offers in terms of its policy-making behaviour.

¹² Also see Christiansen (1996 and 2001a); Drake (1997); Morth (2000); Nugent (2000); Peterson (1995 and 1999).

¹³ See, for example, Christiansen (2001); Cini (1996); Egeberg (2003); Nugent (2002); Page (1997); Peterson and Bomberg (1999); Rhodes, Peters and Wright (2000).

Commission, the salience of fragmentation has increased significantly.¹⁴ Academics have raised questions about the European Commission's 'democratic deficit', administrative overload and possible ways to improve its internal management and to achieve more effective governance.

Studies inspired by sociological and anthropological approaches have concentrated on factors such as identity, culture, and mentality that characterise the different actors and organisations the Commission is composed of.¹⁵ While these studies have offered valuable insights into the Commission's life and the multi-dimensional character of its divisions, they have remained largely descriptive when it comes to explaining what is actually happening in the European Commission, for example how and why it produces policy outputs and how distinct patterns of policy-making evolve. Some of these questions have been addressed by public policy analysts using tools from bureaucratic politics and network analysis and concentrating on other facets of fragmentation, such as organisational divides and exogenous factors (e.g. the influence of interest groups and national interests).¹⁶ These studies have demonstrated that, rather than pursuing a set of pre-defined preferences, the European Commission often engages in internal conflict and competition over policy solutions and strategies and that the outcomes of these processes are not easily systematised.

My thesis takes up the insights gained from studies that see the fragmentation of the European Commission as a product of its organisational

¹⁴ See, for example, Christiansen (2001a); Cram (2001); Dimitrakopoulos (2004); Egeberg (2004 b); Metcalfe (1996 and 2000); Nugent (2002); Radaelli (1999); Spence (1997); Stevens (2001); Wincott (2001).

¹⁵ E.g. Abélès, Bellier and McDonald (1996); Cini (2000 and 2004); Hooghe (1999, 2000 and 2001); McDonald (2000); Ross (1995).

¹⁶ A number of studies have yielded important results on how business and consumer interests affect the behaviour of Commission actors (e.g. Cram 1997; Egeberg 2004 a and b; From 2002; Hayward and Menon 2003; Hooghe 2001; Mak 2000; Mazey and Richardson 1997, 2001; Middlemas 1995; Morth 2000; Page and Wouters 1994; Page 1997; Peterson 1995 and 1999; Ross 1995; van Schendelen and Pedler 1994). The role played by national interests continues to be a contentious issue, particularly as it concerns the European Commission's administrative services (e.g. Christiansen 1997; Egeberg 2004 a and b; From 2002; Hooghe 2001; Michelmann 1978; Middlemas 1995; Page and Wouters 1994; Page 1997; Peterson 1999; Ross 1995; Spierenburg 1979).

design and the procedures according to which it operates.¹⁷ These studies have mostly followed a new-institutionalist approach (March and Olsen 1989), concentrating on the Commission's fragmentation as conditioned by factors such as its division into a political and an administrative realm, the prevalence of functional specialisation of and a horizontal division of labour between different Directorates General (DGs), the absence of a central authority, and decision-making procedures that emphasise collegiality rather than hierarchy. Variation in the outputs produced by the Commission has been attributed to fragmentation and the associated complexity, instability, and fluidity of the European Commission that allow, for example, for a variety of policy styles.¹⁸ On a conceptual level, this approach has been greatly advanced by Peters (1991, 1994 and 2001) who suggested that the European Commission's agenda-setting activities should be viewed as a pluralist or 'competitive process' (Peters 2001, p. 83) during which different actors (for example, Directorates General) interrelate as largely autonomous, but interdependent organisations. In this view, fragmentation affects the European Commission's policy outputs, for example the form and content of legislation it proposes.

These insights have been taken up in a number of case studies relating the incidence of fragmentation to actual policy-making behaviour observed in the European Commission.¹⁹ While the results presented in these contributions are appealing, one may also say that some of them tend to risk over-simplification. A central observation emerging from my reading of these studies has been that, perhaps due to a pre-occupation with the complex and multiple causes of fragmentation as such, the effects of fragmentation on the organisational dimension have been subject to speculation rather than systematic investigation. For example, an assumption underlying many contributions is that the mere incidence of organisational divisions equates with 'fragmented' Commission

¹⁷ See, for example, Christiansen (2001a); Cini (1996); Coombes (1970); Egeberg (2002); Michelmann (1978); Page (1995 and 1997); Peters (1994 and 2001); Peterson (1999); Spence (1997); Stevens (2001).

¹⁸ E.g. Cram (1994 and 1997); Laffan, O'Donnell and Smith (2000); Morth (2000); Page (1992); Rittberger and Richardson (2003).

¹⁹ See, for example, Christiansen (2001a); Cini (1996); Laffan (1997); Peterson (1999); Stevens (2001).

behaviour, i.e. policy-making that is uncoordinated, incoherent, prone to internal blockage and resistant to change.²⁰ Taking up the well-established general notion of fragmented institutional behaviour which implies that 'the bureaucracy does not act as an integrated tool of the public instrument, but rather as a set of subgovernments' (Peters 1995, p. 185), several contributors have used fragmentation in a somewhat static way.²¹ Fragmentation appears to serve as a catch-all variable with little explanatory value because it tends to be confused with its actual effects. It has lacked a precise definition of what it actually is, how it manifests itself, and how it varies, for example across policy sectors, issues and over time.

Taking up the notion of organisational fragmentation, I argue that in order to advance our understanding of how the Commission operates we need to further develop and to define the fragmentation of the Commission. What is needed is a conceptualisation of how fragmentation manifests itself and how it varies, under what conditions it may persist or be overcome, and how it affects the policy outputs produced by the Commission. In order to develop a framework for establishing causal links between the Commission's organisational fragmentation and its legislative outputs I conceptualise legislative policy-making in the European Commission as a process of policy coordination.

²⁰ As observed by Harcourt (1998, p. 371), 'conventional wisdom argues that policy issues are badly co-ordinated within the Commission'. For example, Peterson (1999, p. 62) noticed a tendency of 'imperatives - national, political and sectoral - (...) to divide the Commission and mitigate against collective administrative action', while Laffan (1997, p. 425) stated that 'establishing a Commission line, as opposed to the policy preferences of individual directorates, is tortuous'.

²¹ In the words of March (1994, p. 192-193), 'rather than have decision processes that proceed from consistent intentions, identities, and expectations to coordinated decisions and actions, organizations exhibit numerous symptoms of incoherence. Decisions seem unconnected to actions, yesterday's actions unconnected to today's actions, justifications unconnected to decisions. Beliefs are often unconnected to choices, solutions unconnected to problems, and processes unconnected to outcomes. Organizations frequently have ambiguous preferences and identities, ambiguous experiences and history, ambiguous technologies, and fluid participation in decision making'. For accounts relating the incidence of fragmentation in the Commission to 'fragmented' behaviour see, for example, Christiansen (2001b); Cini (2001); Coombes (1970); Laffan (1997); Metcalfe (2000); Peterson (1999); Schmidt (1998a); Stevens and Stevens (1996); Stevens (2001).

The concept of policy coordination

Policy coordination is one of the classic issues of the Public Administration literature.²² It occupies an important position in organisation theory and has been addressed in the context of public policy analysis and debates on 'New Public Management'.²³ Concepts of policy coordination have been used to analyse decision-making in complex or 'fragmented' institutional environments such as the White House, the French core executive and the German ministerial bureaucracy.²⁴ Policy coordination has been understood as both a goal, i.e. 'the bringing together of diverse elements into a harmonious relationship in support of common objectives' (Seidman 1980, p. 145), and a process, i.e. the 'act of coordinating' (ibid.) that takes place in an arena of at least two organisations. As I am conducting an analysis of policy-making in the European Commission, I am primarily interested in concepts focusing on the *process* of coordination. The contributions that have inspired the research design of this study mostly originate from a bureaucratic politics perspective which analyses policy-making in institutions and bureaucracies by viewing their component parts as organisational actors with their own purposes and goals (Allison and Zelikow 1999).

Coordination theorists perceive of fragmented institutional environments as being composed of a plurality of actors, for example government departments or ministries, that maintain different tasks, interests, goals and strategies.²⁵ However, far from being autonomous these actors are interdependent, due to several reasons. Institutional decision-making rules require them to co-operate and collaborate. Other factors intensify interdependence, for example the cross-

²² E.g. Alexander (1993); Allison (1971); Allison and Zelikow (1999); Chisholm (1989); Davis (1995); Goetz (2003); Hanf and Scharpf et al. (1978); Hayward and Wright (2002); Metcalfe (1994); Peters (1998); Rogers and Whetten (1982); Scharpf (1997); Seidman (1980); Simon (1997).

²³ E.g. Metcalfe (1994); Peters (1998); Rogers and Whetten (1982).

²⁴ See, for example, Hanf and Scharpf (1978); Hayward and Wright (2002); Seidman (1980). Besides the executive levels of central government, more local or regional organisations e.g. agencies of public transit systems have also been studied (e.g. Chisholm 1989; Pressman and Wildavsky 1973).

²⁵ Chisholm (1989); Hanf and Scharpf (1978); Hayward and Wright (2002); Lindblom (1965); March and Olsen (1976); Peters (1998); Rogers and Whetten (1982).

cutting nature of policy issues and the far-reaching functional specialisation of organisational actors.²⁶ Due to internationalisation, technological developments, and changing policy agendas incorporating new issues (such as environmental concerns or minorities' rights), many policy issues have become more 'cross-cutting', i.e. they tend to cut across a greater number of issue dimensions (e.g. technological, public interest, economic) (e.g. Peters 1998). The far-reaching specialisation of organisational actors organised within an institution increases the tendency towards overlapping policy responsibilities. Together, these factors create a 'multiorganizational setting' (Chisholm 1989, p. 5) in which organisational actors must seek to promote the development of consensus in order to be capable of action.

With its notions of plurality and interdependence, the coordination literature draws attention to the interactions of organisational actors, the unit of analysis being the set or fields of organisational actors organised within an institution, rather than a single policy actor.²⁷ According to the literature, the fragmentation of an institutional environment inevitably leads to debate and conflict among these actors. In the words of Hanf and Scharpf (1978, p. 3), 'a single consistent policy in a given functional area pursued by all political units is one of the least probable outcomes of governmental processes involving multi-organisational systems'.²⁸ In order to be able to realise their goals and to produce policy outputs, e.g. a legislative proposal, organisational actors engage in a process to accommodate their differences which can be described as joint decision-making and joint action (Rogers and Whetten 1982). Most commonly

²⁶ For a summary of these factors see, for example, Campbell and Peters (1988); Chisholm (1989); Davis (1995); Goetz (2003); Hayward and Wright (2002); Peters (1998); Rogers and Whetten (1982); Seidman (1980).

²⁷ Chisholm (1989); Davis (1995); Hanf and Scharpf (1978); Hayward and Wright (2002); Peters (1998); Rogers and Whetten (1982). The term 'institution' is used here to refer to a 'government institution' (Campbell and Peters 1988, p. 19), its organisation and structure, including formal rules and standard operating practices. This definition does not imply a rejection of more extended notions of institutions such as comprising 'the whole range of state and societal institutions that shape how political actors define their interests and that structure their relations of powers to other groups' (Steinmo, Thelen and Longstreth 1992, p. 2), but rather reflects the limited scope and purpose of this study. In order to clearly disaggregate the European Commission as an overall entity from the different elements (i.e. DGs et cetera) it is composed of, DGs are termed 'organisations' or 'organisational actors' and the Commission as such is referred to as an institution.

²⁸ Also see Hayward and Wright (2002); Peters (1998a); Rogers and Whetten (1982).

called 'coordination', this political process has been conceptualised as being 'undertaken by an organization or an interorganizational system to concert the decisions and actions of their subunits or constituent organizations' (Alexander 1993, p. 331) and as seeking 'to manage the conflicts that may be anticipated or do actually emerge in a context of interdependence between the policy actors' (e.g. Hayward and Wright 2002, p. 20).

Coordination is aimed at preventing, avoiding and repressing conflict and promoting the development of consensus in an institution or organisation.²⁹ In other words, coordination represents a response of organisational actors to the fragmentation of their institutional environment. The management of coordination varies, for example across policy sectors and countries.³⁰ In this context, higher levels of fragmentation and conflict among organisational actors have been said to make coordination more difficult to cope with and therefore 'fragmented' institutional behaviour more likely. Coordination encompasses a variety of activities including procedures, rules, routines and standard operating practices. The literature draws a basic distinction between 'formal' and 'informal' ways or mechanisms of coordination. Formal coordination centres on obligatory procedures and the principle of hierarchy (i.e. coercion and imposition), whereas informal coordination implies various consensus-building activities that take place in less 'formalised' arenas, for example ad-hoc working groups and personal conversation among officials.³¹ In 'multi-organisational' environments, most decisions are made on the basis of a mix of these different forms of coordination.

The concept of policy coordination can be applied to the European Commission and offers an excellent tool to conceptualise the processes that go on within. Apart from few exceptions (Metcalf 1996 and 2000; Peters 2001), the concept has been ignored in the context of the European Commission thus far, even though the term 'coordination' has occasionally been used to

²⁹ Hayward and Wright (2002); Metcalfe (1994); Scharpf (1997).

³⁰ E.g. Chisholm (1989); Davis (1995); Hayward and Wright (2002); Kassim et al. (2001); Peters and Wright (2001); Peters, Rhodes and Wright (2000); Rogers and Whetten (1982).

³¹ Alexander (1993); Chisholm (1989); Davis (1995); Hanf and Scharpf (1978); Hayward and Wright (2002); Lindblom (1965); Peters (1998); Scharpf (1997); Seidman (1980); Simon (1997).

characterise Commission policy-making.³² A central assumption underlying my study is that the Commission is a fragmented institution, i.e. a ‘multi-organisation’, composed of a plurality of actors that are interdependent and that engage in coordination. The Commission is divided into a political and an administrative realm and on its administrative level characterised by the compartmentalisation and functional specialisation of different Directorates General (DGs). The different DGs maintain distinct tasks and pursue their own policy agendas (see below). At the same time, they are interdependent because their responsibilities tend to overlap and procedures require them to mutually consult each other rather than solving conflict solely by means of hierarchy and coercion. The situation of plurality and interdependence leads to an environment of general uncertainty in which conflict and debate are likely to emerge and to which the DGs react by means of coordination activities. The higher the level of fragmentation and conflict, the less likely that conflict is overcome. The following section relates the general insights on fragmentation and coordination to the central questions posed in the thesis.

Research question and design

As previously stated, the phenomenon of fragmentation of the Commission encompasses several dimensions. In order to define fragmentation more clearly, to explain how it takes effect and to show how it varies I have chosen one aspect of fragmentation: its organisational dimension as it occurs on the administrative level of the Commission. The central research question addressed in the thesis is how this ‘administrative fragmentation’ affects the Commission’s legislative outputs, i.e. whether and how it prepares and proposes EU legislation. In the

³² See, for example, Christiansen (2001a); Cini (1996); Coombes (1970); Harcourt (1998); Hayward and Menon (2003); Mazey and Richardson (1997); Spence (1997); Stevens (2001). While some work has been done on formal coordination procedures, such as the coordinative functions of the Secretariat General or the Legal Service less is known about more informal ways of coordination, such as bargaining (Christiansen 2001a; Cini 1996; Coombes 1970; Ludlow 1991; Nugent 2001; Stevens 2001). Although a number of contributors have acknowledged that informal consensus-building is of pivotal importance in the European Commission, there has been little empirical work with the exception of research into the informal channels of influence used by Commission President Jacques Delors during the 1980s (Cini 1996; Laffan 1997; Metcalfe 1996; Middlemas 1995; Peterson 1999; Ross 1995).

following paragraphs, the explanatory and the dependent variable are narrowed down and defined.

The administrative fragmentation of the European Commission

In the literature, associations with the 'fragmentation' of institutions are often normative. In the words of Chisholm (1989, p. 13-14), the term implies 'breakage, disconnection, incompleteness, and disjointedness, terms that presuppose that an entity once whole has been broken up' (also see Rogers and Whetten 1982). However in this thesis the term 'fragmentation' is used in a neutral way to describe the European Commission as being decomposable into different organisational actors, for example DGs and the *cabinets*. I concentrate on the fragmentation of the Commission as occurring on its administrative level. The European Commission holds an array of powers that include implementation responsibilities, the external representation of the European Union, and the legal guardianship of the Treaties. The preparation of legislation which is widely acknowledged to represent a cornerstone of the Commission's activities and which is the focus of this study falls within the responsibility of different Directorates General (DGs) all of which are organised on the administrative level.³³

The focus on fragmentation occurring on the administrative level of the European Commission does not reflect an ignorance of the enormous (and much better documented) significance of Commissioners and *cabinets* for the process of preparing and ultimately deciding on legislative proposals. The choice of the level of analysis has foremost been governed by my interest in administrative policy-making and by the fact that 'few Commission initiatives are launched, few Commission proposals are made, and few Commission decisions are taken before they are extensively examined and, ultimately, approved by the services [i.e. the DGs]' (Nugent 2002, p. 142). A majority of policy initiatives originate directly from DGs and even when they are launched on *cabinet* or

³³ E.g. Christiansen (2001a); Cini (1996); Edwards and Spence (1997); Nugent (2001); Peters (1994 and 2001).

Commissioner level, the bulk of drafting work is undertaken in the DGs.³⁴ Hence, any decision taken by *cabinets* and Commissioners depend on decisions previously taken on DG level. Nor does the focus on the Directorates General imply that the positions of and the influence taken by *cabinets* and Commissioners on the DGs must be ignored, but rather allows the analysis to take account of the fact that DGs act on the instructions of 'their' respective *cabinets* and/or Commissioners or, more indirectly, that they may act in anticipation of their preferences and positions. Also no claim is made to explain the evolution of EU legislation as such since the process of inter-institutional negotiations lies outside the scope of this study, taking place after the Commission has concluded its agenda-setting role and involving other EU institutions.

In terms of the organisational fragmentation occurring on the Commission's administrative level, the most determining feature is the functional specialisation of the individual DGs. The European Commission is comprised of 24 different organisations or services that support the work of the so-called 'political' level of Commissioners and their *cabinets*. While a small number of services take on coordinative or horizontal functions, most services are so-called Directorates General (DGs) that maintain functional responsibilities for policy sectors or issues.³⁵ This has led a number of authors to call DGs 'quasi-ministries', i.e. 'the organisational equivalent of government ministries in domestic administrations' (Hix 1999, p. 37).³⁶ While not ignoring that each DG is sub-divided into various departments and units each of which may develop its own organisational identity, I focus on the DGs as organisational actors that take responsibility for distinct policy sectors and the legislative initiatives associated with these. In most cases, one DG takes lead responsibility for a legislative dossier and at least one other DG participates in the preparation process. DGs not only undertake different tasks, but also maintain different

³⁴ E.g. Cini (1996); Nugent (2002); Stevens (2001).

³⁵ For example, DG Agriculture deals with agricultural policy, whereas DG Competition is responsible for applying EU competition law. For detail on the functions of the Legal Service and the Secretariat General see, for example, Christiansen (2001a); Cini (1996); Coombes (1970); Ludlow (1991); Nugent (2001); Stevens (2001).

³⁶ Also see Christiansen (2001a); Michelmann (1978); Page (1995); Spence (1997).

missions and agendas. This is the result of many factors, the most important being institutional affiliation which is linked to the pre-defined functions and tasks (see below).

In spite of their different responsibilities and agendas DGs do not operate as autonomous entities, but depend on each other and are required to co-operate. There are various reasons for this, the most important being that internal decision-making rules require mutual consultation on legislative initiatives (see Chapter Two for detail). Furthermore, most (if not all) policy issues stretch beyond neatly defined sectoral boundaries (Peters 1998) and therefore usually prompt the participation of more than one DG. In the European Commission, the tendency towards interdependence is further intensified by the fact that DGs tend to be somewhat more specialised than national ministries and that the overlapping of policy responsibilities therefore occurs more frequently.³⁷ The preparation of legislation can therefore be conceptualised as a process of co-operation, collaboration, and coordination among different Directorates General through which they respond to a given situation of fragmentation.

While administrative fragmentation is a universal feature of legislative policy-making in the European Commission, its actual level varies with each case of legislative policy-making and so do its effects on legislative outputs. In order to assess the level of administrative fragmentation and to analyse its impact, I have chosen three indicators: the number of DGs that actively participate in the preparation of a legislative initiative (or 'dossier'); the extent to which these DGs differ over the 'paradigm' of legislation; and the extent to which they compete for authority over the initiative.³⁸ The choice of these indicators has been inspired by the literature on policy coordination which claims that coordination is more difficult to handle the greater the number of

³⁷ Two obvious examples are telecommunications and energy that, in many member states, fall under the authority of the economics ministry, whereas in the European Commission, they each have their own Directorate General. See Egeberg (2002); Hix (1999); Page (1997); Peters (1994 and 2001); Richardson (1996).

³⁸ In reality, differences on paradigm and competition for authority may overlap. For example, what seems like a disagreement on the substance of a legislative initiative may in fact reflect an underlying struggle for authority. While one might combine the two indicators to assess the overall 'distance' between the DGs I find it more useful to keep them apart for analytical purposes.

organisational actors, the more they compete for power and influence, and the more they disagree on the definition of policy problems and solutions.³⁹ The indicators allow us to conceptualise administrative fragmentation as running along a continuum and varying across policy sectors. In reality, we can always expect some degree of fragmentation as in the European Commission, there are no single-actor constellations nor are actors' goals and views completely congruent.

The thesis takes fragmentation as an explanatory variable to analyse how it affects the legislative outputs of the Commission. Hence, it does not seek to look at the underlying causes of fragmentation or to explain why it varies. Doing so would represent an entirely different study which would have to examine a multitude of possible causes of fragmentation, for example national interests, interest groups as well as technological and economic developments. These factors have been shown to influence policy-making in the Commission and to influence the motivations and interests pursued by individual DGs.⁴⁰ One could also think about the nature of the issues that affect a given situation of fragmentation because issues are important in understanding how decisions are made in institutions and bureaucracies (e.g. Peters 1998).⁴¹ Rather than uncovering the various possible causes of fragmentation my aim is to show *how* a given situation of fragmentation impacts on the Commission's behaviour in the legislative process. Insofar as other factors affect a given situation of fragmentation they can be expected to influence Commission behaviour and hence the overall EU policy process. Rather than stopping short at the notion

³⁹ Chisholm (1989); Hanf and Scharpf (1978); Hayward and Wright (2002); Peters (1998a); Seidman (1980).

⁴⁰ See, for example, Christiansen (1997); Edwards and Spence (1997); Greenwood (1997); Mazey and Richardson (1994); Page (1997); Peterson and Bomberg (1999); Richardson (1996); Ross (1995); Stevens (2001).

⁴¹ For example, some policy issues cut across a greater number of issue dimensions than others and therefore provide for more scope for conflict and controversy than others. However, one must be aware that the cross-cutting nature and, linked to it, the controversiality of issues are far from being objective facts, but depend on the perceptions, interests, and motives of the organisations and individuals that deal with them. As pointed out by Peters (1994, p. 18), 'policy issues do not define themselves but rather are shaped through complex social and political processes'. Also see Jachtenfuchs (1996); Kingdon (1984); Peters (1998); Schön and Rein (1994).

that such factors 'matter', the thesis allows for understanding the mechanisms whereby they influence the legislative process.

1) The number of DGs

The number of DGs that actively participate in the preparation of legislation is a crucial factor determining administrative fragmentation. According to the policy coordination literature, a greater number of organisational actors makes the reaching of agreement between them more difficult as more (and potentially more diverse) interests must be reconciled.⁴² While usually one DG takes formal responsibility for any legislative initiative, at least one other DG is associated.⁴³ For most policy initiatives, a large number of DGs are formally associated, with more than twenty DGs not being uncommon. Significant variation occurs as regards the actual involvement of these DGs: usually, between one and four DGs submit detailed comments on draft documents and proposals to inter-service consultations and engage in a dialogue with the DG that keeps formal drafting responsibility, for example in inter-service committees or working groups. In accordance with formal procedures, the DG with drafting responsibility must consult with and try to obtain agreement from these other DGs before a legislative proposal can be passed on to formal decision-taking in the *cabinets* and the College of Commissioners (see Chapter Two for detail). The greater the number of DGs, the greater their plurality and interdependence.

2) Differences on the paradigm of legislation

The second indicator of administrative fragmentation is the extent to which the participating DGs consent or disagree on what I call the 'paradigm' of legislation. DGs may maintain different policy agendas and pursue different goals for each legislative initiative and, more generally, policy sector. A central

⁴² See Chisholm (1989); Hanf and Scharpf (1978); Hayward and Wright (2002); Peters (1998, p. 31f.); Seidman (1980, p. 146f.).

⁴³ This is clearly indicated in the official sources documenting the Commission's legislative activities, for example the Prelex Database which records the involvement of different DGs back to the 1970s.

claim found in the policy coordination literature is that greater differences among organisational actors make coordination more difficult to deal with because common ground and therefore the chances of reaching agreement are reduced.⁴⁴ Based on the assumption that the views held in different DGs on policy problems and solutions are rarely completely congruent, I argue that conflict or debate over the details of legislative initiatives is a universal feature of Commission policy-making. Such debate may concern the scope of regulatory provisions, the setting of implementation periods, or the timing of publishing a legislative proposal. More fundamental variation occurs if there is dispute concerning the substance of and the need for EU legislation. First of all, DGs may differ over the primary objectives of legislation. For example, one DG may favour a detailed regulatory framework whereas another may speak in favour of proposing as little regulation as possible and instead relying on the self-regulation of markets. Secondly, DGs may conflict on whether the Commission should propose legislation at all.

The positions of the DGs on these two aspects are the result of several factors, the most important one being institutional affiliation which is related to the pre-defined functions and tasks assigned to each DG (Allison and Zelikow 1999).⁴⁵ As demonstrated in a number of case studies, such 'soft ideology' (Peters 1995, p. 179) underpins much of the daily work of DG officials, even at the lower levels of the hierarchy.⁴⁶ To a lesser extent, the existence of 'departmental views' (ibid.) may be conditioned by personalities, for example in the senior management of DGs, who maintain their own values and motives and 'different perspectives on appropriate policy responses' (Page 1997, p. 135) or the views held by the Commissioner responsible. Furthermore, the views held in different DGs are significantly shaped and influenced by exogenous factors such as interest groups, expert committees, national representatives, as well as

⁴⁴ Hanf and Scharpf (1978); Hayward and Wright (2002); Peters (1998a); Seidman (1980).

⁴⁵ For example, the Environment DG is likely to have an outlook on environmental issues that is quite different from that taken by DG Industry, as the former is tasked with promoting the protection of the environment whereas the latter seeks to advance the competitiveness of the European industry – two objectives that do not necessarily harmonise.

⁴⁶ For good case studies see, for example, Armstrong and Bulmer (1998); Cini (2000); Hooghe (2000); Ross (1995).

technological and economic developments. DGs may also vary in their positions and outlooks due to different 'sub-cultures' resulting from the fact that officials are drawn from a variety of political and administrative cultures.⁴⁷ However rather than analysing the underlying causes of the different positions and preferences that prevail in the DGs the primary aim is to uncover these positions and preferences and to analyse how they shape the process of policy coordination (see above).

3) The competition for authority

The third indicator concerns the extent to which the participating DGs compete for influence, control and competence over the legislative initiative, i.e. authority. According to coordination theories, greater competition for influence renders coordination more difficult to cope with since rivalry can be expected to dominate the search for consensus.⁴⁸ The allocation of formal drafting responsibility to one DG does not rule out that other DGs dispute this authority and seek to increase their influence and power at its expense.⁴⁹ Even if the allocation of the dossier is not disputed as such, the authority taken by a DG may be subject to conflict during the legislative process. Many legislative initiatives cover a whole range of regulatory issues or themes that are the responsibility or prompt the interest of several DGs. These DGs may conflict over which DG will lead the definition of the policy solution for the individual issues.

The legislative outputs produced by the European Commission

A key argument put forward in the thesis is that in order to understand how the European Commission operates, we need to dismiss the somewhat simplistic assumption that the Commission's fragmentation automatically translates into

⁴⁷ In this context, the administrative arm of the European Commission has often been called a 'multicultural organisation', for example due to its linguistic diversity. See Cini (2000); McDonald (2000); Nugent (2001); Page (1997); Peters (2001); Spence (1997); Richardson (1982).

⁴⁸ Hanf and Scharpf (1978); Hayward and Wright (2002); Peters (1998a); Seidman (1980).

⁴⁹ For detail on the procedures governing the allocation of dossiers to DGs see Chapter Two.

'fragmented', i.e. slow and incoherent behaviour which is resistant to change (see above). In order to explain the variation in the Commission's legislative policy-making I distinguish three categories of legislative outputs: the formal legislative proposals published by the Commission; the legal instruments it adopts; and the publication of consultative documents exploring the possibilities and options of EU-level legislation. As an initiator of EU legislation, the European Commission prepares and adopts formal draft legislation which takes the form of a draft directive or a proposal for some other kind of legal instrument (e.g. a regulation). Draft legislation is published and submitted to the EU institutions for hearings and voting. The European Commission may also adopt its own legal instruments, including Commission directives, decisions and regulations. These instruments are legally binding and do not require the approval of other EU institutions. In this context, the provisions of Article 86 (ex-Article 90) of the Treaty empower the Commission to issue directives or decisions to Member ^{States} in order to prevent them from introducing or maintaining measures contrary to the Treaty regarding public undertakings and enterprises being granted special and exclusive rights (see Chapter Two for detail).

In most cases, the drafting of legislation is preceded by a 'preparatory stage' during which the European Commission prepares and adopts documents of an explanatory or consultative nature, most commonly so-called 'Green Papers'. These documents build an important part of the overall process of legislative policy-making because they indicate whether and for what reasons the Commission intends to propose legislation in a given policy domain. Furthermore, they set out the aims of future legislation and present timetables for drafting legislative initiatives. Being primarily addressed to interested outside parties that are invited to participate in a process of consultation and debate with the Commission, these consultative documents represent a routine way in which the European Commission 'formalises' (Cini 1996, p. 146) its agenda-setting function. Hence, I treat them as legislative outputs produced by the European Commission.

In order to assess variation on legislative outputs, I have chosen three indicators of the European Commission's legislative outputs: the duration of the process through which the Commission prepares and adopts a consultative document, a legislative proposal or legal instrument; the consistency of the propositions made from the initiation to the adoption of these documents; and the decision whether to propose legislation.

1) The duration of legislative policy-making

Empirical data reveal that the process which stretches from initiation to the final adoption (or abandonment) of a legislative initiative may take anything from a few months to several years. In my empirical analysis I show how high levels of administrative fragmentation are linked with slow legislative policy-making, whereas low levels can be associated with fast policy-making. The underlying explanation is that the more serious the conflict between the participating DGs, the more time they need to resolve it. While the end of the preparation process is rather easy to define by using the dates of formal adoption or abandonment of proposals and documents, one must be more careful about assessing the start of a legislative initiative. The European Commission may announce the taking of legislative action in a variety of ways, including announcements made by Commission officials in the press or in the Commission's official documentation.⁵⁰

2) The consistency of the Commission's legislative propositions

From initiation to the adoption of a legislative initiative, the provisions discussed in the European Commission may remain fairly stable or instead undergo a great deal of change. Sometimes the Commission adopts a legislative proposal which closely reflects the propositions made at policy initiation, usually by the DG holding formal drafting responsibility. Sometimes, the 'official' strategy pursued by the Commission may change several times. As will be shown, higher

⁵⁰ Following a preliminary data analysis, I chose to use this kind of information rather than relying on speculation and rumours contained in press reports or the memory of interviewees. I chose to use three different categories of the duration: 'short' (less than twelve months); 'moderate' (twelve to 24 months); and 'long' (more than 24 months).

levels of fragmentation provide a greater scope for incoherence than lower ones because more diverse possibilities are being discussed and a departure from initial propositions might be needed to win necessary approval among the Commission actors involved. In order to assess variation in the consistency of the Commission's legislative propositions, I contrasted the propositions made for each legislative initiative at different stages of the preparation process.⁵¹

3) The decision whether to propose legislation

The Commission usually concludes the initiation of legislation with adopting a legislative proposal or legal instrument, a decision which is often previously announced in a consultative document. Otherwise it would waste a considerable amount of scarce resources, notably staff, time and energy. The greater the difficulties to overcome a given situation of fragmentation and conflict, the more likely is that the decision whether to propose legislation is deferred or that the legislative initiative is abandoned altogether. The proposition of legislation is clearly marked by the publication of the relevant documents, whereas deferment and abandoning are either indicated in the Commission's official documentation or by other kinds of information including, for example, press statements.

A qualitatively-oriented cross-sectoral study

In order to investigate and uncover the causal relationships between the variables under study, I conduct a qualitatively-oriented, in-depth comparison of the Commission's legislative policy-making in two policy areas over a period of more than fifteen years. Existing attempts to explain decision-making in the European Commission have mostly been based on single case studies.⁵² While the cross-sectoral variation of the Commission's policy-making has been widely acknowledged, less has been said about its underlying reasons and studies have

⁵¹ In order to do so, I analysed and cross-checked several sources of evidence. Detail on the data I used is provided in the Appendix of the thesis. Following a preliminary data analysis, I use three different categories of the consistency: high, moderate and low.

⁵² E.g. Christiansen (1997); From (2002); Harcourt (1998); Morth (2000); Wendon (1998).

largely avoided generalisations on how exactly the internal life of the Commission influences its policy outputs.⁵³ An argument put forward here is that because different policy areas are characterised by distinct levels of administrative fragmentation they face different problems of policy coordination that lead to different legislative outputs. The two chosen policy domains are the telecommunications and the audiovisual sector. They have primarily been chosen with a view towards their variation in relation to the explanatory variable, i.e. administrative fragmentation, but also because a number of factors make them interesting subjects for a cross-sectoral study.

Both the telecommunications and the audiovisual sector are high-tech sectors with an enormous economic potential and on the national level, there have been far-reaching regulatory changes affecting them: during the 1980s, member states started to abolish state monopolies and systems of public service and replaced them with systems of regulated competition (for detail see Chapter Two). The European Commission started to prepare and propose legislation in the two sectors in the mid-1980s, basing most pieces of legislation on the reasoning and the legal foundations of the Single European Market (SEM) project. In both policy sectors, the regulatory issues addressed by the Commission cut across a number of issue dimensions and often were politically sensitive ones that attracted controversy across the entire spectrum of sectoral interests, including member states (see Chapter Two).⁵⁴ This led the European Commission to address similar themes of legislation, for example market opening and liberalisation, a harmonisation of market conditions and facilitation of cross-border investment and trade, as well as regulation designed to safeguard the so-called 'public interest' (e.g. user rights).

In this context, it needs to be stated that the thesis does not attempt to explain the evolution of EU telecommunications and audiovisual policies as such. The development of these policies has been characterised by a multitude of factors, such as Treaty provisions and the case law of the European Court of

⁵³ For comparative accounts see, for example, Nugent (2001); Peterson and Bomberg (1999); Pollack (1994, 2000b, 2003); Radaelli (1999); Ross (1995); Schmidt (1997 and 1998); Stevens (2001).

⁵⁴ On the cross-cutting nature of policy issues see, for example, Goetz (2003); Peters (1998).

Justice, negotiations in the Council of Ministers, the European Parliament and other EU institutions, business and user lobbying, technological developments, and external events. The scope of the analysis is limited to tracing how the Commission's legislative proposals evolved for the two policy areas and how the outcomes of this process can be explained by variation in administrative fragmentation.

Against the background of far-reaching changes taking effect on the national, international and EU levels, the chosen policy sectors reveal considerable variation on the indicators of my chosen independent variable, i.e. administrative fragmentation. The overall picture is one of a high level of administrative fragmentation in the audiovisual field and a considerably lower level in the telecommunications sector. Distinct arrays of DGs took over responsibility for the preparation of legislation in the two fields – these differed not only in terms of the numbers of DGs, but also in the extent to which there existed differences on the paradigm of legislation and competition for authority. In telecommunications, two DGs (DG Competition and DG Telecoms) determined the preparation of legislation for the entire period under study with other DGs being either not interested or limiting their actions to a minimum. In contrast to this stable pattern, the audiovisual domain was characterised by increasing numbers of DGs. While during the 1980s, their number was also limited to two (DG Culture and DG Internal Market and Industrial Affairs), it doubled to four in the early 1990s to include DG Competition and DG Telecoms, and further increased to five in the late 1990s to involve DG Industry.

While in both policy domains, a debate occurred among the DGs concerning the details of legislative provisions, considerable variation can be observed in terms of the differences on the paradigm of legislation and the competition for authority. In telecommunications, DG Competition and DG Telecoms agreed on the need for and the primary objectives of legislation and they were in basic consent to share authority for telecommunications issues. DG Competition took responsibility for liberalisation and market opening, whereas DG Telecoms concentrated on issues of re-regulation. Both DGs accepted that EU legislation would be based on a combination of market opening with re-

regulatory harmonisation that would guarantee fair market conditions and user rights. In the audiovisual field, a similar level of agreement prevailed at first. During the 1980s, DG Culture and DG Internal Market were in accordance to share authority for audiovisual legislation by allocating liberalisation and market opening to DG Internal Market and by assigning re-regulation to DG Culture. They also agreed on the primary objectives of legislation, consisting of a mix of liberalisation and re-regulation. The situation radically altered when in the early 1990s DG Competition and DG Telecoms joined the policy arena to express entirely different positions on the need for and the objectives of legislation and to challenge the established allocation of authority.

The empirical analysis reveals how the different configurations of administrative fragmentation relate to different legislative outputs produced by the Commission. While in the telecommunications sector, the DGs were able to overcome debate on the details of legislation, they were much less able to do so in the audiovisual domain where conflict persisted or intensified. In the telecommunications sector, the participating DGs acted rapidly and coherently during the entire period under study and were able to produce a large number of consultative documents, legislative proposals and legal instruments. In the audiovisual field, the DGs involved needed more time to develop legislation, the Commission changed propositions more frequently and proposed fewer pieces of legislation. Moreover, at several occasions the Commission deferred decision-taking or abandoned legislative initiatives altogether.

The methodological approach is qualitative and uses process-tracing of the major legislative initiatives taken by the European Commission in the telecommunications and the audiovisual sectors from the early 1980s to the year 2000.⁵⁵ The empirical analysis is divided into three periods that roughly coincide with major phases of legislative policy-making underway in the Commission. The first phase reaches from the early 1980s when legislation was

⁵⁵ Given the scope of this thesis, financial support initiatives, R&D programmes and 'soft law' (i.e. non-binding instruments) are excluded from the analysis as are regulatory initiatives which are considered of minor importance (such as numbering and addressing in telecommunications). For a definition of telecommunications and audiovisual policy respectively see Chapter Two. Since the year 2000, the European Commission has entered another phase of policy-making which is still in progress in both sectors and therefore outside the scope of this study.

first initiated to 1989 when the Commission concluded the preparation of legislative proposals aimed at introducing limited liberalisation and regulatory harmonisation. The second stage begun in 1990 when the Directorates General set out to develop further the Commission's policy strategy and to expand legislation by drafting major policy initiatives. During this period which lasted until 1996, the Commission prepared several pieces of legislation aimed at further opening telecommunications and audiovisual markets and establishing minimum rules to ensure fair market conditions and to safeguard the interests of users. In 1997, the European Commission entered another phase of legislative policy-making. In the context of converging media, telecommunications and computer technologies Commission DGs started to develop regulatory approaches to deal with these changes in both policy areas. This phase ended around 2000 with the adoption of legislative proposals aimed at consolidating and simplifying the existing legislative frameworks.

The evidence presented in the empirical analysis is based on several sources of primary material: official documentary sources published by the European Commission, press reports, interviews, and unpublished documentary sources produced by the Commission DGs. The starting point for gathering empirical evidence was a close examination of published official sources, followed by an analysis of press cuttings. In order to collect missing information and to cross-check evidence in-depth interviews and, where needed, reference to unpublished Commission documents were used. Detail on the sources and samples of evidence is provided in the Appendix of the thesis.

Conclusion

Taking as a departure point to look into the 'black box' of the European Commission, the main question addressed in my thesis is how the internal divisions that characterise the Commission affect its policy-making behaviour. More specifically I ask how the organisational fragmentation on its administrative level, triggered by the functional specialisation of different Directorates General and the absence of a pre-defined course of policy-making, affects the ways in which its prepares and proposes legislation. From existing

contributions I take up the idea that in order to understand how the European Commission operates, how it sets policy agendas and takes decisions we must dismiss the popular image of the Commission being a single-minded actor and instead conceptualise the Commission as an arena which is composed of different actors that engage in a 'pluralist process' (Peters 2001) to coordinate their actions. I argue that the fragmentation of the Commission has lacked a precise definition thus far and that there has been little account taken of the ways in which it actually manifests itself and how it varies across policy areas and over time. Hence, the central aim pursued in this study is to select a single, but crucial aspect of fragmentation and to analyse how it takes effect and how it varies.

Using insights from the concepts of policy coordination that are derived from the Public Administration literature I conceptualise legislative policy-making in the European Commission as a process of coordination among different organisational actors (i.e. Directorates General) that maintain distinct tasks and interests and therefore inevitably engage in conflict and debate. These actors find themselves not only in a situation of plurality, but also one of interdependence because decision-making rules require them to collaborate and to consult each other. In order to accommodate their differences they engage in a process of coordination which is characterised by different activities designed to accommodate, repress and resolve conflict.

Selecting as the explanatory variable the fragmentation which occurs on the administrative level of the European Commission, I use three different indicators to assess what I call 'administrative fragmentation': the number of DGs that actively engage in legislative policy-making; the differences that exist between them as regards the primary objectives and the actual need for preparing Community legislation; and their competition for authority over identifying policy problems and solutions. The legislative outputs produced by the European Commission are operationalised using three indicators: the duration of legislative policy-making; the consistency of the Commission's legislative propositions; and whether the Commission actually proposes legislation, defers or abandons doing so.

I analyse the impact of administrative fragmentation in a qualitatively-oriented in-depth comparison of the Commission's legislative activities in two policy areas over a period of more than fifteen years. The two domains are the audiovisual and the telecommunications sector and were both subject to extensive legislative efforts undertaken by the European Commission that combined liberalisation with re-regulation. While several background conditions make the two sectors interesting subjects for a cross-sectoral comparison they are characterised by significant variation in the explanatory variable under study, i.e. administrative fragmentation. While the telecommunications sector was characterised by low levels of fragmentation over a long period of time, the audiovisual field saw a significant increase of fragmentation over the years. The empirical analysis will show how in both sectors the different levels of administrative fragmentation translated into distinct scenarios of coordination and correlated with legislative outputs.

Conceptualising the European Commission as a fragmented policy-making institution whose constituent parts are in conflict but try to collaborate and coordinate challenges existing views of role of the Commission, including that of a 'supranationalist' and unified 'competence maximizer' as well as that of a blocked and inefficient policy-maker. While conflict and fragmentation are universal features of the Commission's policy-making, variation concerns whether and how they are overcome. Showing how administrative fragmentation affects the Commission's legislative outputs, the analysis uncovers the different roles the Commission is capable of playing under different circumstances. Hereby the thesis challenges existing views not only of the Commission, but also of how the overall EU policy process operates.

Chapter Two: The Context of Organisational Decision-Making in the European Commission

Introduction

The present chapter has got two purposes. First, it sets out the institutional and procedural framework underpinning the preparation of legislation in the European Commission. The aim is to show that in the course of legislative policy-making the Commission DGs find themselves in a situation in which they are required to balance their individual organisational interests with the requirements posed by formal procedures and commonly used 'rules of the game'. The chapter provides detail on the functional specialisation of and the internal structure of the Commission Directorates General (DGs) as well as on the procedures that shape legislative policy-making in the European Commission. It is argued that the processes that drive the preparation of legislation on the Commission's administrative level are less fixed and rule-bound than the hierarchical structure of the Commission may suggest. Although preparing legislation usually follows established 'codes of practice', routines and 'rules of the game' the course of legislative policy-making is not entirely predictable, but depends on the behaviour of different DGs and their use of these different rules and routines. The DGs maintain a significant scope of flexibility and discretion they may use to actively shape the course of policy coordination.

The second theme of the chapter is to establish the context in which the European Commission placed its audiovisual and telecommunications policies. In order to avoid presenting an over-whelming amount of detail in the

empirical chapters I sketch out central developments in the two policy areas that shaped the Commission's legislative policy-making. Besides a definition of the boundaries of the two policy domains I provide an account of the background against which the Commission placed its legislative activities, including the traditional models of national regulation and the developments that posed challenges to them, the legal foundations of Community legislation and its major themes.⁵⁶ In order to indicate the variation which can be observed on the central explanatory variable, i.e. administrative fragmentation, the chapter provides an overview of the Directorates General that engaged in preparing legislation in the two sectors under study. This includes a summary of their functions, tasks and general missions as well as their respective policy agendas for the telecommunications and audiovisual area. I show that while initially similar levels of administrative fragmentation prevailed in the two sectors, the situation fundamentally changed in the early 1990s due to a significant increase of fragmentation in the audiovisual field. A brief section at the end of the chapter provides some concluding remarks, pointing to the general and sector-specific conditions that underpin the Commission's legislative policy-making in the two policy domains under study.

The organisation and procedures of the European Commission

The institutional setting

A central assumption put forward in this study is that the European Commission is a complex institution which is divided or fragmented across several dimensions (see Chapter One). On its organisational dimension, the most obvious sub-division is that into an administrative and a political arm. The so-called political level comprises the Commissioners and their support staff, the *cabinets*. Commissioners ultimately adopt all major initiatives and decisions the Commission takes, usually based on preparatory work undertaken in the

⁵⁶ Sticking to common practice, the terms 'EC' and 'Community' are used when referring to the period prior to the 1992 Treaty on the European Union and 'EU' for the period since.

administrative services.⁵⁷ The *cabinets* assist their respective Commissioners and usually consist of six or seven staff.⁵⁸ The second arm of the European Commission is composed of the administrative services, the focus of my study. In several respects, this realm of the European Commission resembles a classic Weberian bureaucracy as many of its organisational principles are hierarchical.⁵⁹ The European Commission's administrative services are organised into departments, similarly to national civil service being organised into ministries (e.g. Spence 1997). Most services are Directorates General (DGs) with sectoral policy responsibilities (e.g. for agriculture, environment, and competition policy) and operating according to the principle of functional specialisation.⁶⁰ Other services exert functions of a more horizontal or 'coordinative' nature, the most important ones being the Secretariat General and the Legal Service.⁶¹

The internal structure of all these services resembles a classical hierarchy (see Figure 1).⁶² Each DG is headed by Director General whose primary task is

⁵⁷ Commissioners are appointed for five-year terms in a complicated procedure involving the European Parliament and the member states. Commissioners hold policy portfolios similar (but not necessarily congruent) to the DGs. The so-called College of Commissioners is chaired by the Commission President as a *primus inter pares*. The most important principle associated with the College is the principle of collegiality, implying that the Commissioners take collective responsibility and that individual Commissioners must formally act in the name of the European Commission rather than in their individual capacity. See, for example, Nugent (2001) for detail.

⁵⁸ Work in the *cabinets* is usually organised according to an internal division of labour, with each member assuming responsibility for particular aspects of their respective Commissioner's work. *Cabinet* members also provide an important link between Commissioners and their DGs. For detail see, for example, Cini (1996); Edwards and Spence (1997); Nugent (2001); Stevens (2001).

⁵⁹ E.g. Page (1997); Peters (1995); Spence (1997).

⁶⁰ E.g. Metcalfe (1994); Nugent (2001); Peters (2001).

⁶¹ The Secretariat General is tasked to ensure that the Commission is working effectively and that its composite units coordinate their activities, for example by convening formal inter-service meetings. The Legal Service keeps responsibility for ensuring that the proposals drafted and action undertaken by the Commission are legally correct and represents the European Commission in legal action at the European Court of Justice. For detail on the Legal Service and the Secretariat General see, for example, Edwards and Spence (1997); Nugent (2001).

⁶² For several decades, the DGs used to be known and called by both their numbers and titles. For example, the DG for Competition used to be known as 'DG Competition' or 'DG IV'. Throughout the past twenty years, the titles of some DGs were changed, mostly because their policy responsibilities were reduced, enlarged or modified. For many years, DGs were therefore most commonly referred to in terms of their numbers (Nugent 2001). Since the inauguration of the Prodi Commission in September 1999 and the ensuing attempts to achieve greater transparency and public accessibility of the European Commission, this practice has changed. DGs are now known by their titles or abbreviations thereof. Throughout the empirical chapters,

to manage his or her DG and to represent it both inside and outside the European Commission. All Directors General have senior staff to assist them, including deputies, senior assistants and advisors. Each DG is divided into three to six Directorates each of which is headed by a director. The Directorates take different responsibilities within those assigned to the DG and are divided into specialised divisions or units, usually between three and six in number. Units and divisions are headed by so-called Heads of Unit or Heads of Division. Each unit is staffed by approximately three to four staff.

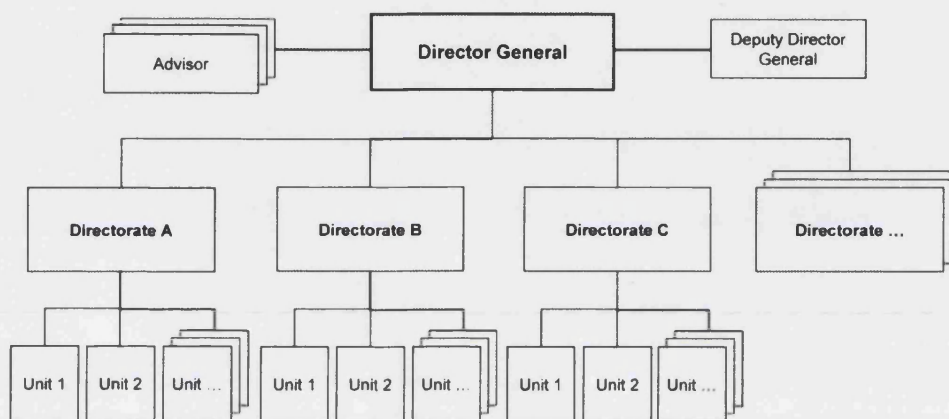


Figure 1 The Organisational Structure of a Directorate General

Rules, procedures and routines

Among its many other functions which include implementation responsibilities and the external representation of the European Union, the preparation of legislation represents a cornerstone of the Commission's activities. The European Commission keeps the sole right of formal initiative for most areas of legislation under the first pillar of the EU (except for few exceptions in justice and home affairs).⁶³ The European Commission may propose three main forms

the DGs are referred to by the titles they had at the time, including indication of their numbers in brackets or footnotes to avoid confusion. For the period after 1999, only the titles are used.

⁶³ E.g. Christiansen (2001a); Cini (1996); Edwards and Spence (1997); Nugent (2001); Peters (1994 and 2001). The focus is on the ways in which the European Commission exerts its formal right of initiative does not reflect an ignorance of the fact that there are various origins of EU legislation. The Commission does not operate in a vacuum, but often takes up ideas and problems put forward by other EU actors and institutions. Peterson and Bomberg (1999, p. 38)

of legislation for adoption by the Council in co-operation with the European Parliament: Directives, Regulations and Decisions.⁶⁴ Under special circumstances, the Commission may also adopt its own Directives or Decisions following the procedures of Treaty Article 86(3) (ex-Article 90(3)) that provide an overlap between the Commission's executive and legislative functions (see section two).⁶⁵

The process during which the European Commission's administrative services develop and propose legislation is commonly called 'agenda-setting' (Peters 2001, p. 78-79) since it provides the basis for legislative decisions taken by other EU institutions. From a perspective focusing on the European Commission this process is itself 'an incremental process' (ibid.) that comprises various stages, including agenda-setting and issue-definition, policy formulation, and decision-taking, and that takes shape at various levels (see Figure 2). Even though formal decision-taking is confined to the College of Commissioners, one must acknowledge that important decisions are made in the Commission well before. Commissioners and *cabinets* heavily rely on and usually decide on the basis of the preparatory work undertaken by the DGs to provide information and expert advice and to prepare legislative proposals and other relevant texts (Nugent 2002; Spence 1997). In this context, choices made by and within DGs structure all subsequent choices - even if the DGs simply anticipate the goals and preferences of their *cabinets* and Commissioners, for example when deciding whether to consider a policy issue or not. Since these choices shape the entire course of the legislative process it is vital to understand how they emerge.

provide a useful overview of the origins of Commission proposals. Nevertheless it is clear that the 'opportunities for the Commission to establish the parameters within which future discussion takes place, and thus to influence final outcomes, are substantial' (Cini 1996, p. 144).

⁶⁴ Regulations are binding in their entirety and are directly applicable in all member states. Decisions are also binding in their entirety, but applicable only to those member states, corporate actors or individuals they are addressed to. Directives, the most common form of legislation the European Commission proposed in the two sectors under study, are addressed to all member states and binding in the result to be achieved, leaving it to each member state to decide over the most appropriate form and method of implementing its provisions into national law. For detail on the different legislative procedures see, for example, Hix (1999); Nugent (1995; 2001, p. 265).

⁶⁵ For a discussion see, for example, Cini and McGowan (1998, p. 164f.); Nugent (2001, p. 265).

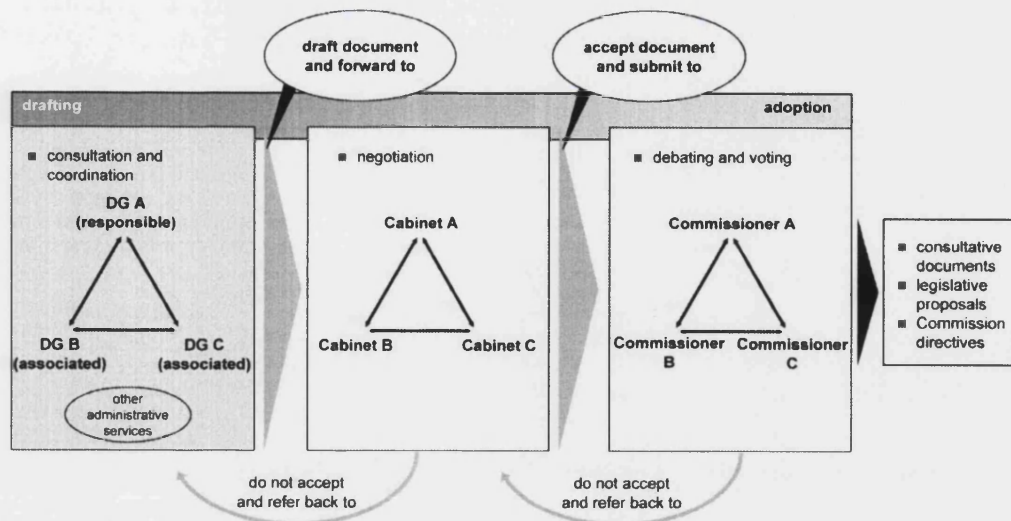


Figure 2 Central Levels and Stages of Legislative Policy-Making in the European Commission

The actual drafting of proposals for directives or other legal instruments is usually preceded by a 'preparatory stage' during which the European Commission prepares documents of a consultative or explanatory nature, most commonly so-called 'Green Papers' or other Commission Communications. These consultative documents constitute an important part of the overall process of preparing legislation because they set out a number of possible policy options the European Commission might take (e.g. sector-specific regulation versus non-binding measures). Often they express clear Commission preference for one of these options and indicate policy guidelines and timetables for future action. These documents represent one way in which the European Commission 'formalises' (Cini 1996, p. 146) its agenda-setting function. Within the Commission, such documents are also of considerable importance. Because their provisions result from the consultations among the participating Commission DGs they reflect the preliminary results of policy coordination. For example by announcing the proposition of legislation and indicating its central provisions they direct the future course of legislative policy-making.⁶⁶

⁶⁶ In this context it is important to note that it would be generally difficult for the Commission to justify a substantial change of its chosen course of action previously announced in a consultative document because the common norm among Commission officials is to avoid

The preparatory stage is followed by the drafting of legislative proposals and legal instruments. Following consultations with outside actors, Commission DGs engage in further defining and spelling out the Commission's chosen course of action. Under the leadership of one, sometimes two DGs they prepare draft legislation which is intended for adoption by the College of Commissioners as either official draft legislation to be submitted to the EU institutions or a Commission instrument, for example a directive or a recommendation. The publication of draft legislation is often accompanied by another consultative document or explanatory memorandum that identifies the reasons for the Commission's legislative strategy.

In order to analyse the preparation of legislation taking place on the administrative level of the European Commission, it is essential to understand the rules and procedures that govern this process. Whereas the composition and duties of the European Commission are set out in the Treaties, the ways in which the Commission must proceed in preparing and adopting draft legal instruments are prescribed by its internal rules of procedure (e.g. European Commission 2000) and related documents.⁶⁷ These rules that have been amended several times over the past decades establish the rules of the game according to which Commissioners, *cabinets* and Directorates General are assigned their tasks and functions and the procedures they are asked to follow. While they make rather specific provisions for decision-taking in the College of Commissioners, they leave much more room for interpretation and discretion on the level of DGs. They simply ask the DGs that engage in the preparation of a legislative initiative to cooperate and to consult each other. Hence, for the DGs, the formal rules only set framework conditions or 'rules of the game' (Hooghe 2000, p. 101) rather than a clear-cut procedure.⁶⁸ Hence the progress of each dossier is unique and not predictable. The fact that there are only few enforceable procedures implies that codes, routines or rules may be adapted,

inconsistency and to defend an official Commission policy collectively vis-à-vis other EU institutions and the public (e.g. Christiansen 2001).

⁶⁷ For an overview of these documents see

http://www.europa.eu.int/comm/reform/index_en.htm .

⁶⁸ As pointed out by Hooghe (2000, p. 107), 'Commission officials are less rule-bound than is often assumed'.

changed, circumvented or broken. At the same time, one needs to be aware that in most cases DGs and their sub-divisions stick to established rules and that the preparatory processes taking place on the administrative level broadly follow the same lines (Nugent 2001; Spence 1997). For example, early policy drafts are usually drawn up on lower levels of the hierarchy and then put forward to more senior policy-makers who are entitled to overrule previous decisions. The procedures provide for several, partly overlapping phases of policy formulation: the initiation and early drafting phase, the drafting phase, inter-service consultations, and decision-taking in the political arena of *cabinets* and Commissioners (see Figure 2).⁶⁹ The following paragraphs provide an overview of these phases, including an indication of how much scope they offer for discretion and flexibility.

Initiation and early drafting phase

For any legislative initiative, no matter whether it takes the shape of a consultative paper, a formal policy proposal or a Commission instrument, responsibility is taken over by one, sometimes two DGs for what is commonly called a 'file' or 'dossier'. No matter whether the initiative prompts a call made by the European Parliament or the Council or whether it originates from within the European Commission, the initial question to be solved is which DG is going to take responsibility for the file. In most cases, the decision on which DG takes possession of the dossier is a straightforward one, following directly from its general policy responsibilities and/or from its authority over previous dossiers (Cini 1996; Nugent 2001).⁷⁰ Following the allocation of the dossier, the unit in the DG with drafting responsibility engages in the early drafting work of a consultative document and/or a legislative proposal. This is usually undertaken by a handful of staff, led by a Rapporteur in the unit responsible. Rapporteurs keep the director of their directorate informed about the progress of the dossier

⁶⁹ Although this final stage is not focus of the present study, the applicable procedures are briefly summarised here, mainly for the reason of comprehensiveness, but also because the different stages are closely linked and often tend to overlap.

⁷⁰ If the allocation of dossiers to a particular DG is disputed by one or more DGs the decision of which organisation gets hold of the file is resolved through the Commission hierarchy, first on the more senior DG level, and if necessary, by the *cabinets* or Commissioners.

and incorporate changes the latter may raise during the drafting process. The unit usually starts consulting with actors inside and outside the Commission, including national experts, lobbying groups, and independent consultants, both informally and in more formalised committees.⁷¹ When policy drafts reach a more advanced stage, they travel up the hierarchy of the DG up until they reach the Director General and his or her advisers who may make recommendations or raise objections. The draft travels up and down within the DG hierarchy with re-drafting usually taking place in the unit under the responsibility of the Rapporteur.

As there is no straightforward procedure prescribing the course of action for this first stage the DG with formal drafting responsibility has considerable discretion as regards how to proceed. For example, in order to weigh different options of action against each other and to explore the legal basis of a legislative proposal, the DG may commission a legal analysis or a study to outside experts or consultants. This may be followed by consultations with outside actors. Within the Commission, the DG may seek to coordinate its efforts with other DGs, for example by conducting preliminary consultations in ad-hoc or issue-related working groups or through personal contacts (e.g. electronic mail, telephone calls, face-to-face). The unit may also completely refrain from engaging in such consultations and proceed alone until it submits a more advanced draft text to formal inter-service consultations.

Inter-service consultations

The European Commission's Rules of Procedure formally require the DG with drafting responsibility to coordinate its drafting efforts with other DGs. In practice, each DG that expresses an interest in the dossier may participate in the so-called inter-service consultations. The responsible DG usually circulates an advanced draft text to these DGs and the Legal Service, the latter being tasked to ensure that the dossier reaches all relevant DGs and that rules and timetables are complied with. The file usually includes a note stating that if no objections

⁷¹ For an overview see, for example, Cini (1996); Mazey and Richardson (1997); Spence (1997).

are raised within a specified number of days, it is assumed that there are no fundamental problems identified with the dossier and that it can be put forward for formal discussion among *cabinets* in its present form. If other DGs raise objections, they send their comments to the DG with drafting responsibility as well as to the *cabinets* involved. The unit responsible is not obliged to amend its proposals if other DGs object, but if it does not take up their recommendations it must attach a note to the file stating the objections raised by other DGs before it can be passed on to discussion and decision-taking in the *cabinets* and the College of Commissioners (see below).

Apart from this formalised written procedure, the DGs concerned with the dossier usually engage in inter-service groups, permanent working parties and other formal coordination meetings that are organised and supervised by the Secretariat General. At the same time, they often continue to coordinate in more informal ways similar to the early drafting phase (see above). It is at all these occasions that disputed provisions may be discussed and amendments suggested. Officials often choose to seek clearance from other DGs in informal arenas before draft texts enter more formal arenas. The main intention behind this is to avoid conflict and ‘politicization’ because it is commonly expected by Commission officials that an early involvement of the senior management of the DGs and the *cabinets* makes this stage more time-consuming and controversial (Nugent 2002; Spence 1997).

Formal decision-taking

After formal inter-service consultations have concluded, the DG with drafting responsibility prepares a draft text for submission to the Commissioner *cabinets*. Often this is not the first time that *cabinets* get involved as they often bring in their views before, particularly if DGs have difficulties to agree on a common policy strategy (see above). The draft text is then discussed by the *cabinets*, first in the *special cabinets* meetings which represent one member of each participating *cabinet*, then by the *chefs de cabinets*. Before the draft text reaches the College of Commissioners for decision, it may be sent back and forth between *cabinets* and the DG with drafting responsibility for modification and re-

drafting. The College votes by simple majority following predefined procedures, with votes being confidential and not made public. When it comes to voting, the College has several choices: it can accept the draft proposal, reject it, refer it back to the DG responsible for amendments, or defer taking a decision at all (Cini 1996; Nugent 2001).

The context of the European Commission's telecommunications and audiovisual policies

The empirical analysis examines the major legislative initiatives undertaken by the European Commission in the telecommunications and the audiovisual sector from the early 1980s to the year 2000. It would neither be reasonable nor feasible to include all pieces of EU legislation adopted by the Community in the two domains during this period because doing so would present us with an overwhelming amount of empirical detail and therefore make comparative assessments and arriving at generalisations rather difficult. Instead I concentrate on the dominant themes of legislation addressed by the European Commission in the two policy areas under study. Because these themes were rather similar across the two sectors, they provide a useful framework for directing the empirical analysis.

From the start of legislative initiatives, the Commission DGs that engaged in preparing legislation for telecommunications and the audiovisual field primarily aimed at combining market opening and liberalisation with re-regulatory measures (see Table 1). Foremost this implied to expose restricted areas and services to competition, for example by opening telecommunications services to competition and by relaxing the prohibition of television advertising. Initially these efforts were limited to telecommunications and audiovisual equipment and services and later extended to cover the provision and operation of networks carrying these services.⁷² The second cornerstone of the Commission's

⁷² Equipment refers to both the network (lines and switches) and the terminal equipment (consumer devices) connected to these networks (e.g. telephones, modems, television sets). In each sector, a variety of services are offered, such as voice telephony, data communications, traditional television broadcasting, voice mail, teleshopping and so on. Infrastructure refers to the network that carries these services, including copper wires, terrestrial transmission of broadcasting, satellites, broadband and cable television networks et cetera.

legislative activities concerned the harmonisation of regulation. First, this was aimed at harmonising market conditions to facilitate cross-border investment and trade, to prevent the abuse of dominant positions and to promote the application of new technologies. For example, the Commission proposed similar conditions for service providers and operators concerning the access to networks, market entry, licensing, technical standards, criteria of ownership and market power. Secondly, re-regulation concerned the guaranteeing of user rights, for example universal service and the protection of audiences from harmful content - mostly in the name of the so-called 'public interest' and as a response of the two sectors' significance for society.

Table 1 Examples of the themes of legislation addressed by the European Commission in the telecommunications and the audiovisual sector

theme	telecommunications sector	audiovisual sector
market opening and liberalisation	<ul style="list-style-type: none"> ▪ liberalisation of terminal equipment ▪ liberalisation of telecommunications services ▪ liberalisation of telecommunications networks 	<ul style="list-style-type: none"> ▪ liberalisation of advertising ▪ liberalisation of television networks
regulation of market conditions	<ul style="list-style-type: none"> ▪ access to network infrastructure ▪ licensing conditions ▪ interconnection and interoperability 	<ul style="list-style-type: none"> ▪ regulation of advertising ▪ quotas for the broadcast of television programmes of European and 'independent' origin ▪ rules limiting media ownership ▪ technical standards for the transmission and reception of television broadcasts
regulation in the name of the public interest	<ul style="list-style-type: none"> ▪ universal service ▪ affordability ▪ number portability 	<ul style="list-style-type: none"> ▪ protection of viewers from harmful content (e.g. pornography and violence) ▪ prohibition of certain types of advertising

The focus on the dominant themes of legislation prepared for by the Commission implies that the analysis does not cover all issues emerging in the two sectors under study. Since the Commission has mostly defined audiovisual legislation in the context of regulating television, other audiovisual activities, for example radio broadcasting and cinema, are excluded from the scope of

study.⁷³ While other European Union institutions, notably the European Parliament, have often debated audiovisual policy with a view towards its cultural dimension, for example its significance for democracy, the freedom of opinion and pluralism, the European Commission has mostly treated audiovisual legislation from an economic perspective.⁷⁴ It has concentrated on the significance of television for investment and trade and its role in achieving the SEM (Single European Market). The purely 'cultural' dimension of EU audiovisual policy is therefore excluded from the scope of the study. As regards the telecommunications sector, I exclude the regulation of issues I consider of minor importance, for example numbering, addressing and technical standards. As this study concentrates on the major pieces of binding legislation prepared by the European Commission, it excludes from its scope financial support programmes, R&D initiatives, and non-binding policy instruments (e.g. Resolutions and Recommendations). Nor are the Commission's executive powers to rule on state aid, anti-competitive behaviour and the abuse of dominant positions under competition general law analysed.

The national traditions of television broadcasting and telecommunications

In most European countries, traditional monopolies dominated the audiovisual and the telecommunications sector until the late 1980s.⁷⁵ In telecommunications, so-called PTOs (Public Telecommunications Operators) owned the network infrastructure, supplied terminal equipment and provided

⁷³ As stated by the European Commission, 'television is our primary source of information and entertainment. We each spend, on average, up to three hours a day watching news, sports, films and other programmes. The audiovisual sector provides one million EU jobs. It involves big commercial interests and issues of cultural diversity, public service and social responsibility. Each national government runs its own audiovisual policy, while the Union sets rules and guidelines where common interests, like open EU borders and fair competition, are concerned' (http://www.europa.eu.int/pol/av/overview_en.htm). In the literature, similar claims have been made, such as that 'the audio-visual sector in the EC will usually refer to TV and film activities.' (Hitchens 1999, quoted in Goldberg et al. 1998, p. 5). Also see Collins (1994).

⁷⁴ For overviews see, for example, Collins (1994); Hoffmann-Riem (1996); Humphreys (1996); Ward (2002).

⁷⁵ Britain was a notable exception where telecommunications started to be liberalised in 1981. For good overviews see Grande (1994); Thatcher (1999).

all telecommunications services.⁷⁶ Mainly because building and maintaining telecommunications networks required massive financial investment, telecommunications was considered a natural monopoly. PTOs were usually housed within national ministries for posts and telecommunications, their employees having civil servant status. They combined the functions of regulators and suppliers of networks and services. The audiovisual field was organised in a fashion similar to telecommunications. The transmission and provision of broadcasting was based on a public service broadcasting (PSB) system that operated as a quasi-monopoly, tasked to inform, educate and entertain the viewers.⁷⁷ The most common means to finance these public service broadcasters was the license fee paid by the viewers. Using advertising as a means to finance broadcasting was either prohibited or strictly limited and the small number of available television channels and broadcasting services were based on the scarcity of frequencies.

In the late 1970s, both the audiovisual and the telecommunications sector started to undergo fundamental technological change. In telecommunications, the 'microelectronic revolution' (Grande 1994) and the emergence of new transmission modes (satellites, optic-fibre cables, broadband) entailed a greater capacity of telephone networks and led to the emergence of new communications services, for example high-speed facsimile, electronic mail, telex, and mobile telephony.⁷⁸ The far-reaching technological changes created new market demands, prompting the entry of actors from the computer and data-processing sector and pressure exerted by companies wanting to use the new services and to develop their corporate networks. Profound technological changes also revolutionised the audiovisual sector. New technologies (satellite, cable) reduced the existing scarcity of frequencies and therefore increased the possibility to distribute new programmes and audiovisual services.⁷⁹ New services

⁷⁶ E.g. Eliassen and Sjøvaag (1999); Noam (1992); Sauter (1997); Schneider (2001); Steinfield et al. (1994).

⁷⁷ E.g. Barendt (1993); Dyson et al. (1988), Humphreys (1996), Levy (1999), Noam (1991). A notable exception was the United Kingdom where commercial television was introduced in 1954. See, for example, Crisell (1997); Hoffman-Riem (1996).

⁷⁸ E.g. Bauer et al. (1994); Dyson and Humphreys (1990); Humphreys and Simpson (1996).

⁷⁹ E.g. Dyson et al. (1988); Dyson and Humphreys (1990); Fraser (1997).

emerged, including interactive telematic services (e.g. tele-banking, tele-shopping), video recording and digital television. This led private companies (e.g. publishers, the advertising and the film industry) to argue in favour of relaxing the so-far strict regulation of audiovisual broadcasting and to allow for more advertising on television programmes.

Together, the technological and economic pressures led many national experts and policy-makers to argue that greater competition was needed in the two sectors. Calls were made for greater competition, efficiency, and consumer choice and for making European telecommunications and television markets more competitive vis-à-vis US and Japanese firms. The technological and economic changes co-occurred with a changing political climate that prevailed in many West European countries since the late 1970s, most prominently in Thatcherite Britain, and the regulatory reforms that were associated with it to 'roll back the state'.⁸⁰ From the early 1980s, national governments introduced regulatory changes that were intended to open up the existing monopolies and to introduce liberalisation and more competition.⁸¹

The emerging EC dimension

Up until the early 1980s, virtually no EC legislation existed in the telecommunications and the audiovisual sectors.⁸² Community-wide harmonisation was limited to issues such as mutual recognition of technical

⁸⁰ E.g. Dyson et al. (1988), Dyson and Humphreys (1990), Grande (1994), Humphreys and Simpson (1996).

⁸¹ In the United Kingdom, the Thatcher government started to liberalise the telecommunications sector in 1981 when the Telecommunications Act provided for splitting the provision of telecommunications from that of postal services, created the monopolist, British Telecom, as a separate government-owned corporation and introduced full competition to the terminal equipment market. Further legislative acts completed the process of liberalisation (Thatcher 1999). Other West European countries followed in the course of the 1980s, notably Germany, France and Italy that all introduced limited steps to liberalise their telecommunications sectors (Noam 1992).

Similar developments took place in the audiovisual field. Italy started to authorise commercial television broadcasting during the second half of the 1970s (Dyson et al. 1988). Other countries soon followed, authorising private satellite and cable channels and introducing advertising as a means for private broadcasters to finance themselves (e.g. Fraser 1997; Harcourt 2002; Humphreys 1996; Noam 1991). So-called 'dual' systems representing a co-existence of commercial and public service broadcasters emerged.

⁸² E.g. Goldberg et al. (1998), Humphreys (1996), Sandholtz (1998), Thatcher (2001).

standards and mostly took place in alternative (and mostly intergovernmental) fora.⁸³ No binding legislation was adopted. In the late 1970s, the European Commission started to develop several R&D programmes designed to promote new communications technologies and services, notably ESPRIT and RACE for the telecommunications sector, and the MEDIA Programme for the audiovisual field.⁸⁴

The EEC Treaty made no mention of telecommunications. PTOs were generally thought to be protected by Article 86(2) (ex-Article 90(2)) which exempted the provision of public services from competition.⁸⁵ Nor did the Treaty make any explicit provisions for the audiovisual field.⁸⁶ Hence, the efforts undertaken by the European Commission during the 1980s to establish legislation in the two areas were based on a growing body of case law of the European Court of Justice which established the applicability of the Treaty of Rome to each policy area. In a number of decisions, the European Court of Justice ruled that telecommunications and audiovisual broadcasting represented economic activities carried out for remuneration and that they therefore fell under the Treaty of Rome.⁸⁷

⁸³ In the telecommunications sector, important bodies were the CEPT and the ITU (see Schneider and Werle 1990), whereas for the audiovisual field, there were associations such as the EBU (see Goldberg et al. 1998).

⁸⁴ For good overviews see Goldberg et al. (1998), Peterson and Sharp (1998), Sandholtz (1992), Ungerer and Costello (1988).

⁸⁵ E.g. Sauter (1997); Schneider and Werle (1990). It was not before the entry into force of the Treaty on the European Union in 1993 that telecommunications was first explicitly mentioned in Title XII EC on Trans-European Networks (TEN), providing specific objectives for telecommunications legislation, such as interconnection, interoperability and access to networks. For an overview see Sauter (1997, p. 181f.).

⁸⁶ There has been a revision of the Treaty of Rome and the establishment of a 'Culture Article' (Article 128) in the Maastricht Treaty which entered into force in 1993. The article established a limited competence of the Community in cultural matters by promoting a common culture. Council decisions in cultural matters are to be taken unanimously rather than by qualified majority voting. The 'Culture' Article has been of limited significance for Community regulation of television broadcasting as legislation has been based on economic aspects (e.g. Goldberg et al. 1998). Finally, the Treaty of Amsterdam amending the Treaty on the European Union included a Protocol on the System of Public Broadcasting in the Member States, providing that the Treaty provisions shall be without prejudice to the competence of Member States to provide for the funding of Public Service Broadcasting for the fulfilment of the public service remit.

⁸⁷ For the audiovisual sector, the most important ruling was the so-called 'Saatchi' case in 1974. The decision over the dispute that hinged upon whether broadcasting did fall under the Treaty of Rome established that the harmonisation of legislation fell under the procedure of the approximation of laws in the context of the common market. E.g. Collins (1994); Goldberg et

Following from case law several Treaty provisions have proven relevant to the two sectors: Articles 23-31 (ex-Articles 30 – 37) on the free movement of goods; Articles 43-55 (ex-Articles 52 – 66) on the freedom to provide services and freedom of establishment; the competition law provisions of Article 81 (ex-Article 85) on anti-competitive agreements, Article 82 (ex-Article 86) on the abuse of monopoly positions and, of particular importance for the telecommunications sector, Article 86 (ex-Article 90) which establishes the applicability of Treaty provisions to the public sector (see below).⁸⁸ Prior to the entering into force of the SEA in 1986, no significant legislative measures were adopted by the Community. Under the SEA, regulatory harmonisation was based on Article 95 (ex-Article 100a) on the approximation of laws under qualified majority voting in the Council in co-operation with the European Parliament, whereas pure liberalisation measures rested on Article 86 (ex-Article 90) forbidding member states from introducing or maintaining measures contrary to the Treaty regarding public undertakings and enterprises granted special and exclusive rights.⁸⁹

The first attempts made by the European Commission to initiate legislation in the two policy areas did not originate directly from the Commission, but represented a response to the calls made by other Community institutions. In the late 1970s, the Council invited the Commission to draft policy guidelines for

al. (1998); Humphreys (1996). For the telecommunications sector, the so-called 'British Telecom' case established the application of EC competition rules to the public sector, including telecommunications. E.g. Sandholtz (1998); Sauter (1997); Schmidt (1998a).

⁸⁸ When the Treaty of Amsterdam entered into force on 1 May 1999 together with a consolidation of the Treaty establishing the European Community and the Treaty on the European Union, all existing Treaty Articles were renumbered. In this chapter both old and new numbers are provided. In the empirical chapters all Treaty Articles are referred to by the numbering system that was used at the time. Chapters Three to Five use the old numbers, and Chapters Six and Seven the new numbers.

⁸⁹ Article 86(1) (ex-Article 90(1)) of the TEU states that concerning public undertakings or undertakings granted special or exclusive rights, member states are not allowed to enact or maintain in force acts contrary to the Treaty rules, in particular competition rules. Article 86(2) grants limited derogations from the application of the Treaty to services of a general economic interest to the extent that such rules would not be contrary to the Community interest. Article 86(3) (ex-Article 90(3)) tasks the European Commission with observing the application of Article 86, if necessary by means of enacting its own directives or decisions addressed to the member States. Since the 1970s, the European Commission had sought ways to issue ex-ante regulation by means of following the so-called 'Article 90 procedure' (now Article 86). In particular, see the Commission Directive 80/723/EEC of 25.06.1980 on financial transparency. Official Journal L/195/35 of 29.07.1980. For useful introductions to the use made by the European Commission of Article 90 see Schmidt (1998a, pp. 74-83); Sauter (1997).

the telecommunications sector (Schneider and Werle 1990, p. 91). The European Parliament passed a Resolution in May 1981, calling on the European Commission to draft Council directives in order to harmonise standards and to prevent any further fragmentation of the European telecommunications market. Similarly, in the audiovisual field, the European Parliament called on the Commission to take steps towards a Community policy on television broadcasting. The Committee on Youth, Culture, Education, the Media and Sport drafted a number of reports and resolutions requesting a Community media policy that would remove the legal and technical barriers to a common broadcasting market and promote European audiovisual products.⁹⁰

Before the mid-1980s, the European Commission limited its activities to draft a number of consultative papers and recommendations and did not prepare legislation. However, even during these years the dominant themes of future legislation emerged. The European Commission placed both its telecommunications and audiovisual policies in the context of achieving the common market (European Commission 1984a and 1987). This largely represented a response to the case law established by the European Court of Justice according to which legislation in the two fields was to be based on the common market provisions. It implied that the Commission treated the telecommunications and the audiovisual sector from an economic point of view. Following from the overarching logic of the common market, the dominant policy issue addressed by the European Commission was to open up what had been markets largely national in nature thus far, both by means of liberalisation and (re-) regulation.⁹¹ The main objectives behind this were to increase investment, consumer choice and the quality of services, and to achieve common standards, universal service and affordability of services (see above).

⁹⁰ The European Parliament first adopted the Schall Report in January 1981 (Official Journal C28, 9.2.1981, p. 74), followed by the legendary Hahn Report and Resolution (European Parliament 1982 a and b). These landmark documents were followed by further calls for a Community audiovisual policy. For an overview see European Parliament 1987; also see Collins (1994, p. 31 f.); Machet (1999, p. 5f.).

⁹¹ 'Liberalisation', 'deregulation' and 're-regulation' proved to be dominant terms used by the European Commission and other sectoral actors (e.g. Eliassen and Sjøvaag 1999; Majone 1990). Liberalisation is not to be confused with 'deregulation', as fair and effective competition may require regulation to prevent dominant players from abusing their position (e.g. Graham and Prosser 1987; Majone 1996).

On Community level, powerful national and transnational interests lobbied for the introduction of EU-level legislation, for example equipment manufacturers and business users in telecommunications and the advertising industry and the commercial broadcasters in the audiovisual field.⁹² At the same time, the interests affected in the two fields tended to be diverse and clear-cut coalitions for or against EU-level initiatives were rare. Likewise, member states were not always in favour of Community legislation and frequently changed their positions, depending on the issue under consideration.⁹³

Administrative fragmentation in the audiovisual and the telecommunications sectors

In each policy area under study, distinct settings of DGs shaped the course of legislative policy-making. A central claim made in Chapter One is that these different configurations resulted in different levels of administrative fragmentation, defined by the number of DGs, their differences on the paradigm of legislation and their competition for authority. The empirical analysis will show how variation in administrative fragmentation created different scenarios of coordination and led to distinct legislative outputs produced by the European Commission. During the 1980s, rather similar levels of administrative fragmentation prevailed across the two policy domains. In each sector, two DGs actively engaged in the preparation of legislation. These DGs agreed not only on the need for Community-wide legislation, but also on a set of policy objectives, most importantly a combination of market opening and liberalisation with re-regulation, based on a harmonisation of minimum rules. They also accepted to share the authority for the different aspects of legislation. In the early 1990s, substantial variation emerged between the two domains. While the level of administrative fragmentation remained stable in the telecommunications sector, the situation fundamentally altered in the audiovisual field, due to a significant increase of administrative fragmentation.

⁹² E.g. Collins (1994); Fraser (1997); Humphreys (1996); Sandholtz (1998); Schmidt (1997 and 1998).

⁹³ For detail on member states' positions in telecommunications see, for example Cram (1997); Sandholtz (1998), Schmidt (1998a), Thatcher (2001). Member states' interests as regards to audiovisual issues have been documented by Collins (1994); Fraser (1997); Harcourt (1998); Humphreys (1996).

The number of DGs doubled from two to four. Furthermore, differences among the participating DGs on the paradigm of legislation increased as did the competition for authority for audiovisual issues.

In the telecommunications sector, the preparation of telecommunications legislation was mostly dealt with by two Directorates General for more than fifteen years, the DGs for Competition and Telecommunications. While DG Competition has had a long-standing history in the Commission due to its powers to implement general competition law, DG Telecoms is a relatively new organisation as it was only created in 1986. Besides there was either very little or no input made by other Commission DGs.⁹⁴ During the 1980s, the DG Internal Market and Industrial Affairs expressed an interest in telecommunications legislation, notably in the context of its efforts to achieve the SEM by means of the free movement of goods and the freedom to provide services. However, its interest in actively contributing to the preparing telecommunications legislation soon reduced when it turned to concentrate on other issues, for example public procurement (see Chapter Three). Moreover, as it broadly endorsed the policy priorities expressed by DG Competition and DG Telecoms it saw little reason to interfere. In the 1990s, other DGs began to take an increasing interest in telecommunications and wanted to be consulted on legislative provisions, for example the DG Consumer Protection, DG External Relations, and DG Science, Research and Technology (e.g. Fuchs 1994; Schmidt 1998a). However, these DGs usually limited their activities to submit comments on those legislative provisions that directly affected their responsibilities, mostly during formal inter-service consultations, concentrating on technical details and specifications rather than the substance of the Commission's policy strategy (see Chapter Four). Between DG Competition and DG Telecoms there was a high level of agreement concerning both the general paradigm of legislation and the allocation of authority for telecommunications issues. In spite of their different tasks, functions and outlooks on telecommunications issues (see below) the two DGs managed to pursue a common line of action and to coordinate each others' activities over a period of more than fifteen years.

⁹⁴ This has been documented by Dang-Nguyen (1993, p. 16); Fuchs (1994); Schmidt (1998a, p. 53).

In contrast to this stable pattern, the audiovisual field was characterised by changing levels of administrative fragmentation. During the 1980s, fragmentation was low, similarly to the telecommunications sector. Two DGs, DG Culture and DG Internal Market and Industrial Affairs, engaged in the preparation of audiovisual legislation, with other DGs taking no significant interest in their activities. The two DGs maintained different tasks and missions and had different policy priorities for the audiovisual field but agreed on the paradigm of audiovisual legislation and accepted each others' authority for audiovisual issues. The situation changed in the early 1990s when two other DGs joined the policy arena: DG Competition and DG Telecoms. The number of DGs doubled and there was a significant increase of differences on the paradigm of legislation and the division of authority. Administrative fragmentation increased even further when DG Industry joined the policy arena in the late 1990s. The following paragraphs provide an overview of the DGs that engaged in the preparation of legislation in each sector, indicating their general tasks and functions as well as their outlooks on sectoral issues.

The setting in the telecommunications sector

Before the late 1970s, no organisation existed in the European Commission that held specific responsibilities for telecommunications. Telecommunications issues were perceived to be part of the EC's technology and industrial policy and therefore fell under the responsibility of the industrial branch of DG Internal Market and Industrial Affairs. In the European Commission, an EC dimension to telecommunications policy was first discussed upon the initiative of Etienne Davignon, then Commissioner for Industry, whose interest was to promote communications and information technologies on a European level.⁹⁵ In 1979, he set up an Information Technology Task Force (ITTF) in the Commission. Its officials were mostly recruited from DG Internal Market and Industry (Sandholtz 1992, 1998). The main reason for the establishment of the ITTF was to create an organisation within the Commission to deal with overseeing the implementation of the RACE and ESPRIT programmes. In 1986, the Task

⁹⁵ E.g. Eliassen and Sjoavaag (1999); Sandholtz (1992); Thatcher (2001).

Force acquired the status of a Directorate General, called DG for Telecommunications, Information and Innovation Industry (DG XIII, hereafter 'DG Telecoms'). A division was founded in the new DG, called 'Telecommunications Policy'. Its main task was to look at possible regulatory changes on Community level that would build on existing lines of action taken on the international level, for example the efforts undertaken to harmonise the markets for terminal equipment.

While during the 1980s, most divisions in DG Telecoms dealt with R&D issues, the division 'Telecommunications Policy' developed an interest in exploring possibilities for Community-wide liberalisation and regulatory harmonisation of telecommunications services and networks. The main concern of the officials was to promote the application of new communications technologies and services, such as facsimile, data communications, and modems.⁹⁶ In this context, they laid emphasis on opening up national markets that were restricted due to public monopolies and little technological innovation (see Chapter Three).⁹⁷ They were also interested in establishing minimum rules that would guarantee access to networks and interoperability, as well as user rights such as affordable tariffs. It was not before the early 1990s that DG Telecoms pursued a more ambitious strategy (see Chapter Four). In the context of the impact of new technologies and services, such as mobile telephony and the internet, it began to argue in favour of complete liberalisation, including public voice telephony and infrastructure. In the view of DG Telecoms liberalisation would have to be balanced with ongoing regulatory harmonisation, guaranteeing, for example, interconnection and universal service.

The main task of DG Competition has been to implement EU competition law, which includes vetting on mergers, joint ventures and acquisitions as well as

⁹⁶ In this context, DG Telecoms has often been portrayed as being close 'to the 'classic' conceptions of industrial policy: it sees its task as both stimulating and strengthening the different players while taking care not to undermine the European 'champions' (Fuchs 1994, p. 183; also see Ross 1995). Also see European Commission (1987).

⁹⁷ E.g. Dang-Nguyen et al. (1993, p. 20f.) European Commission (1987).

ruling on state aid and the abuse of dominant positions.⁹⁸ DG Competition has sought to open up markets and to lower market entry barriers for competitors in several policy sectors, including posts, telecommunications, and electricity. The use of its executive powers has centred on the implementation of Article 81 (ex-Article 85) on anti-competitive agreements and Article 82 (ex-Article 86) on the abuse of monopoly positions as well as state aid control. Article 86 (ex-Article 90) grants the European Commission the right to rule on public undertakings by means of enacting directives or decisions without the approval of the European Parliament and the Council.⁹⁹

Given its mission to promote competition and to open up restricted markets, DG Competition has showed a natural interest in fostering an opening of telecoms markets since the early days of a European-wide telecommunications policy. During the 1980s, the units responsible in its Directorate for 'Restrictive Practices, Abuse of Dominant Positions and Other Distortions of Competition I' joined DG Telecoms in its efforts to liberalise the telecommunications sector and took leadership over the preparation of liberalisation directives based on Article 86 (ex-Article 90) (see Chapter Three). During the 1990s, DG Competition greatly contributed to the expansion of liberalisation which ultimately resulted in full competition for telecommunications services and networks by 1 January 1998. As regards regulatory harmonisation, DG Competition argued in favour of a minimum of rules balancing the application of general competition law with ex-ante regulation and avoiding an overload of disputes to be solved by means of

⁹⁸ For good overviews of DG Competition's tasks and functions see Cini and McGowan (1998); McGowan and Wilks (1995 and 1997). The European Commission's and, more specifically, DG Competition's powers to implement general competition law were altered more recently due to amendments made to the Merger Regulation and antitrust rules. The Council adopted a New Merger Regulation in January 2004 and a Regulation containing new rules on antitrust enforcement that entered into force in May 2004. Under the new rules, the mechanisms whereby the Commission can refer cases to national jurisdictions is simplified and NCAs (National Competition Authorities) are empowered to apply fully the provisions of the Treaty to ensure that competition is not distorted or restricted. See New Merger Regulation, Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (The EC Merger Regulation). Official Journal L24, 29.1.2004, pp. 1-22. Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Official Journal L1 4.1.2003, pp. 1-25. Council Regulation No 1/2003 was complemented by a Commission Implementing Regulation and six Commission Notices. For an overview see European Commission (2004).

⁹⁹ For an overview see Michelmann (1978, p. 78); Schmidt (1998a, p. 67).

applying general competition law on a case-by-case basis (e.g. Schmidt 1998a). Although DG Competition did not take formal drafting responsibility for harmonisation directives, it actively participated in their preparation for more than a decade (see Chapters Three, Four and Seven).

The setting in the audiovisual sector

Within the European Commission, responsibility for media and audiovisual issues has traditionally been held by DG 'Information, Communication and Culture', commonly known as DG X or 'DG Culture'. Before the mid-1980s, its main task was to inform the public about the Commission's activities (Collins 1994). After that, its activities centred on implementing the MEDIA Programme, a financial support system for media production, distribution, and training (see Goldberg et al. 1998 for detail). As has been widely acknowledged in the literature, the main concern prevailing in DG Culture as regards audiovisual policy has been pluralism and the diversity of television programmes (see Chapters Three and Five).¹⁰⁰ As regards audiovisual legislation, DG Culture has expressed a special interest in detailed regulation, concerning for example the protection of children and minorities from harmful programmes, rules that would limit media concentration, and provisions that would promote European public service broadcasters rather than commercial operators. The views prevailing in DG Culture have commonly been associated with French cultural policy (Collins 1994; Levy 1999). As regards audiovisual legislation, the main responsibilities of DG Culture have centred on the broadcasting directive 'Television without Frontiers'. In 1993, DG Culture, more specifically its unit 'Audiovisual Policy', took over formal responsibility from DG Internal Market to oversee the implementation of the directive and to prepare possible amendments (see Chapter Five). Towards the late 1990s, its role in preparing audiovisual legislation in the Commission somewhat reduced, mainly due to the conflicts and delays surrounding the revision of the existing 'Television without Frontiers' directive (see Chapter Six).

¹⁰⁰ See, for example, Collins (1994, pp. 18-19); Harcourt (1998, p. 379); Humphreys (1996); Levy (1999, p. 46).

Another key actor since the early days of the Commission's audiovisual policy has been DG Internal Market and Industrial Affairs.¹⁰¹ The DG has developed its interest in Community broadcasting regulation due to the links to the internal market for which it keeps established responsibility. The overarching concern in DG Internal Market was to achieve a common broadcasting market by means of a mixture of liberalisation and regulatory harmonisation.¹⁰² Being concerned with the fragmented nature of the European television industry due to different regulatory systems in member states and the restrictions placed on cross-frontier television broadcasting, DG Internal Market called for harmonising member states' rules since the early 1980s (see Chapter Three). In this context, it focused on facilitating the provision of cross-frontier television by means of relaxing rules on television advertising and harmonising a minimum of rules as this would stimulate the audiovisual industry and encourage investment.

The responsibility of DG Internal Market for the audiovisual domain centred on issues related to the realisation of the internal market. During the 1980s, it initiated and kept responsibility for the broadcasting directive 'Television without Frontiers' whose provisions were based on the freedom of establishment and the freedom to provide services (see Chapter Three). Responsibility was taken by a division called 'Media and Data Protection' within Directorate F ('Approximation of Law, Freedom of Establishment and Freedom to Provide Services; the Professions'). During the 1990s, DG Internal Market gave the dossier to DG Culture and turned towards other legislative initiatives including legislation on media ownership and concentration (see Chapter Five). Towards the late 1990s, DG Internal Market increasingly dealt with media-related issues such as data protection, transparency, and electronic commerce (see Chapter Six).¹⁰³

¹⁰¹ In 1993, DG Internal Market and Industrial Affairs was split into two separate services, the DG Internal Market and Financial Services (or DG XV) and the DG Industry (DG III). Responsibility for audiovisual issues was taken over by the newly-organised DG Internal Market.

¹⁰² See Collins (1994, pp. 18-19); Harcourt (1998); Humphreys (1996, p. 261).

¹⁰³ For an overview see Goldberg et al. (1998). These issues lie outside the scope of this thesis and are therefore not analysed.

In the early 1990s, the policy arena on the administrative level of the European Commission enlarged to include other DGs, most importantly DG Competition and DG Telecoms. As previously stated, the main task of DG Competition is to implement EU general competition law. In the audiovisual sector, DG Competition has concentrated on ruling on joint ventures and mergers by applying general competition law and the Merger Regulation (see Chapter Five). Another important activity has concerned ruling on abuses by public service broadcasters of their 'dominant market position' (Humphreys 1996, p. 284). DG Competition also expressed an increasing interest in shaping the content of audiovisual legislation, due to its concern that regulatory provisions would counteract its interpretation of general competition law or establish new market barriers.¹⁰⁴ In this context, DG Competition mostly argued in favour of keeping regulatory intervention at a minimum level.¹⁰⁵ It actively participated in the preparation of the major pieces of audiovisual legislation, notably the directive on media ownership and the 'Television without Frontiers' directive (see Chapter Five). It also sought to influence the 'Convergence' debate underway in the Commission in the late 1990s which centred on the question whether the Commission should propose a new model of regulation combining legislation on telecommunications and audiovisual issues (see Chapter Six).

The involvement of DG Telecoms in audiovisual legislation mostly emerged due to the linkages existing between the audiovisual field and the telecommunications sector, for example in the context of mutual recognition, transmission standards and satellite equipment. However, up until the early 1990s the interest of DG Telecoms remained limited to the regulation of television standards for which it prepared legislation (see Chapter Five). The main concern prevailing in DG Telecoms was to promote new technologies and services, for example the transmission of programmes by satellite and new consumer equipment such as wide-screen television sets.¹⁰⁶ The situation changed in the early 1990s when DG Telecoms started to take a much greater

¹⁰⁴ See Collins (1994, pp. 144-153); Harcourt (1998); Humphreys (1996, p. 284).

¹⁰⁵ See Collins (1994); Ross (1995).

¹⁰⁶ E.g. Dai (1996); Levy (1999); Ross (1995).

interest in shaping audiovisual legislation. Given its responsibility for the telecommunications domain and the success of its legislative initiatives in this sector, it started to develop an initiative for the so-called 'Information Society' (see Chapter Five). According to DG Telecoms, the increasing convergence between the communications, broadcasting, and information technology sectors questioned the traditional distinctions between telecommunications and media services. In the view of DG Telecoms, the necessary response would be to adapt audiovisual legislation to the regulatory model established for the telecommunications sector, i.e. to achieve a combination of far-reaching liberalisation with a minimum of rules that would facilitate technical innovation, investment and commercialisation. Aims like pluralism and consumer choice were not to be achieved by regulation, but would eventually be self-fulfilling due to greater choice and the self-regulatory forces of the market.¹⁰⁷

Following from its interest in shaping the evolution of audiovisual legislation and realising its vision of a 'convergent' regulatory regime, DG Telecoms sought to actively participate in all major legislative initiatives pursued by the Commission in the audiovisual field during the 1990s. Apart from its efforts to further develop legislation on television standards and conditional access systems, DG Telecoms brought itself into the preparation of the directives on media ownership and the revision of the 'Television without Frontiers' directive (see Chapter Five). Furthermore, in the late 1990s, it undertook efforts to adapt the regulatory model for the audiovisual sector to that of telecommunications, notably in the context of its 'Convergence' initiative (see Chapter Six).

Conclusion

The chapter has provided detail on the organisational and procedural context underpinning legislative policy-making in the European Commission. As has been shown, while the Directorates General of the European Commission are organised according to the principle of hierarchy, the procedures that drive their collaboration and co-operation are less fixed and rule-bound than one might expect. Common 'codes of practice' and routines exist and determine

¹⁰⁷ See, for example, Harcourt (1998); KPMG (1996); Levy (1999).

much of the process of drafting legislation. Although the course of legislative policy-making usually follows these established routines, Commission DGs (and within them the different units and divisions) maintain considerable flexibility and discretion as regards whether and how to make use of them, for example when to consult other Commission DGs and how much to listen to their concerns. Hence, the course of legislative policy-making substantially depends on the behaviour of the participating DGs and their use of rules, routines and procedures during the act of coordinating.

As has been shown the two policy areas under study are characterised by several background conditions that make them interesting subjects of a cross-sectoral comparison. The European Commission addressed similar themes of legislation, centring on a combination of market opening and liberalisation with re-regulation which would establish market conditions and safeguard the so-called 'public interest'. The context in which the Commission placed its legislative efforts was characterised by strictly regulated public monopolies (or quasi-monopolies) on the national level and the attempts made in some member states to introduce more competition. Following the case law of the European Court of Justice, the European Commission initiated and proposed legislation on the basis of achieving the SEM. It started acting in the mid-1980s, largely in a response to requests made by other Community institutions, for example the European Parliament.

The chapter indicated the levels of administrative fragmentation that emerged in the two policy sectors at different times. Initially low levels of fragmentation prevailed in both fields, due to a small number of DGs and the fact that they agreed on the need for and the substance of Community legislation and consented to share authority for defining policy solutions. A central momentum of variation emerged in the early 1990s when the number of participating DGs doubled from two to four in the audiovisual field, whereas it remained unchanged in telecommunications. While in telecommunications, the two participating DGs continued to accept the paradigm of legislation and a sharing of authority, more fundamental conflict emerged between the four DGs in the audiovisual sector that concerned the paradigm of legislation as well as the division of influence and control. In spite of their different missions and

functions, DG Competition and DG Telecoms established a set of shared policy priorities in telecommunications. It was based on a combination of liberalisation with regulatory harmonisation and the underlying perception that an open market would be needed to facilitate trade and investment, to promote new technologies and to increase consumer choice. The co-existence of liberalisation and re-regulation was linked to a consent on the authority of DG Competition for the former and of DG Telecoms for the latter.

In contrast to the shared paradigm of legislation and authority in telecommunications, there was much less common ground between the DGs involved in the audiovisual sector. While DG Culture and DG Internal Market that took primary (and, during the 1980s, exclusive) responsibility for audiovisual matters based their collaboration on an agreement on policy objectives and a division of authority, a substantial increase in administrative fragmentation occurred in the early 1990s, prompted by the entry of DG Competition and DG Telecoms into the policy arena. Not only was there a greater number of DGs actively participating in the making of legislation, but also greater conflict between them concerning the paradigm of legislation and authority. DG Internal Market argued in favour of market opening and liberalisation combined with a minimum harmonisation of rules. DG Culture tended towards speaking for more and more detailed regulation than envisaged by DG Internal Market, whereas DG Competition and DG Telecoms preferred little or no regulation and relying instead on the application of general competition law or market forces. As will be demonstrated in the empirical chapters these significant differences resulted in contrasting positions on the primary objectives of audiovisual legislation as well as the actual need for it (see Chapters Five and Six). Linked to their different policy agendas for the audiovisual sector, the four DGs also tended to compete for power and influence. DG Culture and DG Internal Market wanted to maintain their respective responsibilities for legislative policy-making, whereas DG Competition was primarily concerned about not giving away its powers to apply general competition law. DG Telecoms sought to expand its authority for communications- and media-related issues, including the Commission's legislative activities in the audiovisual sector.

The following chapters analyse how the different levels of administrative fragmentation discerned in the two policy domains influenced the process of policy coordination and affected the legislative outputs produced by the European Commission.

**Part One:
The
Beginnings of
the European
Commission's
Legislative
Activities,
1984 – 1989**

Chapter Three: Collaboration and Joint Action – Coordination in the Telecommunications and the Audiovisual Sectors

Introduction

The present chapter analyses the efforts undertaken by the Directorates General of the European Commission to first initiate legislation in the audiovisual and the telecommunications sectors. In the early 1980s, there was virtually no Community legislation in the two fields and public monopolies dominated in most member states. By the end of the decade, the situation had changed fundamentally: first steps had been undertaken to open the restricted markets to competition and to introduce a harmonisation of rules by means of Community legislation prepared for by the European Commission. The chapter analyses these steps and is organised into two broad parts. The first part examines the Commission's legislative policy-making in the audiovisual field, and the second part analyses its preparation of legislation in telecommunications. In both policy areas, the Commission DGs prepared limited measures to open up markets to competition by means of liberalisation and to provide for a minimum of regulatory harmonisation. In the audiovisual field, the Commission proposed a directive in 1986 called 'Television without Frontiers' which combined elements of liberalisation and re-regulation on several policy issues, most importantly television advertising. In the telecommunications sector, it drafted two Commission directives in 1987 and 1988 that were designed to liberalise terminal equipment and the provision of value-added telecommunications services. These measures were complemented

by a re-regulatory proposal on ONP (Open Network Provision) in 1989 which established the principles of access to and use of public telecommunications networks by means of technical interfaces, tariff principles and usage conditions.

The chapter examines the evolution of these major legislative initiatives. The findings suggests that there were similar levels of administrative fragmentation in each sector that correlated with high legislative outputs produced by the European Commission. Only two DGs actively engaged in the preparation of legislative proposals: DG Internal Market and Industrial Affairs and DG Culture in the audiovisual field, and DG Telecoms and DG Competition in telecommunications. There was either very little or no input made by other Directorates General. For the audiovisual field, DG Internal Market and Industrial Affairs advocated legislation based on the economic dimension of television broadcasting, whereas DG Culture concentrated on cultural and social aims associated with the public interest. In telecommunications, DG Telecoms engaged in promoting new technologies and services and in increasing investment, while DG Competition had an interest in advancing the opening up of telecommunications markets to competition by means of liberalisation. The evidence shows that in spite of their different agendas, few differences existed between the participating DGs in terms of the paradigm of legislation and they consented to a division of influence and control. In both sectors, the DGs were in accordance on combining liberalisation with re-regulation and they were willing to share authority for preparing legislation.

The low level of administrative fragmentation which existed in both policy domains does not suggest that there were no conflicts or debates between the DGs involved. Dispute and controversy did occur, but they were limited to the details of legislation rather than its substance. This greatly facilitated coordination among the participating DGs. Their collaboration mostly relied on a division of work arranged between them. In telecommunications, DG Competition took responsibility for liberalisation, whereas DG Telecoms concentrated on re-regulation. In the audiovisual field, DG Internal Market and Industrial Affairs centred its efforts on liberalisation and re-regulation designed

to achieve the common market, whereas DG Culture focused on regulation in the name of the public interest. Another important mechanism of coordination were the preliminary consultations that took place between the DGs, usually on the lower levels of their hierarchies, for example in issue-related working groups or through personal contacts among officials. During these consultations, the DGs were usually able to solve contentious issues. The analysis shows how in both policy domains the participating DGs were able to produce detailed drafts of legislation on which there was a high level of agreement and that caused little discussion when they made their way through the formal decision-making procedures of the Commission. Legislative policy-making was rapid and consistent and resulted in several decisions to propose Community legislation.

The main argument which emerges from the chapter is that if there is a high level of unity among the Commission DGs they have little difficulties to coordinate their actions. Conflict and debate are almost ever-present features of coordination since the DGs rarely completely agree on the details of legislation. However, conflicts may be overcome if there are few differences on the paradigm of legislation and if competition for policy authority remains low. Making effective use of different coordination mechanisms, Commission actors are able to act rapidly and consistently.

The first half of the chapter examines the preparation of Community legislation in the audiovisual domain and is divided into two broad parts. The first section analyses the agenda-setting process through which DG Culture and DG Internal Market and Industrial Affairs decided that the Commission would propose legislation and developed major policy aims and legislative provisions. The result of this process was the Green Paper on 'Television without Frontiers' (European Commission 1984a), an important consultative document which explored the possibilities of Community legislation on several issues. The second section examines the process through which the Commission DGs engaged in drafting a proposal for a directive on 'Television without Frontiers' (European Commission 1986). It shows how they further refined the Commission's approach to audiovisual legislation and translated it into a legislative proposal by means of effective policy coordination. The second half of the chapter focuses on the Commission's legislative policy-making in the

telecommunications sector. In a first section I show how DG Competition and DG Telecoms set a policy agenda which committed the Commission to propose legislation based on a combination of liberalisation with re-regulation announced in the 1987 Green Paper on Telecommunications (European Commission 1987) The second section analyses the preparation of legislation liberalising terminal equipment and services as well as regulating for ONP and shows how intense coordination between DG Telecoms and DG Competition enabled the Commission to produce high legislative outputs. At the end of the chapter a concluding section summarises the configurations of administrative fragmentation and legislative outputs that emerged during the first major phase of Commission policy-making and relates them to the emergence of distinct patterns of policy coordination.

Policy coordination in the audiovisual area

Setting the policy agenda

Growing awareness in the European Commission

Before 1980, no audiovisual legislation existed in the European Community. In the European Commission, there was little interest in preparing legislative proposals for the audiovisual field, as policy priorities were elsewhere, centring for example on regional development, reforming CAP (Common Agricultural Policy) and advancing the EMS (European Monetary System).¹⁰⁸ The DG for Information, Communication and Culture, commonly known as ‘DG X’ or ‘DG Culture’, kept responsibility for issues associated with the media and audiovisual sector. However, since its main task at the time was to inform the public about the policy initiatives undertaken by the European Commission it did not undertake efforts to prepare legislation in the audiovisual area.

¹⁰⁸ Interview Number 4, Interview Number 8. For detail on the European Commission’s policy priorities before 1980 see, for example, Nugent (2001). For detail on the activities of the European Community in the audiovisual field before 1980, see Collins (1994); Humphreys (1996, p. 260); Wagner (1994, p. 96 f.).

The situation began to change in the early 1980s when satellite and cable technologies challenged the established traditions of television that prevailed in most European member states, based on Public Service Broadcasting systems and a limited number of available television channels. Satellite television made transfrontier television a reality and provided the scope for a circumvention of national broadcasting regulation. For example, a commercial channel forbidden to increase the share of advertising on its programme beyond a certain limit in its country of operation could now simply establish itself in a member state with less rigid advertising restrictions and transmit its programme to the other country it was originally intended for. Situations such as these soon raised concerns among policy-makers that national regulation would be less and less able to control trends towards commercialisation and internationalisation.¹⁰⁹ The Community institutions slowly started to develop an interest in advancing a Community audiovisual policy. The first institution that recognised a need to develop Community audiovisual legislation was the European Parliament which called for removing the legal and technical barriers to a single broadcasting market and for promoting European audiovisual services (see Chapter Two). In this context, the European Parliament urged the European Commission to report on the media sector by mid-1983 and to explore the political and legal means required for the realisation of a European television channel.¹¹⁰

In the Commission, the issue was taken up by DG Culture. Its responsibility for responding to the Parliament's requests was generally accepted by other Commission actors as a logical consequence of the DG's general authority over cultural and audiovisual matters.¹¹¹ At the time, it was common norm in the Commission to treat broadcasting from a cultural policy perspective which centred on concerns such as the expression of cultural matters in the media and

¹⁰⁹ For detail, see, for example, Humphreys (1996, p. 257); Wagner (1994, p. 83 f.)

¹¹⁰ The European Parliament adopted the 'Schall Report' in January 1981 (Official Journal C 28, 9.2.1981, p. 74), followed by the 'Hahn Report' and Resolution (European Parliament 1982 a and b). These landmark documents were followed by further calls for a Community audiovisual policy (for an overview see European Parliament (1987); Collins (1994, p. 31 f.); Machet (1999, p. 5f.)).

¹¹¹ Interview Number 8.

the position of the European film and television programme industry vis-à-vis the powerful US producers.¹¹² This cultural policy framework was the undisputed domain of DG Culture. In late 1982, DG Culture began undertaking efforts to prepare a consultative document on a Community audiovisual policy. It drafted a so-called Interim Report entitled 'Realities and Tendencies in European Television: Perspectives and Options' (European Commission 1983a). The Report concentrated on the creation of a pan-European television programme, an issue on which other DGs made little or no input as it did not attract wide-spread interest in the Commission and was not considered a contentious issue.¹¹³ Nevertheless consultations between DGs influenced the overall content of the Interim Report, mainly because the DG Internal Market and Industrial Affairs considered the dossier a window of opportunity to initiate Community audiovisual legislation.

The DG Internal Market and Industrial Affairs, also called 'DG III', traditionally kept responsibility for realising the common market for goods and services and for promoting a Community industrial policy, including the preparation of legislative proposals. As regards the common market a cornerstone of its activities was to ensure the freedom of establishment and the freedom to provide services established in the Treaty.¹¹⁴ In the early 1980s, DG Internal Market and Industrial Affairs gradually increased its interest in the audiovisual sector as part of its efforts to achieve the common market that, according to DG Internal Market and Industrial Affairs, included audiovisual products and services.¹¹⁵ Linked with its institutional mission, DG Internal Market and Industrial Affairs viewed the audiovisual sector from a perspective oriented towards industrial and economic policy rather than the cultural policy framework pursued by DG Culture. Following the case law of the European

¹¹² Interview Number 8, Interview Number 10. For detail on the context of the Community's cultural policy during the 1980s see, for example, Collins (1994); Humphreys (1996); Wagner (1994).

¹¹³ Interview Number 4, Interview Number 8.

¹¹⁴ The most relevant Treaty Articles were Articles 30 to 37 on the free movement of goods and Articles 52 to 66 on the freedom to provide services and freedom of establishment. See Chapter Two for detail.

¹¹⁵ Interview Number 8. Also see contributions of Ivo Schwartz, then Director in DG III (Schwartz 1982, 1985, 1986).

Court of Justice ruling that the freedom of establishment and the freedom to provide services applied to the audiovisual sector, officials in DG Internal Market and Industrial Affairs came to view the provision of television broadcasting as part of the single market.¹¹⁶ The dominant attitude in DG Internal Market and Industrial Affairs was that the legal barriers to cross-frontier broadcasting needed to be removed by a harmonisation of rules that would remove impediments to the unrestricted flow of television, for example as regards advertising.¹¹⁷

In DG Internal Market and Industrial Affairs, the issue of a common broadcasting market was dealt with by a division organised within the Directorate for the 'Approximation of Laws, Freedom of Establishment, Freedom to Provide Services', called 'Intellectual Property and Unfair Competition'. The main issue discussed in the division was how to realise the freedom of establishment and the freedom to provide services in the audiovisual area. The officials responsible considered Europe to be seriously disadvantaged by the fragmented character of its audiovisual markets, particularly in comparison to the huge and much more homogenous US market.¹¹⁸ The arrival of cross-frontier broadcasting by means of satellite technology seemed a welcome boost towards increases in European productions and intra-European exchanges of audiovisual services. DG Internal Market and Industrial Affairs considered a harmonisation of advertising rules a central step on the way to creating a common broadcasting market. In this context, a further stimulus towards promoting a harmonisation of rules was the request posed to the Commission by the European Parliament to propose a directive that would harmonise national rules of advertising.¹¹⁹ The Parliament noted that the information and communication industries had an important economic

¹¹⁶ Interview Number 8. The mission of DG III concerning the audiovisual sector has been documented by Ivo Schwartz (Schwartz 1982, 1985, 1986).

¹¹⁷ For example, television advertising was allowed in some member states, whereas it was completely banned in others, which created legal problems as regards to the transmission and reception of trans-frontier broadcasting.

¹¹⁸ See contributions of former DG III Director Ivo Schwartz (Schwartz 1982, 1985, 1986). Similar observations were made by Humphreys (1996, p. 260)

¹¹⁹ See 'Schall Report' (Official Journal C 28, 9.2.1981, p. 74), 'Hahn Report' and Resolution (European Parliament 1982 a and b), European Parliament (1987).

dimension and that in view of the cross-frontier character of television, national regulation would gradually lose its effectiveness.

The drafting of the 'Interim Report'

While the drafting of the 'Interim Report' was underway in DG Culture, the DG began to coordinate its actions with DG Internal Market and Industrial Affairs in order to set the agenda for Community audiovisual legislation. The two DGs consulted each other, usually in the context of inter-service working groups that brought together officials of the relevant units as well as through more personal contacts between individual officials. DG Culture concentrated on the creation of a pan-European television programme but since the Report would present the Commission's first official response to the technological and economic challenges in the audiovisual area, it was also generally expected to discuss implications for the future regulatory framework at Community level. Among DG Culture and DG Internal Market and Industrial Affairs it was broadly accepted that this task was not falling into the domain of the former, but under the authority of the latter.¹²⁰ This was mostly due to the widely-held view that a Community audiovisual policy would primarily address the economic side of television (see below).

Although DG Culture and DG Internal Market and Industrial Affairs maintained different outlooks on audiovisual policy, concentrating on its cultural and economic dimension respectively, they both consented on the need to explore further whether to establish Community regulation in the area.¹²¹ In the context of their consultations they arranged to make the issue of Community-wide regulation the subject of a separate consultative document, a so-called Green Paper which would reflect 'on the progressive establishment of a common market for television, especially considering the freedom to provide television services within the Community and to receive television programmes transmitted from one Member State to the other' (European Commission 1983,

¹²⁰ Interview Number 2, Interview Number 4, Interview Number 8.

¹²¹ Interview Number 4, Interview Number 8. Similar observations have been stated by Humphreys (1996, p. 269).

p. 8). It was also agreed between the two DGs that the document would be prepared under the leadership of DG Internal Market and Industrial Affairs, in collaboration with DG Culture, as the document would concentrate on the economic aspects of television broadcasting.¹²²

The final version of the Interim Report (European Commission 1983a) published by the Commission in May 1983 was not subject to any serious debate and adopted after a speedy drafting process. The document reflected closely the ideas of the DGs for Culture and Internal Market and Industrial Affairs.¹²³ As regards pan-European television, it gave consideration to the practical possibilities of establishing a European television programme, envisaging the Commission's support for measures taken by European organisations (such as the European Broadcasting Union). The Report stated that satellite, cable and video technologies would internationalise European television by the end of the 1980s. As regards audiovisual regulation, it stated that

'on the institutional front, they [the European Community and its Member States] will have to devise and put in place a general framework for the 'European system' which will be constituted by the satellite, cable and traditional network, and to examine the economic financial aspects of the new situation, including the question of advertising' (European Commission 1983a, p. 5).

The preparation of the Green Paper 'Television without Frontiers'

Much of the drafting of the Green Paper which came to be commonly called 'Television without Frontiers', was based on work previously undertaken in the unit 'Intellectual Property and Unfair Competition' organised within the Directorate for the approximation of laws of DG Internal Market and Industrial Affairs. As early as in 1981, its officials who were mostly German legal experts under Director Ivo Schwartz launched a legal analysis intended to identify legal obstacles to the free circulation of radio and television broadcasts. Its main result was that existing national rules presented legal obstacles to the free circulation of television and radio programmes in the Community as they

¹²² Interview Number 4, Interview Number 8. European Commission (1983, p. 5).

¹²³ Interview Number 4, Interview Number 8.

produced restricted and fragmented national markets.¹²⁴ Most importantly, these obstacles were the rules on advertising, but also on copyright, youth protection and the right-of-reply. To the officials in DG Internal Market and Industrial Affairs the case for audiovisual regulation on Community level was clear. In accordance with the senior management of the DG, they envisaged a harmonisation of rules intended to liberalise and to open up markets and to establish minimum rules necessary to ensure the free circulation of broadcasts. The Commissioner for the Internal Market and Industrial Affairs, Karl-Heinz Narjes, supported the idea.¹²⁵

DG Internal Market and Industrial Affairs consulted on the contents of Community audiovisual legislation both within and outside the Commission. As regards outside actors, it mostly engaged in talks with the broadcasting and the advertising industry.¹²⁶ The companies confirmed the view taken in DG Internal Market and Industrial Affairs that existing national rules on advertising presented legal obstacles to the free circulation of television programmes and that they hampered investment and consumer choice. In the Commission, the interest of other Commission DGs in participating in the drafting of the Green Paper 'Television without Frontiers' was rather low, with the exception of DG Culture. Audiovisual policy was not yet considered a high-profile policy area and therefore did not attract a great number of Directorates General.¹²⁷ As a consequence, the drafting of the Green Paper took place in a relatively closed circle, dominated by DG Internal Market and Industrial Affairs officials who engaged in consultations with DG Culture, mostly in their established working groups.

DG Internal Market and Industrial Affairs and DG Culture continued to have different outlooks on the broadcasting sector, i.e. an internal market viewpoint in DG Internal Market and Industrial Affairs and a perspective oriented towards cultural policy and the public interest in DG Culture that was

¹²⁴ Interview Number 8, Interview Number 26. Also see Schwartz (1982, 1985, AND 1986).

¹²⁵ See, for example, statement by Narjes quoted by Schwartz (1982, p. 155).

¹²⁶ This has been documented by Fraser (1997, p. 215); Humphreys (1996, p. 268).

¹²⁷ Interview Number 4, Interview Number 8.

in favour of protecting and supporting the European media industry. Nevertheless the two DGs had a fundamental objective in common, namely the creation of what they called a common broadcasting landscape by means of legislation.¹²⁸ Even though DG Culture did not share the policy priorities of DG Internal Market and Industrial Affairs that centred on liberalisation through minimum rules, it agreed with DG Internal Market and Industrial Affairs in so far that it hoped that efforts to realise a common broadcasting market would benefit its interest to foster cultural unity and programme diversity.

A factor which further eased the relationship of the two DGs was that they considered each others' support useful to strengthen their own arguments and were therefore willing to take up each others' recommendations.¹²⁹ DG Culture was aware that any regulatory harmonisation based on cultural policy would run into difficulties due to a lack of Treaty provisions. As was convincingly argued by DG Internal Market and Industrial Affairs, broadcasting had to be treated as a tradable service falling within the Treaty's provisions for the common market because the Community lacked legislative competence in purely cultural matters.¹³⁰ Because justifying a Community initiative on cultural grounds was no serious option, officials in DG Culture were willing to accept the efforts taken in DG Internal Market and Industrial Affairs, hoping that its legal expertise would benefit their interest in fostering cultural unity in the Community and strengthening the European programming and production industry.¹³¹ Officials in DG Internal Market and Industrial Affairs, in turn, believed that listening to DG Culture and incorporating some of its concerns would make their own policy strategy more comprehensive and help gathering support from outside interests holding views similar to those of DG Culture (e.g. the European Parliament and the European television producers).

Based on a consent on the need for legislation as well as its primary objectives, the coordination among the two DGs on the contents of the Green

¹²⁸ Interview Number 4, Interview Number 8.

¹²⁹ Interview Number 2, Interview Number 3, Interview Number 4, Interview Number 8, Interview Number 12.

¹³⁰ Interview Number 2, Interview Number 3, Interview Number 4, Interview Number 8.

¹³¹ Interview Number 2, Interview Number 12.

Paper 'Television without Frontiers' was rather easy. Consultations between DG Internal Market and Industrial Affairs and DG Culture continued to be of an informal nature: the two DGs engaged in preliminary talks that centred on informal draft texts of the Green Paper before formally consulting with other Commission services.¹³² These talks were mostly organised in inter-service working groups and also took place through personal conversation among officials. In the course of these consultations, the two DGs came to agree that the purpose of the Green Paper 'Television without Frontiers' would be threefold (European Commission 1984a): first, reflecting the views in DG Culture, it would demonstrate the importance of radio and television broadcasting for European integration; second, it would illustrate the competence of the Community provided for by the applicability of the Treaty of Rome; and third, the document would set out ideas on the approximation of member states' broadcasting regulation, the priority of DG Internal Market and Industrial Affairs.

According to the ideas of DG Internal Market and Industrial Affairs, Community regulation was to focus on advertising, copyright, youth protection and the right-of-reply. In this context, DG Internal Market and Industrial Affairs advocated the idea of 'liberalisation through harmonisation' (European Commission 1984a, p. 260). This implied to harmonise only a minimum of rules necessary to ensure the free circulation of television programmes so that markets would be opened and attract more investment. In order to keep the debate with outside actors open, the officials responsible intended to set out the aspects of possible Community regulation, but to leave open the scope and level of harmonisation (e.g. the type of the legal instrument) in the Green Paper. During consultations with DG Culture, DG Internal Market and Industrial Affairs agreed to address aspects of culture and the public good emerging in the context of audiovisual policy, for example by referring to the right of Community citizens to benefit from a range of information, ideas and opinion offered in television programmes. As it was built on a solid consensus among DG Internal Market and Industrial Affairs and DG Culture, the draft Green

¹³² Interview Number 4, Interview Number 8.

Paper did not attract serious debate during the formal decision-making procedures that followed. Other Commission actors, for example the Legal Service and the Commissioner *cabinets*, approved of the draft document which passed the stages of decision-taking with no delays or major changes. A few months later, in June 1984 the Commission officially adopted its Green Paper 'Television without Frontiers'.

The Green Paper 'Television without Frontiers'

Being a document of more than 300 pages length, the 1984 Green Paper on 'Television without Frontiers' clearly argued in favour of a harmonisation of broadcasting rules. It stated that the primary objectives of Community legislation would be the 'opening up of intra-Community frontiers for national television programmes' (European Commission 1984a, p. 4) and the creation of a single European broadcasting market by proposing minimum rules. All broadcasting in the Community would have to comply with such rules. Member states would be able to lay down stricter and more detailed rules on those broadcasters established within their jurisdiction, but not be empowered to prevent cross-border transmission of broadcasts. The Commission justified the Community's right to legislate by referring to the rulings of the European Court of Justice, noting that the Treaty did not exclude any sphere of economic activity.

While the document left open whether Community legislation was to be achieved by a single instrument (a 'catch-all' directive) which would combine elements of market opening with harmonisation or by means of several directives, it made detailed provisions for the different aspects of regulatory harmonisation. These provisions were consultative and the Commission invited comments of interested parties before proceeding to draft formal proposals. The central issue of harmonisation was going to be advertising as the Commission found that the main barrier to a common broadcasting market was caused by the application of different advertising rules in member states that included the broadcast of programmes received from and produced in other member states. The Green Paper envisaged the general authorisation of

advertising in all member states, to be made subject to certain minimum standards. These rules concerned, for example, restrictions on advertising time (suggesting an upper limit of 20 per cent of total broadcasting of a channel), the prohibition of advertising on Sundays and public holidays, the separation of advertising from other programme material and sponsoring, as well as restrictions or prohibition of advertising of tobacco and alcohol (European Commission 1984a, p. 263f.). Other issues covered by the Green Paper were right-of-reply, copyright and the protection of children from violence and pornography, issues for which the European Commission considered legislative initiatives necessary to harmonise national broadcasting markets (European Commission 1984a, p. 286f.). The Commission envisaged minimum rules in these areas, leaving it up to member states to enact more detailed or stricter regulation.¹³³

The preparation of legislation

On the basis of the Green Paper, DG Internal Market and Industrial Affairs engaged in consultations with interest groups and member states. Outside actors broadly welcomed Community regulation in the field, particularly the advertising industry and the new commercial broadcasters that sought to advance liberalisation and market opening.¹³⁴ The Green Paper also provoked more hostile reactions, notably from the established broadcaster interests, for example the public broadcasters (represented by the European Broadcasting Union), broadcasters' professionals associations and trade unions that all feared for the negative effects of liberalisation, such as increasing media concentration. Member states were divided, with some governments welcoming the Green

¹³³ For an overview of the provisions see Goldberg et al. (1998); Machet (1999).

¹³⁴ Unpublished Commission documents. 'Summary Record of the Hearing on the Commission's Green Paper 'Television without Frontiers', more particularly on the part therein on regulation of advertising'. 'Minutes of the Proceedings of the working group of government experts'. Produced by DG III in July 1985. For documentation of the lobbying activities of the industry see Humphreys (1996, p. 267f.); Wagner (1994, p. 115f.). Also see Agence Europe 12./13.11.1984, 28./29.1.1985.

Paper, whereas others opposed Community regulation, particularly liberalisation.¹³⁵

The plans of DG Internal Market and Industrial Affairs received a stimulus when a new Commission was appointed in early 1985. Commissioner Narjes for Industrial Affairs and the Internal Market was succeeded by Lord Cockfield, a senior UK Commissioner who was to become the 'architect' of the Single Market programme.¹³⁶ The Commission's widely-cited White Paper on the Internal Market (European Commission 1985b, section 115 to 117), drafted by DG Internal Market and Industrial Affairs, called the creation of a common broadcasting market an important and urgent task. The preparation of audiovisual legislation was also supported by the new Commission President Jacques Delors who made a personal commitment to realise not only the single market agenda, but also a common audiovisual landscape.¹³⁷ 'Television without Frontiers' became one of the big issues in the Commission, ranking high on the overall policy agenda (Bulletin of the European Communities 1986). In this context, a broad majority of organisations and actors showed themselves supportive of the plans of DG Internal Market and Industrial Affairs.¹³⁸

In March 1985, DG Internal Market and Industrial Affairs started drafting a proposal for a directive 'Television without Frontiers'. The positions expressed during public consultations had made DG Internal Market and Industrial Affairs rethink some of the provisions of the Green Paper. For example, the officials responsible decided to exclude the right-of-reply from Community legislation, to exempt radio broadcasting from future proposals and to limit the general authorisation of advertising to cross-frontier rather than all advertising. DG Internal Market and Industrial Affairs had come to favour a 'catch-all'

¹³⁵ Interview Number 2, Interview Number 4. Member states' positions have been documented by Humphreys (1994, p. 267f.); Wagner (1994, p. 124f.).

¹³⁶ The support given by Lord Cockfield to 'Television without Frontiers' led insiders to call the dossier the 'Cockfield Directive'. See Agence Europe, 21.3.1988. Interview Number 4, Interview Number 8.

¹³⁷ Interview Number 4, Interview Number 8, Interview Number 10, Interview Number 12. Also see speech given by Delors in which he emphasised the importance of the cultural industries, specifically mentioning television programmes, quoted by Collins (1994, p. 67).

¹³⁸ Interview Number 2, Interview Number 8, Interview Number 9. A similar observation has been made by Wagner (1994, p. 124).

instrument rather than a set of separate directives. A single directive would cover all aspects of regulation raised in the Green Paper (i.e. advertising, copyright, youth protection) and combine elements of liberalisation and re-regulation. The main intention standing behind this decision was to design a regulatory framework which would be as comprehensive as possible and have a sound legal basis, tailored to the realisation of the SEM (Single European Market).¹³⁹

Preparing the legislative dossier which was commonly referred to as 'Television without Frontiers' was characterised by intense consultations between DG Internal Market and DG Culture. Other Commission DGs made little or no input as the dossier was considered the unquestionable domain of DG Internal Market and Industrial Affairs and, to a more limited extent, DG Culture.¹⁴⁰ DG Culture continued to agree with DG Internal Market and Industrial Affairs on the need to propose a directive based on the common market principles and to combine elements of liberalisation and re-regulation. Debate between the two DGs emerged over the details of legislation. In DG Internal Market and Industrial Affairs, the main objective continued to be that television broadcasts were received and retransmitted freely in all member states.¹⁴¹ Its approach centred on a framework containing as little regulation as possible and leaving sufficient space to market forces. DG Culture, in contrast, was committed to address cultural and social aims (such as the achievement of an ever closer union by means of enabling Community citizens to receive broadcasts from member states other than their own). This included making the Commission adopt stricter provisions than those envisaged by DG Internal Market and Industrial Affairs. For example, DG Culture called for measures which would protect the European film industry.¹⁴² The idea was to place quotas on broadcasters to transmit a minimum of productions of European and 'independent' origin. Initially this idea met with scepticism in DG Internal

¹³⁹ Interview Number 4, Interview Number 8, Interview Number 9.

¹⁴⁰ Interview Number 4, Interview Number 8.

¹⁴¹ See Bulletin of the European Commission (1986), no. 13, p. 13.

¹⁴² Interview Number 10, Interview Number 12, Interview Number 21. Similar observations have been stated by Collins (1994, p. 66); Machet (1999, p. 10).

Market and Industrial Affairs whose main interest was to encourage investment and the realisation of the common market rather than creating new layers of regulation.

In order to resolve their disputes on the details of the 'Television without Frontiers' directive, DG Culture and DG Internal Market and Industrial Affairs engaged in consultations that took place in the context of their working groups as well as through personal contacts. In spite of the leading position implied by its formal responsibility for the dossier, DG Internal Market and Industrial Affairs considered it unwise to simply dismiss the ideas advocated by DG Culture - even though they implied more regulation than DG Internal Market and Industrial Affairs wanted. DG Internal Market took the view that granting the control over the definition of cultural and social aims to DG Culture would reduce conflict and facilitate the building of consensus.¹⁴³ In autumn 1985 it was announced that DG Internal Market and Industrial Affairs would accept measures to promote the production of European programmes and that it would include a quota of 50 per cent for works of European origin to the draft directive. Another issue which caused debate between DG Internal Market and Industrial Affairs and DG Culture was the regulation of advertising. DG Internal Market and Industrial Affairs aimed at allowing advertising up to 15 per cent of daily programme time, applicable to cross-frontier broadcasting only. Member states would be free to impose stricter rules on national broadcasting.¹⁴⁴ Initially DG Culture considered the threshold of 15 per cent too high and opted for stricter rules but later agreed to fix an advertising limit of 15 per cent of daily programming time of any television programme.

The draft directive 'Television without Frontiers'

When after a few months DG Internal Market and Industrial Affairs and DG Culture had resolved their debate on the quotas and the advertising rules, the

¹⁴³ The position of DG Internal Market and Industrial Affairs was also said to be influenced by the fact that the *cabinet* of Commission President Delors supported the quota provisions and there was also intense lobbying from the French government and the European Parliament. Interview Number 8, Interview Number 10. Agence Europe, 14.9.1985, 12.10.1985, 13.3.1986, 18.3.1986.

¹⁴⁴ Interview Number 8. Agence Europe, 12.10.1985, 13.3.1986, 18.3.1986.

'Television without Frontiers' dossier passed the Commission's formal decision-taking procedures without causing great controversies. In April 1986, less than one year after drafting had started, the Commission officially adopted the proposal for a directive on 'Television without Frontiers' (European Commission 1986).¹⁴⁵ The finalised version of the proposal was largely in line with earlier drafts prepared on DG level, its provisions grounded on television and radio broadcasting as economic activities and combining liberalisation with regulatory harmonisation. Responding to the requests made by DG Culture, DG Internal Market and Industrial Affairs had attached to the draft directive a memorandum that listed cultural and social aims as a priority of Community legislation, followed by economic aims such as the freedom to provide broadcasting services and the free circulation of broadcasts.¹⁴⁶

As regards liberalisation, the draft directive centred on advertising, the cornerstone of the proposal. It contained a provision that authorised advertising for the cross-frontier transmission of television programmes - limited to 15 per cent of advertising of the total daily air time (European Commission 1986). Member states were free to authorise, ban or limit the air time of radio and television advertising transmitted and received only on their territory. As regards regulatory requirements provisions included advertising, copyright, the protection of young people from harmful programmes, and quotas for European and 'independent' productions. For example, the proposal provided for a complete ban of advertising of tobacco and several restrictions on advertising of alcohol. Member states were left the option to lay down stricter and more detailed rules. The quota provisions obliged all television broadcasters to broadcast 30 per cent of programmes of Community origin and 5 per cent of programmes produced independently (European Commission 1986). Rules were also proposed for copyright, applying to cross-frontier programme transmission by cable, and the protection of young people by means of requiring member states to prohibit harmful programmes while leaving them free to enact stricter or more detailed rules.

¹⁴⁵ For documentation see, for example, Commission Press Statement, IP/86/26,1.3.1986.

¹⁴⁶ Interview Number 21.

The draft directive was debated under the co-operation procedure in the European Parliament and the Internal Market Council. In the Council of Ministers, the directive almost failed, due to a potential blocking minority under qualified majority voting. The European Commission revised its proposal on 'Television without Frontiers' twice, mainly to make the quota provisions for television productions less binding.¹⁴⁷ The copyright provisions were dropped, whereas an Article was added to the directive regulating for the right-of-reply granted to any natural or legal person. The directive was adopted in October 1989 and entered into force in October 1991.¹⁴⁸

Policy coordination in the telecommunications sector

Setting the policy agenda

Growing awareness in the European Commission

Until the 1980s, no Community policy on telecommunications existed as such. In the mid-1970s, the telecommunications sector had started to undergo fundamental transformation, triggered by its convergence with information technology. New communications services and applications emerged, such as facsimile, videotext and data transmission. Within the European Commission, there was no Directorate General with specific responsibility for the telecommunications sector. It was widely acknowledged that telecommunications issues fell into the domain of the DG for Internal Market

¹⁴⁷ The provisions concerning the quotas contained in Articles 4 and 5 of the directive were weakened by inserting 'where practicable and by appropriate means' to the wording. In addition, the Council and the European Commission adopted a protocol stating that member states were politically, but not legally obliged to conform to the quota provisions. See *Agence Europe*, 10.3.1989, 7.10.1989. *Financial Times*, 18.2.1988, 13.4.1989, 14.4.1989.

¹⁴⁸ Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities. *Official Journal L298*, 17.10.1989.

and Industrial Affairs and its industrial policy branch.¹⁴⁹ The interest taken by the DG in the rapidly changing telecommunications sector was part of its concern for a competitive industry and the opening of European markets by means of liberalisation and 'deregulation' measures. The early stages of the Commission's telecommunications policy were therefore based on an industrial policy framework.

On the initiative of DG Internal Market and Industrial Affairs, the Commission published two documents on the telecommunications in the late 1970s: a Communication on 'New Information Technologies' (European Commission 1979) and 'Recommendations on Telecommunications' (European Commission 1980). In these documents, DG Internal Market and Industrial Affairs drew attention to 'the vital importance of an efficient telecommunications infrastructure' (European Commission 1980, p. 2). Stating that 'neither Community-wide services, nor a Community-wide market for terminals or other telecommunications equipment exist' (European Commission 1980, p. 3), the Commission claimed that an efficient low-cost communication infrastructure would be essential to support the vast range of new and increasingly transnational services. DG Internal Market and Industrial Affairs saw a need for minimum regulatory harmonisation at Community level concerning, for example, mutual recognition. The four Recommendations were submitted for adoption by the Council and envisaged the creation and opening up of a Community-wide telecommunications market, suggesting, for example, that member states consult each other on technological standards and type approval and undertake limited steps to open up markets (e.g. by seeking competitive proposals for the procurement of equipment).¹⁵⁰ In the meantime, the European Parliament intensified its calls for the creation of a Community market for telecommunications terminal equipment and the development of advanced telecommunications services and networks. In a number of

¹⁴⁹ Interview Number 9, Interview Number 16. Similar observations have been made by Dang-Nguyen et al. (1993).

¹⁵⁰ For summaries of the draft recommendations see European Commission (1980, p. 5f.) and European Commission (1987, p. 100). The Council of Ministers adopted them between 1984 and 1986 (see European Commission (1987, p. 100) for documentation).

resolutions and reports it requested the European Commission to explore opportunities to realise such a market.¹⁵¹

The creation of DG Telecoms

In 1983, on the initiative of Industry Commissioner Etienne Davignon who took a great interest in communications and information technologies, a Task Force was set up from an industrial policy division in DG Internal Market and Industrial Affairs.¹⁵² The so-called Information Technology Task Force (ITTF) was primarily created to deal with overseeing the implementation of the RACE and ESPRIT programmes (see Chapter Two). Its mission was to promote the effectiveness and competitiveness of European telecommunications markets in the face of technological change and internationalisation.¹⁵³ In this context, some officials, most of which were recruited from DG Internal Market and Industry, engaged in exploring the consequences of far-reaching technological and economic changes that affected the telecommunications sector and their impact on established national regulatory systems.

Between 1983 and 1985, the Task Force prepared several consultative documents that were later officially adopted by the Commission and that examined the changing telecommunications sector (European Commission 1983 b, 1983c, 1984b, 1985a). The Task Force had consulted with DG Internal Market and Industrial Affairs and, to a lesser extent, DG XII for Science and Research on these documents. As there was a high level of agreement between the Directorates General regarding the content of the consultative documents and as the authority of the Task Force to prepare them was generally accepted, the preparation of the documents was characterised by unity rather than

¹⁵¹ For an overview of action taken European Parliament see European Commission (1987, p. 20f. and 100).

¹⁵² This has been documented by Sandholtz (1992); Thatcher (2001).

¹⁵³ Interview Number 9, Interview Number 11, Interview Number 13. Similar observations have been stated by Sandholtz (1992, 1998).

conflict.¹⁵⁴ Hence, they were rapidly adopted and the finalised versions were closely in line with previous drafts.

Acknowledging the economic importance of the telecommunications sector, the documents identified the weaknesses of the European telecommunications market, notably its fragmentation into national markets and the slow exploitation of new technologies due to low investment. According to the Task Force, this weakness endangered Europe's competitiveness vis-à-vis the United States and Japan (e.g. European Commission 1983b, p. 12; 1984b, p. 8f.). As the main objectives of Community action the Task Force identified the promotion of new services and markets (e.g. telematics) and the full use of new technologies to advance the communications infrastructures in the Community. It also recommended Community legislation, proposing regulation which would create and stimulate a Community-wide market for telecommunications services and terminals. For example, the documents suggested a harmonisation of standards and approval procedures for terminal equipment (European Commission 1984b, p. 13f.). As regards the scope and level of Community harmonisation, the Task Force emphasised that the Commission's approach would be mostly 'deregulatory' in nature.¹⁵⁵ Because agenda-setting was still at an early stage, the documents were mostly exploratory in nature and refrained from making any more detailed policy recommendations. Nevertheless, they proved significant as that they marked the rising of awareness in the Commission that the telecommunications sector represented a policy area for regulatory harmonisation and liberalisation.

The preparation of the 1987 'Green Paper' on Telecommunications

In 1986, the European Commission began to take more concrete steps towards a Community telecommunications policy. The Task Force acquired the formal

¹⁵⁴ Interview Number 9, Interview Number 11.

¹⁵⁵ The European Commission stated that 'a legal framework does not imply, however, additional constraints and bureaucracy; on the contrary, it will quickly become apparent that the gradual transfer of power and resources to the Community, if brought about as the Commission envisages, will be counter-balanced by a reduction in regulation and, moreover, a more rational utilization of the public resources allocated to this sector' (European Commission 1983b, p. 10).

status of a Directorate General, called DG ‘Telecommunications, Information and Innovation Industry’ (commonly known as DG XIII or ‘DG Telecoms’). In the same year, a division within the newly-founded DG, called ‘Telecommunications Policy’, came up with the idea to look into regulatory changes at Community level. The authority of DG Telecoms to explore a Community dimension of legislation on telecommunications was broadly accepted among other Commission DGs as it fell within its institutional mission to deal with the telecommunications sector.¹⁵⁶

Given the success of the Green Paper on ‘Television without Frontiers’ (see previous sections), the idea emerging in DG Telecoms was to draft a ‘Green Paper’, a consultative document which would set out the Commission’s policy priorities for the telecommunications sector and build the basis for public consultations.¹⁵⁷ The drafting of the Green Paper was the work of a small unit directed by Herbert Ungerer. The unit planned to provide a detailed analysis of the policy sector and to propose limited liberalisation and regulation at Community level. In the view of DG Telecoms, the traditional organisation of the telecommunications sector prevented the full development of new services and the realisation of an open and dynamic market. The officials identified a fourfold impetus for Community action: technological developments (notably the emerging new value-added services); the economic situation (i.e. the potential for more growth and investment in the sector); the trends towards liberalisation in some member states and the fact that different re-regulatory systems implied potential barriers to intra-Community trade; and the aim of realising the Single European Market (see European Commission 1987).

The drafting of the Green Paper began during the second half of 1986. DG Telecoms consulted on its provisions with two other DGs, the DGs for the Internal Market and Industrial Affairs and the DG for Competition. For DG Telecoms, coordination with these two DGs was important for two main reasons: first, in order to strengthen its position as a newly-founded DG and to give its voice more weight in the Commission, it sought to gather broad internal

¹⁵⁶ Interview Number 9, Interview Number 11, Interview Number 13, Interview Number 14, Interview Number 16. Similar observations have been made by Schmidt (1998a, p. 116).

¹⁵⁷ Interview Number 9.

support for its policy strategy; secondly, it considered the legal expertise of officials in DG Internal Market and Industrial Affairs and in DG Competition useful to develop legislation on a sound legal basis.¹⁵⁸

As most officials in DG Telecoms had formerly worked in DG Internal Market and Industrial Affairs, the links between the two Commission DGs were strong.¹⁵⁹ DG Internal Market and Industrial Affairs shared the interest of DG Telecoms to introduce Community legislation as this was in line with its efforts to promote the creation of the SEM and to achieve the full implementation of the free movement of goods and the freedom to provide services. DG Internal Market also supported the promotion of the telecommunications industry and the application of new technologies and services. In 1985, DG Internal Market and Industrial Affairs had drafted the White Paper on 'Completing the Internal Market' which emphasised the importance of the telecoms network infrastructure and services as the backbone of the prospering of intra-Community trade and services (European Commission 1985b). Consultations between the two DGs mostly took place in informal working groups and there was little or no conflict concerning the provisions of the Green Paper on Telecommunications.¹⁶⁰ DG Telecoms took up the input from DG Internal Market and Industrial Affairs, for example by linking its policy programme to the single market framework.¹⁶¹

A greater and more significant input to the preparation of the Green Paper originated from DG Competition (DG IV). Officials in DG Competition agreed with DG Telecoms over basic policy aims, assigning primary importance to a liberalisation of the telecommunications sector. Given its mission to promote competition in the Community's markets, DG Competition had an interest in

¹⁵⁸ Interview Number 9, Interview Number 13, Interview Number 16.

¹⁵⁹ Interview Number 9.

¹⁶⁰ Interview Number 9, Interview Number 11.

¹⁶¹ This was evident in the text stating, for example, that 'the strengthening of European telecommunications has become one of the major conditions for promoting a harmonious development of economic activities and a competitive market throughout the Community and for achieving the completion of the Community-wide market for goods and services by 1992' (European Commission 1987, p. 2), but also in the title of the Green Paper called 'Green Paper on the Development of the Common Market for Telecommunications Services and Equipment' (emphasis by the author).

fostering an opening of telecoms markets in the Community.¹⁶² Since 1985, DG Competition had decided a number of cases of close relevance to the telecommunications sector which confirmed that telecommunications administrations were fully subject to the Treaty rules.¹⁶³ DG Competition had also sought ways to issue *ex-ante* regulation by means of following the so-called Article 90 procedure empowering the European Commission to issue its own directives (see Chapter Two).¹⁶⁴ It considered the telecommunications sector as a policy domain to which the Article 90 procedure might be applied. Due to its interest in advancing competition in the common market and in consolidating its powers to use the Article 90 procedure, DG Competition showed itself supportive of the attempts made by DG Telecoms to introduce Community legislation to the telecommunications sector.¹⁶⁵ Officials in DG Telecoms, in turn, welcomed the opportunity to advance a Community policy for the telecommunications sector based on accordance with the traditionally powerful DG Competition.¹⁶⁶ Officials in both DGs therefore regarded a close collaboration as a welcome window of opportunity to advance their own interests.

The two DGs shared an interest not only in establishing Community competence, but also agreed on the substance of the policy approach to be taken by the European Commission.¹⁶⁷ It was undisputed that the emphasis was going to be on the opening of the markets for terminal equipment and telecommunications services other than voice telephony, for example facsimile and data communications. DG Telecoms and DG Competition also intended to propose a separation of regulatory and operational functions of

¹⁶² Interview Number 9, Interview Number 11, Interview Number 13, Interview Number 14.

¹⁶³ For an overview of these decisions, see European Commission (1987, pp. 128-129 and pp. 134-135).

¹⁶⁴ Article 90 forbids member states from introducing or maintaining measures contrary to the Treaty regarding public undertakings and enterprises granted special and exclusive rights.

¹⁶⁵ Interview Number 9, Interview Number 11, Interview Number 13, Interview Number 14.

¹⁶⁶ Interview Number 9, Interview Number 11, Interview Number 13. On the general role and power position of DG Competition in the Commission see, for example, Cini and McGowan (1998); Michelmann (1978), Schmidt (1998a).

¹⁶⁷ Interview Number 9, Interview Number 11, Interview Number 13, Interview Number 14. Also see Financial Times, 26.3.1988. Agence Europe, 2./3.5.1988.

telecommunications administrations, and to combine liberalisation with measures to harmonise telecommunications standards and user conditions (e.g. interoperability). In 1986 and early 1987, they engaged in consultations on the Green Paper on telecommunications. These consultations mostly took place in inter-service working groups or through personal contacts. They largely excluded other Commission DGs that were either not interested or simply endorsed the strategy chosen by DG Competition and DG Telecoms. Apart from making its input on the common market framework, DG Internal Market and Industrial Affairs largely kept out of the preparation process.¹⁶⁸ The preparation of the Green Paper therefore took place in a rather small circle of people.

During their talks the two DGs agreed that the Commission would issue a directive under Article 90 introducing limited liberalisation for terminal equipment and advanced telecommunications services.¹⁶⁹ They both considered a Commission directive a more efficient instrument than a directive which would need the approval of the Council and the European Parliament and be subject to a much more complicated decision-taking process. The two DGs decided that in the Green Paper on Telecommunications they would abstain from explicitly announcing the application of the Article 90 procedure, but instead refer to a possible use.¹⁷⁰ Following a speedy preparation process led by DG Telecoms which collaborated closely with DG Competition, the finalised version of the 'Green Paper on the Development of the Common Market for Telecommunications Services and Equipment' was sent to the *cabinets* and Commissioners. There it caused little debate. The Commissioners responsible, Karl-Heinz Narjes for Telecommunications and Industry, Peter Sutherland for

¹⁶⁸ Interview Number 9, Interview Number 13, Interview Number 16.

¹⁶⁹ Interview Number 9, Interview Number 11. Similar observations have been stated by Schmidt (1998a, p. 116-117).

¹⁷⁰ The decision was largely due to the intervention of the Legal Service whose officials feared that the Commission would become entangled in a serious conflict with member states centring on the applicability of Article 90(3) to telecommunications and that this would, in turn, endanger member states' approval for other Commission initiatives. DG Telecoms and DG Competition therefore agreed to simply state that, following from existing case law and Commission decisions, the Commission regarded telecoms authorities in member states as commercial undertakings subject to Community rules and, therefore, open to harmonisation efforts. Interview Number 9, Interview Number 11. Also see European Commission (1987, pp. 134-135 and 179-83). In the literature, this has been documented by Schmidt (1998a, p. 116-117).

Competition, and Lord Cockfield for the Internal Market, were reported to be largely in agreement as they shared the concern for an open telecommunications market and European competitiveness.¹⁷¹ In June 1987, less than one year after its initiation, the Commission adopted the Green Paper on the 'Development of a Common Market for Telecommunications Services and Equipment' (European Commission 1987), hereafter the '1987 Green Paper'.

The 1987 'Green Paper' on Telecommunications

The central statement of the '1987 Green Paper' was that there had to be substantial changes to national regulatory systems by means of Community regulation. The establishment of Community regulation was set in the context of the completion of the Single European Market and the establishment of a Community-wide information market. Liberalisation was to be combined with measures to harmonise national standards and user conditions. As regards liberalisation, the Green Paper proposed a phased complete opening of the terminal equipment market to competition and the free and unrestricted provision of all services other than public voice telephony (European Commission 1987, p. 61f.). The European Commission accepted the continued exclusive provision or granting of special rights regarding the provision and operation of network infrastructure. The continued exclusive provision or special rights regarding the provision of a limited number of telecommunications services (voice telephony being the only obvious candidate) was confirmed on the basis of making it subject to review at given intervals. The Commission also called for a clear separation of regulatory and operational functions of telecoms administrations and the partial opening of the market for satellite ground stations to competition (European Commission 1987, p. 73f.).

As regards regulatory harmonisation, the '1987 Green Paper' proposed the establishment of the Open Network Provision, called 'ONP'. ONP would govern the access to the telecommunications infrastructure, for example by establishing

¹⁷¹ Financial Times, 26.3.1988. Agence Europe, 2./3.5.1988.

conditions for interoperability and interconnection and including the requirement for telecommunications tariffs to follow cost trends. DG Telecoms and DG Competition emphasised that the Commission did not intend to propose legislation which would cover more than a minimum needed to achieve the objective of an integrated, competitive European telecommunications market. For example, the Commission made explicit that it did not intend to propose legislation covering the status or the ownership of network operators and telecommunications administrations (i.e. PTOs), the policy regarding leased lines and the resale of line capacity (European Commission 1987, p. 13, 15, 184).

The preparation of legislation

With the publication of its '1987 Green Paper', the European Commission launched consultations with telecommunications organisations and companies. The consultations were led by DG Telecoms which aimed at identifying common positions on the future legislative framework and persuading a majority of outside actors to support its ideas.¹⁷² The consultations revealed a broad consensus on the aims of liberalisation and harmonisation, whereas in terms of the details, different positions prevailed, for example as regards to liberalisation and re-regulation of satellite communications or the creation common tariff principles.¹⁷³ In February 1988, on the initiative of DG Telecoms, the Commission published a Communication (European Commission 1988a) which summarised the results of the consultations. The Communication was essentially the work of DG Telecoms, but also included contributions made by DG Competition. It was intended to present details on the Commission's policy strategy. Officials in DG Competition and DG Telecoms decided to continue

¹⁷² Interview Number 9, Interview Number 13.

¹⁷³ According to the Commission, there was a broad consensus concerning the full opening of terminal equipment to competition and the progressive opening of telecoms services to competition from 1989 onwards, as well as on ONP. In other areas, such as the regulation of satellite communications and the definition of common tariff principles, there was much less unity (European Commission 1988a, p. 15f.). See, for example, Financial Times, 11.5.1988. Also see European Commission (1988a).

their double strategy of liberalisation and regulatory harmonisation.¹⁷⁴ As the two DGs had previously agreed on the substance and most of the details of legislation and other Commission DGs continued to be either supportive or not interested, the preparation and adoption of the Communication had caused little debate and taken less than three months.¹⁷⁵

The Communication (European Commission 1988a) identified areas for which the Commission considered concrete policy actions necessary. Most importantly, these included the full opening of the terminal equipment market and the progressive opening of the services market. The Communication announced that the Commission would adopt two directives following the Article 90 procedure (European Commission 1988a, p. 22f.). As regards re-regulation, the Commission announced the submission of a proposal for a directive on Open Network Provision (ONP) establishing conditions for interoperability and interconnection.

The directive on liberalising terminal equipment

During the following months, DG Competition and DG Telecoms intensified their collaboration. A major step on the way to implement the Green Paper was the initiative on liberalising terminal equipment. No later than three months after its notification, the directive would oblige member states to withdraw any special or exclusive rights granted to undertakings bringing into service or providing the maintenance of terminal equipment (such as modems or fax machines). The application and enforcement of Article 90 fell within the domain of DG Competition. Hence, the preparation of a Commission directive on terminal equipment was essentially the responsibility of DG Competition. This was broadly accepted by a majority of Commission DGs, including DG Telecoms.¹⁷⁶

¹⁷⁴ See contributions made by Commission members Carpentier (1991); Narjes (1988); Ungerer and Costello (1988).

¹⁷⁵ Interview Number 9, Interview Number 11, Interview Number 13.

¹⁷⁶ Interview Number 9, Interview Number 11, Interview Number 13.

DG Telecoms officials had a great interest in shaping the draft directive. Given that its unit for 'Telecommunications Policy' was resourced with more staff than the unit responsible in DG Competition, DG Competition welcomed its input.¹⁷⁷ Under the leadership of DG Competition, the two DGs collaborated – mostly in their semi-permanent working groups. In the course of coordination, dispute among the two DGs concerned the details of legislation. In order to facilitate coordination, the units responsible in DG Competition and DG Telecoms allocated the responsibility for the Open Network Provision (ONP) exclusively to DG Telecoms and decided to run the drafting of a proposal for a directive on ONP, the centrepiece of re-regulation, simultaneously with the drafting of liberalisation directives.¹⁷⁸ By assigning liberalisation to DG Competition and re-regulation to DG Telecoms resulted in an efficient division of labour. Each DG concentrated on its respective task and continued to consult the other DG. During the months and years to follow, this would significantly strengthen the relationship between the DG Competition and DG Telecoms (see Chapter Four).

As a result of the preliminary consultations and their quasi-institutionalised division of work, DG Competition and DG Telecoms finalised what they called a 'final draft' of a directive liberalising terminal equipment in April 1988, only a few months after public consultations on the '1987 Green Paper' had concluded. The draft directive introduced a liberalisation schedule in the area of terminal equipment, asking member states to abolish 'special or exclusive rights' granted to PTOs concerning telephone sets, modems, telex terminals and other terminal equipment. In addition, member states were obliged to regularly communicate to the Commission a list of technical specifications and type-approval procedures for terminal equipment.¹⁷⁹ The College of Commissioners did not adopt the directive straightaway, but presented the draft text at an informal meeting of member states' telecommunications ministers.

¹⁷⁷ Interview Number 9, Interview Number 11, Interview Number 13.

¹⁷⁸ Interview Number 9, Interview Number 11, Interview Number 13, Interview Number 14, Interview Number 16. *Financial Times*, 11.05.1988. Similar observations have been stated by Schmidt (1998a, p. 126).

¹⁷⁹ Interview Number 9, Interview Number 11, Interview Number 13. *Agence Europe*, 29.4.1988, 2./3.5.1988. *Financial Times*, 28.4.1988.

Some member states heavily criticised the use of Article 90(3), preferring a proposal for a directive to be adopted under the Article 100a procedure on the approximation of laws that would involve the European Parliament and the Council. During negotiations with member states, the Commission made few concessions to national delegates, mainly concerning implementation timetables and technical specifications.¹⁸⁰ In May 1988, less than four months after publishing its Communication on the results of the public consultations on the 1987 Green Paper (European Commission 1988a) and in line with the timetable set out herein, the College of Commissioners adopted the 'Directive on Competition in the Markets in Telecommunications Terminal Equipment'.¹⁸¹

The directive on liberalising services

As foreseen in the '1987 Green Paper' (European Commission 1987), the next step towards market opening and liberalisation was to open value-added services (VANs), i.e. telecommunications services other than public voice telephony, to competition. DG Competition and DG Telecoms continued their productive collaboration by consulting each other and exchanging their views on a second Commission directive, called the 'Services Directive'. The preparation process started even before the directive on terminal equipment was finalised.¹⁸² During the consultations which were mostly led in their inter-service groups, DG Competition and DG Telecoms worked out a consensus on the details of the 'Services directive'. Member states would be obliged to withdraw all special or exclusive rights for the supply of telecommunications

¹⁸⁰ Interview Number 11. Also see Financial Times, 15.3.1988, 28.4.1988, 21.5.1988.

¹⁸¹ Commission Directive of 16 May 1988 (88/301/EEC) on competition in the markets in telecommunications terminal equipment. Official Journal L131/73.

¹⁸² Interview Number 9, Interview Number 11. The two Commission DGs also prepared a Council Resolution endorsing the 1987 Green Paper and the Communication on the public consultations (European Commission 1988a). See Council Resolution of 30.6.1988 on the development of the common market for telecommunications services and equipment up to 1992. 88/C 257/01. Official Journal, C257, 4.10.1988, p. 1. The governments of France, Italy and Belgium nevertheless decided to appeal to the European Court of Justice against the Terminals Directive. They stated that they fully approved of the objective of greater competition, but contested the directive's legal basis, refusing to recognise that the Commission had the power to adopt a directive on its own. See, for example, Agence Europe, 23.7.1988.

services other than voice telephony and to separate the regulatory powers of PTOs from their commercial activities from January 1991.

Other Commission DGs did not interfere significantly with the preparation of the directive liberalising services. The strategy pursued by DG Competition and DG Telecoms was generally accepted. For example, the DG for the Internal Market and Industrial Affairs had just started to undertake efforts to open public procurement, including telecommunications (European Commission 1988c and d). This contributed to increase the momentum of the liberalisation strategy pursued by DG Competition and DG Telecoms.¹⁸³ In late 1988, DG Competition, in collaboration with DG Telecoms, was about to finalise a directive which liberalised the provision of value-added services. Policy formulation had proceeded rapidly and the final draft closely reflected earlier propositions.¹⁸⁴ The directive was planned to be implemented progressively, exempting voice telephony and telex from competition.¹⁸⁵ In addition to the abolition of exclusive rights granted to PTOs for the provision of VANs, the directive asked for the separation of regulatory powers maintained by PTOs from their commercial activities. Other provisions included that PTOs had to enable their customers to terminate long-term contracts.

Commissioners were expected to discuss and adopt the directive before the end of the year, after presenting an informal draft to the Internal Market Council.¹⁸⁶ In December 1988, following opposition from member states against the draft text submitted by the Commission, the Commission re-scheduled the final adoption of the directive for March 1989. This was mainly intended to allow for more time for negotiations between the Commission and member states.¹⁸⁷ This decision was taken only shortly before a new Commission was introduced in early 1989. For competition, Commissioner Peter Sutherland was

¹⁸³ Interview Number 11, Interview Number 13. Financial Times, 22.6.1988.

¹⁸⁴ Interview Number 9, Interview Number 11, Interview Number 13.

¹⁸⁵ The latter was due to the decline of its use due to the development of telefax, whereas the exception granted to voice telephony was going to be subject to review after several years. See Agence Europe, 8.2.1989.

¹⁸⁶ Financial Times, 24.11.1988.

¹⁸⁷ Agence Europe, 5.11.1988, 16.12.1988. Financial Times, 15.12.1988.

succeeded by Sir Leon Brittan. For telecommunications and industry, Commissioner Karl-Heinz Narjes was succeeded by Filippo Maria Pandolfi. The two new Commissioners were less in agreement on the Commission's plans to liberalise telecommunications services by means of an Article 90 directive than their predecessors. Brittan supported the adoption of a Commission directive, whereas Pandolfi opposed it.¹⁸⁸ The dissent between Brittan and Pandolfi concentrated on how the Commission should proceed to liberalise telecommunications services. Eventually, Commissioners decided to stick to a Commission directive, but to modify some of its provisions, such as whether to liberalise basic data communications services and the date of entry into force - and to postpone its adoption by a few months.¹⁸⁹ The fact that the directive was adopted later than foreseen and that it differed from its earlier version in some respects was therefore not due to conflicts divisions occurring on the administrative level of the Commission, but primarily a consequence of the fact that its adoption co-incided with the re-organisation of the political level of the Commission.¹⁹⁰

The Commissioner *cabinets* decided that the directive would restrict the liberalisation of data communications and grant derogations and special transitional arrangements to some member states.¹⁹¹ DG Competition and DG Telecoms modified the draft directive accordingly. The College of Commissioner adopted the 'Services Directive' in June 1989.¹⁹² The directive prescribed a gradual opening up of the telecommunications market until 31 December 1992. Member states were bound to withdraw exclusive rights for the provision of telecommunications services other than voice telephony. The directive did not apply to telex, mobile radio telephony, paging and satellite communications services. Data transmission was liberalised, but liberalisation was made subject to permission from member states authorities. Member states

¹⁸⁸ Agence Europe, 26.4.1989, 27.4.1989, 28.4.1989. Financial Times, 25.4.1989, 28.4.1989, 10.5.1989.

¹⁸⁹ Agence Europe, 12.4.1989, 28.4.1989.

¹⁹⁰ Interview Number 9, Interview Number 11. Financial Times, 25.4.1989, 28.4.1989.

¹⁹¹ Financial Times, 5.5.1989, 10.5.1989. Agence Europe, 9.11.1989.

¹⁹² Commission Directive 90/338/EEC of 28 June on competition in the markets for telecommunications services. Official Journal L192, 24.7.1990, pp. 10-16.

making the provision of services subject to a licensing procedure were bound to ensure objective, non-discriminatory and transparent conditions for granting such licenses. The maintenance of special or exclusive rights for the provision or operation of telecommunications networks was bound to the establishment of objective and non-discriminatory conditions governing access to the networks. From July 1991, PTOs had to separate their regulatory from their commercial functions.

Re-regulation: The Open Network Provision

In an attempt to reduce conflict and to facilitate coordination, DG Competition and DG Telecoms had previously arranged that the latter would be granted the sole authority to prepare re-regulatory proposals for implementing the ONP (see above). After the publication on the follow-up Communication on the '1987 Green Paper' (European Commission 1988b) DG Telecoms started drafting a proposal for a directive for adoption by the European Parliament and the Council under the co-operation procedure. The 'Telecommunications Policy' unit in DG Telecoms aimed at a Community-wide harmonisation of principles governing the access to telecommunications networks (European Commission 1987, p. 69). ONP was to consist of three parts: technical conditions that would enable networks to connect with each other; service conditions supplying users with certain minimum standards; and tariff principles that would enable users to compare prices.¹⁹³

DG Competition accepted the provisions made by DG Telecoms as it considered a legislative solution useful to avoid lengthy legal conflicts with telecommunications administrations over the provision of network infrastructure to users and competitors.¹⁹⁴ At the same time, it had an interest in avoiding contradictions with the definitions and concepts set out in the liberalisation directives and in keeping what it considered the right balance between market opening and re-regulation. DG Telecoms consulted extensively with DG Competition, mostly in their working groups that preceded formalised

¹⁹³ Financial Times, 22.5.1989. For detail also see GAP (1988).

¹⁹⁴ Interview Number 9, Interview Number 11.

inter-service consultations and therefore excluded other Commissioner services. During the preparation process, DG Telecoms continued to rely on the legal expertise of DG Competition officials, particularly in the context of balancing liberalisation and regulatory measures.¹⁹⁵ Because the two DGs agreed on the substance of the ONP proposal, discussion centred on the details, concerning, for example, definitions and technical specifications. DG Telecoms and DG Competition decided that rather than first publishing a consultative document on ONP, the Commission would adopt an informal legislative proposal to be made available to the public. Building consultations with outside actors on an existing detailed draft rather than an exploratory document, the officials involved aimed at speeding up the legislation process.¹⁹⁶

Following a preparation process which lasted only a few months, DG Telecoms and DG Competition made the draft publicly available together with the informal draft of the 'Services Directive' in December 1988 (see above). The fact that the two DGs managed to make the legislative proposals on liberalisation and re-regulation available at the same time indicates the high level of agreement between them.¹⁹⁷ The draft directive on ONP was largely in line with previous versions: it provided for the harmonisation of conditions for open and efficient access to and use of the public telecommunications network and already liberalised telecommunications services, allowing for the inclusion of technical interfaces, usage conditions and tariff principles to these conditions.

The official ONP proposal (European Commission 1988b) adopted by the European Commission in January 1989 represented a largely unchanged version of the draft proposal agreed on by DG Competition and DG Telecoms. Member states showed themselves divided as regards to their position on ONP.¹⁹⁸ The amendments made by the Commission to the ONP proposal were

¹⁹⁵ Interview Number 9, Interview Number 11, Interview Number 13, Interview Number 16.

¹⁹⁶ Interview Number 19.

¹⁹⁷ Interview Number 13, Interview Number 14, Interview Number 16.

¹⁹⁸ Conflict potential arose from the issues of clarifying 'essential demands' (i.e. the non-economic reasons causing member states to regulate the supply of services, including, for example, the maintenance of network integrity and interoperability), of defining committee

mostly aimed at strengthening the links between ONP and the Services Directive.¹⁹⁹ During the final Council Meetings in December 1989, the Commission offered the ONP and the Services Directive as a 'package deal'. It made the ONP criteria voluntary rather than compulsory, but granted the Commission reserve powers to enforce the ONP conditions.²⁰⁰ The day the Council adopted the ONP directive, the Commission formally notified the Services Directive to become operational.²⁰¹

Conclusion

In the early 1980s, the audiovisual and the telecommunications sectors were basically untouched by Community legislation, their regulation being subject to national systems of public monopolies and public service traditions. Within less than a decade, the situation changed significantly. Under the leadership of the European Commission, Community legislation was established to introduce limited liberalisation and re-regulation to the two policy domains. The Directorates General of the European Commission prepared several important consultative documents and comprehensive legislative packages consisting of liberalisation and re-regulation measures. The analysis of the first stage of the Commission's legislative policy-making in the audiovisual and the telecommunications sector revealed a striking similarity in terms of the central variables under study: low levels of administrative fragmentation correlated with high legislative outputs.

management, and of how to gradually establish the mutual recognition of procedures for awarding licenses and the authorisation of services. A number of member states wanted the scope of application be limited to telephone networks and restricted services, i.e. those areas clearly reserved for national monopolies. Other member states asked for more rather than less regulation. See, for example, Agence Europe, 26.4.1989, 9.12.1989. Financial Times, 9.12.1989, 11.12.1989. Interview Number 14.

¹⁹⁹ Agence Europe, 5.7.1989.

²⁰⁰ Agence Europe, 9.12.1989. Financial Times, 9.12.1989, 11.12.1989.

²⁰¹ Commission Directive 90/338/EEC of 28 June on competition in the markets for telecommunications services. Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision. Official Journal L192, 24.7.1990, pp. 1-9.

In each policy area, the settings of DGs that actively participated in the preparation of consultative documents and legislation were limited to two DGs: DG Culture and DG Internal Market in the audiovisual sector, and DG Competition and DG Telecoms in telecommunications. In the telecommunications sector, the setting also included DG Internal Market and Industrial Affairs at first. This was largely due to the strong links between DG Internal Market and Industrial Affairs and DG Telecoms that resulted from the fact that many officials of the former had formerly worked in the latter. DG Internal Market then gradually withdrew its input, mostly because it accepted the policy strategy pursued by DG Telecoms and because it turned to other policy priorities, for example public procurement. The initial coordination scenario of three DGs shifted towards bilateral collaboration of DG Telecoms and DG Competition. In both policy sectors, other DGs took little or no interest in the activities of the participating DGs.

In spite of their different missions and outlooks, there was a high level of consensus between the DGs involved that related to both the paradigm of legislation and the allocation of authority. In the audiovisual field, DG Internal Market and Industrial Affairs agreed with DG Culture not only on the need for proposing Community legislation, but also on its basic objectives (see Table 2). In both DGs it was broadly accepted that the Commission would concentrate on liberalisation and market opening and complement such measures with re-regulation of market conditions and user rights. The logic underlying this approach and agreed on by the two DGs was the realisation of the SEM. The fact that leadership for 'Television without Frontiers' was allocated to DG Internal Market and Industrial Affairs was due to the fact that the DG was generally accepted to have the greater legal expertise to prepare legislation based on the common market. A similar level of agreement could be observed for the telecommunications domain in which DG Telecoms and DG Competition were united on the need for Community legislation as well as its major objectives – achieving a common market by means of combining limited liberalisation with a minimum of re-regulation (see Table 3). The two DGs accepted each others' responsibility – that of DG Competition for liberalisation and that of DG Telecoms for re-regulating the telecommunications sector.

Table 2 Indicators of administrative fragmentation in the audiovisual sector during the 1980s

	Green Paper 'Television without Frontiers' and Interim Report	proposal for a directive 'Television without Frontiers'
number of DGs	two	two
differences on paradigm	low	low
competition for authority	low	low
overall level of adm. fragmentation	low	low

Table 3 Indicators of administrative fragmentation in the telecommunications sector during the 1980s

	1987 'Green Paper'	liberalisation of terminal equipment	liberalisation of services	Open Network Provision
number of DGs	three → two	two	two	two
differences on paradigm	low	low	low	low
competition for authority	low	low	low	low
overall level of adm. fragmentation	low	low	low	low

Due to the low levels of administrative fragmentation that prevailed in the two policy domains, coordination among the Commission DGs did not meet with serious difficulties. Since the different DGs maintained distinct policy agendas conflict was inevitable, but limited to the details of legislation and therefore rather easy to resolve. Coordination mostly took place in the issue-related working groups that were established between the participating DGs and was further intensified through the personal contacts between individual officials. Coordination was also greatly facilitated by the fact that the participating DGs established a division of work which was closely oriented towards their functions and interests. In telecommunications, DG Competition concentrated on liberalisation measures, while DG Telecoms took responsibility for ONP, the centrepiece of re-regulation. In the audiovisual field, DG Internal Market and Industrial Affairs maintained control over liberalisation and the regulation of market conditions, but was willing to accept the influence taken by DG Culture on issues that touched the cultural and social dimension of television broadcasting and referred to the public interest.

In both policy domains the collaboration between the participating DGs preceded the more formal consultations including other Commission actors, for

example the Legal Service and the *cabinets*. Following their intense and efficient coordination the DGs presented these other actors with detailed policy drafts on which there was a high level of agreement. This usually limited the scope of debate and reduced conflict, speeding up the overall process of policy formulation and decision-taking and making it subject to fewer changes. The legislative activities of the participating DGs led the Commission to propose several pieces of legislation to which it had previously committed itself in consultative documents: two Commission directives introducing limited liberalisation and a re-regulatory proposal in the telecommunications sector, and a comprehensive legislative package combining elements of liberalisation with re-regulation in the audiovisual field (see Table 4, Table 5 and Table 6).

Table 4 Legislative outputs produced by the European Commission in the audiovisual sector during the 1980s

	Green Paper 'Television without Frontiers' and Interim Report	proposal for a directive 'Television without Frontiers'
duration	less than twelve months	less than twelve months
consistency	high	high
decision to propose legislation		
▪ proposition of legislation	✓	✓
▪ deferment	—	—
▪ abandonment	—	—
overall legislative outputs	high	high

Table 5 Legislative outputs produced by the European Commission in the telecommunications sector during the 1980s

	1987 'Green Paper'	liberalisation of terminal equipment	liberalisation of services	Open Network Provision
duration	less than twelve months	less than twelve months	less than twelve months	less than twelve months
consistency	high	high	high	high
decision to propose legislation				
▪ proposition of legislation	✓	✓	✓	✓
▪ deferment	—	—	—	—
▪ abandonment	—	—	—	—
overall legislative outputs	high	high	high	high

Table 6 Central consultative and legislative documents adopted by the European Commission in the audiovisual and the telecommunications sectors during the 1980s

year	sector	type of document	title of document
1983	telecoms	consultative document	Commission Communication on Telecommunications (European Commission 1983b) Commission Communication on Telecommunications – Lines of Action (European Commission 1983c)
	audiovisual	consultative document	Interim Report on Realities and Tendencies in European Television (European Commission 1983a)
1984	telecoms	consultative document	Communication on Telecommunications (European Commission 1984b)
	audiovisual	consultative document	Green Paper on 'Television without Frontiers' (European Commission 1984a)
1986	audiovisual	consultative document	Proposal for a directive 'Television without Frontiers' (European Commission 1986)
1987	telecoms	consultative document	1987 'Green Paper' on Telecommunications (European Commission 1987)
1988	telecoms	consultative document	Follow-up to 'Green Paper' on Telecommunications (European Commission 1988a.)
	telecoms	legal instrument	Commission directive on competition in markets for terminal equipment (Directive 88/301/EC)
1989	telecoms	legislative proposal	Proposal for a Council Directive on implementing ONP (European Commission 1988b)
1990	telecoms	legal instrument	Commission directive on competition in markets for telecommunications services (Directive 90/338/EC)

The following two chapters analyse the second major phase of legislative policy-making that was undertaken by the European Commission in the two sectors. As will be shown, the similar configurations of administrative fragmentation and legislative outputs that were observed for the first stage of policy-making gave way to significant variation between the two policy domains from the early to the mid-1990s. Chapter Four examines the preparation of legislation in the telecommunications sector and shows how low levels of administrative fragmentation enabled the European Commission to produce high legislative outputs. Chapter Five analyses the Commission's legislative activities in the audiovisual field and demonstrates how a significant increase in administrative fragmentation intensified conflict and made the proposition of legislation more difficult.

**Part Two:
The
Refinement
and
Expansion of
the European
Commission's
Legislative
Activities,
1990 – 1996**

Chapter Four: From Collaboration to Partnership – Coordination in the Telecommunications Sector

Introduction

This chapter examines the second major phase of legislative policy-making undertaken by the European Commission in the telecommunications sector. The 1990s mark a decade which fundamentally transformed the telecommunications landscape in the European Union from a situation in which national state monopolies dominated into a liberalised European market for networks and a wide variety of different communications services. Much of this development was shaped by Community legislation.²⁰² The present chapter analyses the efforts undertaken by the Directorates General of the European Commission to prepare this legislation. Having established a telecommunications policy in the late 1980s by means of consultative documents and proposals for several directives that introduced limited liberalisation and regulatory harmonisation in the late 1980s (see Chapter Three), the two participating Commission DGs, DG Telecoms and DG Competition, now sought to refine and expand Community authority.

The chapter shows how within five years, DG Telecoms and DG Competition prepared six important consultative documents setting out the Commission's future course of action and drafted proposals for ten different directives aimed at liberalisation and the extension of ONP (Open Network Provision) respectively. The efforts jointly undertaken by DG Competition and DG

²⁰² E.g. Eliassen and Sjoavaag (1999); Schmidt (1998a); Thatcher (2001).

Telecoms led to legislation designed to liberalise satellite communications, mobile telephony, cable infrastructure and, finally, voice telephony. On the initiative of DG Competition and DG Telecoms, the Commission also prepared several re-regulatory proposals harmonising member states' provisions on a wide range of issues, for example interconnection, universal service, and licensing. The period under study ends concludes with 1996, the year in which the European Commission adopted its directive introducing full competition to voice telephony by 1 January 1998.

Since the relatively low level of administrative fragmentation observed for the 1980s persisted, DG Telecoms and DG Competition were able to continue and intensify their relationship. In spite of their different missions that made DG Competition focus on competition and DG Telecoms concentrate on the promotion of new telecommunications services, alternative networks, and more consumer choice, the two DGs managed to consent on the basic objectives of legislation and on sharing authority for the telecommunications sector. They both envisaged an open and competitive market, the promotion of new services, standardisation and minimum rules regulating issues such as the access to networks and user conditions. It remained undisputed among the two DGs that DG Competition would be responsible for liberalisation and DG Telecoms for re-regulation. Other Commission DGs did not significantly affect policy-making as they were either not interested or simply endorsed the policy strategy pursued by DG Competition and DG Telecoms. Controversy between the two DGs did occur but was limited to the details of legislative initiatives, such as how provisions would balance general competition law and sector-specific regulation.

As in the 1980s, coordination between DG Telecoms and DG Competition was intense and mostly managed by means of informal consultations, a division of policy responsibilities and an exchange of staff. DG Telecoms and DG Competition managed to resolve contentious issues and to supply other Commission actors with detailed legislative drafts. The result was high legislative outputs produced by the European Commission: fast and coherent policy-making that culminated in a large number of decisions to propose Community legislation. The argument emerging from the analysis is that the Directorates

General of the Commission are able to overcome conflict provided that it does not relate to the paradigm of legislation or the division of authority. Low levels of fragmentation enable the DGs to make use of several coordinating activities that help accommodating conflict and therefore make higher legislative outputs more likely.

The structure of the chapter is as follows. A first section analyses the attempts undertaken by DG Competition and DG Telecoms to consolidate existing lines of action established during the 1980s. It is shown how the two DGs used the provisions made in the 1987 'Green Paper' on Telecommunications (European Commission 1987; see Chapter Three) to prepare further legislative proposals. The second section examines the setting of a new policy agenda by means of preparing the 1992 'Review on Telecommunications' (European Commission 1992b) and the drafting of several other consultative documents that prepared the ground for the full liberalisation of telecommunications. Coordination between the two DGs was most intense and effective during this period. The third section analyses the preparation of legislation. It shows that the drafting of these proposals mostly was a process of implementing the compromises achieved during agenda-setting and therefore caused little conflict. A final section will present conclusions on the management of conflict and the course of policy coordination in the European Commission and summarise the dominant configurations of administrative fragmentation and legislative outputs that emerged during the period under study.

The consolidation of existing legislation

The implementation of the 1987 'Green Paper' on Telecommunications

The 1987 'Green Paper' on Telecommunications (European Commission 1987) had set out a long-term approach of combining liberalisation with regulatory harmonisation – a strategy which had come to be accepted by a large

majority of Commission actors (see Chapter Three).²⁰³ Besides the issues of liberalising terminal equipment and advanced telecommunications services, for example facsimile and data communications, and regulating for ONP, the Green Paper referred to other areas of liberalisation and re-regulation. For example, it envisaged the opening of satellite communications and the extension of ONP conditions to leased lines and voice telephony. In the early 1990s, the Directorates General of the Commission engaged in preparing legislation to implement these ideas.

The liberalisation of satellite communications

As indicated in the 1987 'Green Paper' on Telecommunications (European Commission 1987, p. 14), an important issue coming up in the context of liberalising the telecommunications sector was satellite communications. The term 'satellite communications' referred both to the network infrastructure and the provision of satellite-based telecommunications or broadcasting services. As regards its network dimension, the '1987 Green Paper' (European Commission 1987, p. 14) proposed a partial opening of the market in satellite ground stations to competition, particularly for receive-only earth stations. Officials in DG Competition envisaged even more far-reaching liberalisation: by means of legislation private operators ought to be allowed to offer satellite-based telecommunications services in competition with national operators in all member states.²⁰⁴ This view was shared by DG Telecoms that considered the liberalisation of satellite communications an important step on the path to an integrated and efficient telecommunications market. In 1990, the two Commission DGs prepared a Green Paper on satellite communications, a consultative document exploring a liberalisation of the satellite market, with the principal drafting responsibility to be taken by DG Telecoms.

As there was no dissent between DG Competition and DG Telecoms on whether to liberalise satellite communications, the preparation of the Green Paper proceeded in a straightforward manner. Based on a period of pre-

²⁰³ Interview Number 9, Interview Number 16.

²⁰⁴ Interview Number 9, Interview Number 13.

consultations with outside actors and on close co-ordination between the two DGs in their inter-service working groups, DG Telecoms drafted a document text which suggested extending the principles of liberalisation and harmonisation to the satellite market. The document recommended two major changes: first, the unrestricted provision and use of satellite terminal transmission and reception equipment; second, full, equitable, and non-discriminatory access for users to all providers of satellite space capacity. DG Competition and DG Telecoms also called for the separation of regulatory and operational functions of operators with regard to the provision and use of earth and space capacity and suggested a number of harmonisation measures facilitating the provision of Europe-wide services, e.g. mutual recognition of type approval and licences, and the promotion of the development of European standards (European Commission 1990a, p. 120).

Among other Commission DGs, the Green Paper on satellite communications did not prove controversial as they took little or no interest in the document and broadly endorsed its provisions as a logical consequence of the '1987 Green Paper' on telecommunications.²⁰⁵ After less than six months, the draft Green Paper was forwarded to the *cabinets* in a largely unchanged version. There it caused little debate and the European Commission officially adopted the Green Paper on Satellite Communications (European Commission 1990a) in November 1990. The publication of the Green Paper was followed by consultations with external actors and, a little later, the adoption of supportive Resolutions by the Council and the European Parliament.²⁰⁶ In 1991, officials in DG Competition turned towards drafting a Commission directive based on Article 90 which would open satellite communications to competition.²⁰⁷ Its efforts to do so were a direct consequence of its responsibility for advancing liberalisation by means of applying general competition law and therefore

²⁰⁵ Interview Number 13, Interview Number 14, Interview Number 19.

²⁰⁶ Council Resolution of 19.12.1991, 92/C 8/01, Official Journal C8/1, 14.1.1992. European Parliament Resolution, A3-0344/92, Official Journal C42/30, 15.2.1993.

²⁰⁷ Interview Number 9, Interview Number 11, Interview Number 13, Interview Number 14, Interview Number 20.

broadly accepted by the rest of the Commission, including DG Telecoms whose officials made contributions to the drafting of the proposal.

When the draft directive reached a more advanced stage it started travelling through the Commission hierarchy. While the idea of liberalising satellite communications was broadly accepted among a majority of Commission actors, debate arose on its timing. The atmosphere between the Commission and the member states was generally tense at the time, due to member states' opposition against the Commission's use of Article 90 directives to liberalise telecommunications rather than submitting draft legislation for adoption by the Council and the European Parliament.²⁰⁸ Senior policy-makers in DG Competition took the view that the use of the Article 90 procedure would fuel the existing conflict over the adoption of Commission directives and lead to new allegations of the Commission overstepping its competencies. This concern was shared by the Legal Service that had raised doubts over the use of Article 90 in the context of earlier Commission directives (see Chapter Three). A majority of Commission actors therefore decided that the Commission would postpone adopting the directive on satellite liberalisation in order to give member states the opportunity to comment on the Commission's liberalisation plans.²⁰⁹ DG Telecoms and DG Competition arranged that a draft of the directive would be published as an official Commission document before its actual adoption by the Commission as a binding legal instrument. In 1993, the European Commission submitted a draft directive to member states (European Commission 1993b). In terms of its provisions, the draft text was in line with previous versions.²¹⁰ It proposed to abolish the granting of special or exclusive rights in respect of satellite services (with the exception of radio- and television-broadcasting to the public and voice telephony) and those relating to the connection of satellite earth station equipment. The Commission directive would also provide for

²⁰⁸ Interview Number 11, 20. In its rulings of 1991 and 1992, the European Court of Justice upheld the Commission directives on Terminal Equipment and Services. Ruling of 19.3.1991, Case 202/88, Ruling of 17.11.1992, Cases C-271/90, C-281/90, C-289-90. Nevertheless, most member states continued to oppose the adoption of Commission directives. For a discussion see Sauter (1995); Schmidt (1998a, p. 133 ff.).

²⁰⁹ Interview Number 11, Interview Number 20.

²¹⁰ Interview Number 9, Interview Number 11, Interview Number 14.

authorisation procedures applicable in member states to be based on objective, transparent and non-discriminatory criteria. Following consultations with member states and amendments that mainly concerned technical specifications but left the central provisions of the directive intact, the Commission officially adopted the directive in October 1994.²¹¹

The Open Network Provision

In parallel to the efforts designed to liberalise satellite communications, another policy priority of the Commission concerned the consolidation of the ONP conditions. Being the cornerstone of re-regulation, ONP was essentially the domain of DG Telecoms, due to the division of labour previously agreed between DG Competition and DG Telecoms (see Chapter Three). In 1991 and 1992, DG Telecoms prepared two policy proposals for directives applying ONP to leased lines and to voice telephony respectively (European Commission 1991a and 1992a). The ONP proposal on leased lines (European Commission 1991a) of February 1991 harmonised usage conditions, tariff principles, standards and ordering procedures for the provision of leased lines. The ONP proposal on voice telephony (European Commission 1992a) of August 1992 regulated the harmonisation of access and use of networks and services and established user rights for voice telephony services and regulating access to the public telephone network infrastructure and the Community-wide provision of voice telephony services.

As with the first ONP proposal, the preparation of the proposals was based on close collaboration with DG Competition (see Chapter Three). There was little reason for debate between DG Telecoms and DG Competition because they had previously agreed on the substance of ONP legislation, mostly in the context of preparing the '1987 Green Paper' (European Commission 1987, p. 69f.).²¹² Other DGs broadly endorsed their policy priorities and made little or no input to the dossiers. The dossiers passed the formal decision-taking stages

²¹¹ Commission Directive 94/46/EC of 13.10.1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications. Official Journal L268, 19.10.1994, pp. 15-21.

²¹² Interview Number 9, Interview Number 11.

without causing debates or delays. They were adopted less than twelve months after initiation in versions that were largely in line with earlier drafts (European Commission 1991a and 1992a).²¹³ The Council adopted the directive on leased lines in June 1992.²¹⁴ The adoption of the ONP directive on voice telephony failed, due to a lack of agreement between the Council and the European Parliament because the latter voted against the proposal in the fear that users' interests would not be sufficiently protected.²¹⁵

Setting the agenda for full liberalisation

The 1992 'Telecommunications Review'

Following the efforts undertaken by DG Competition and DG Telecoms to consolidate the Commission's approach to the telecommunications sector, the Commission entered a new phase of legislative policy-making in 1992. The existing directives called for a review during 1992 of the conditions under which the telecommunications sector operated in the Community.²¹⁶ The Commissioners responsible, Sir Leon Brittan for Competition and Filippo Maria Pandolfi for Telecommunications, asked DG Competition and DG Telecoms to jointly prepare a consultative document which would review the current situation, examining further opportunities to liberalise telecommunications

²¹³ Interview Number 9, Interview Number 14.

²¹⁴ Council Directive of 5.6.1992 on the application of open network provision to leased lines, Official Journal L165, 19.6.1992, p. 27. The final version of the directive included a number of amendments which were mainly concessions to member states concerning aspects such as the implementation period as well as the specification of procedural details for setting up a cost-accounting system, the conciliation procedure (see European Commission 1992c for detail).

²¹⁵ See Financial Times, 21.7.1994. The Commission submitted a new proposal applying ONP to voice telephony in 1995 (see section three).

²¹⁶ See Article 8 of Council Directive 90/387/EEC on the establishment of the internal market for telecommunications services through the implementation of open network provision and the preambles of Commission Directive 90/388/EEC on competition in the markets for telecommunications services. For an explanatory summary see European Commission (1992b, p. 4f).

services and looking into a more far-reaching harmonisation in the context of ONP.²¹⁷

Between DG Telecoms and DG Competition it was agreed that principal responsibility for the reviewing exercise would be taken by DG Competition, because the emphasis was to be on advancing liberalisation, the domain of DG Competition.²¹⁸ The idea was that the Commission would present an analysis of the current situation in the telecommunications sector together with proposals for future legislation. As a first step, DG Competition commissioned and published two expert studies (Analysis 1992; Arthur D Little 1991). The reports claimed that the expansion of telecommunications markets could only be achieved by liberalisation, arguing that the early introduction of competitive, long-distance intra-Community network operation and service provision were the most effective measures to support. They recommended that liberalisation be combined with the definition of ONP conditions for carriers and service providers and provisions of interconnection.²¹⁹

The assumptions made by Analysis and Arthur D Little corresponded closely to the policy priorities maintained in the Directorate for 'Restrictive Practices, Abuse of Dominant Positions and Other Distortions of Competition I' in DG Competition and the unit 'Regulatory Aspects, Analyses and Studies' in the 'Telecommunications Policy' Directorate in DG Telecoms.²²⁰ In spring 1992, Competition Commissioner Brittan publicly announced that the Commission was examining the possibility of introducing more far-reaching liberalisation, stating that 'on the basis of the current review, the Commission will have the means to close the gap in terms of liberalisation which exists at present between the European telecommunications sector and those of the United States and Japan' (Agence Europe, 23.4.1992). Brittan emphasised that liberalisation was

²¹⁷ Interview Number 16, Interview Number 19, Interview Number 20. Also see, for example, Agence Europe, 22.10.1992, 15.12.1992.

²¹⁸ Interview Number 11, Interview Number 20. Also see Agence Europe, 23.4.1992.

²¹⁹ Interconnection stands for the conditions of access to networks granted by PTOs to users and competitive service providers (European Commission 1987, p. 69). These conditions include, for example, standards and interfaces, tariff principles and the provision of frequencies. For summaries of the studies' recommendations see European Commission (1992b, Annex p.38f.).

²²⁰ Interview Number 9, Interview Number 13, Interview Number 14.

only at an initial stage and by no means complete and that the review currently in progress would not be the last one.²²¹ The drafting of the review proceeded rapidly because DG Competition and DG Telecoms were in basic accordance on the substance of their strategy and resolved debate over the details in the context of intense consultations that took place in their established inter-service working groups, but also between individual Commission officials. Other DGs did not get actively involved to shape the substance of the Commission's approach.²²²

The draft Communication finalised by the two DGs in early summer 1992 reviewed the situation of the telecommunications sector and proposed to abolish the public monopoly for public voice telephony between member states by means of a Commission directive that would liberalise public voice telephony during the second half of 1992.²²³ While the draft document encountered few problems during consultations on DG level, it attracted more serious debate in the *cabinets* and the College of Commissioners. A number of Commissioners were hesitant to support the initiative, finding it premature for the Commission to commit itself firmly to specific guidelines.²²⁴ In their view, the mandate granted to the Commission was to present an assessment document which would set out several possible options for future telecommunications policy rather than explicitly arguing in favour of extending liberalisation. Particularly the liberalisation of voice telephony was considered too ambitious as member states were expected to fundamentally oppose such plans. The College of Commissioners decided that for the time being the Commission would not pursue a strategy of adopting a Commission directive on voice telephony under Article 90, but first consult with outside actors. The Review was therefore to present several options for liberalisation.

²²¹ Agence Europe, 23.4.1992. Communications Week International, 22.6.1992.

²²² Interview Number 11, Interview Number 13.

²²³ Interview Number 11. Agence Europe, 23.4.1992. Communications Week International, 22.06.1992.

²²⁴ Interview Number 19, Interview Number 20. Agence Europe, 3.7.1992, 17.7.1992, 1.10.1992, 14.10.1992, 15.10.1992. Similar observations have been stated by Schmidt (1998a, p. 141).

DG Competition amended the existing draft accordingly.²²⁵ The '1992 Review of the Situation in the Telecommunications Services Sector' (European Commission 1992b), hereafter the '1992 Review', was published in October 1992 and outlined four different options for further policies: a freezing of the liberalisation process; the introduction of extensive regulation of tariffs and investments; the immediate liberalisation of all voice telephony (national and international); and an intermediate step of liberalising voice telephony between member states (1992 Review, p. 25f.). The Review stated clearly the Commission's preference for liberalising as an intermediate step voice telephony between member states (1992 Review, p. 30).²²⁶ Choosing an option which remained behind the most radical solution, i.e. the full liberalisation of voice telephony, reflected a strategic consideration of DG Competition and DG Telecoms.²²⁷ Their intention was to present a solution that would be easier to accept for a majority of Commission actors and outside interests than a more radical reform. Taking a waiting position until the political climate turned more favourable enabled them to circumvent abandoning the aim of full liberalisation and to ensure consistency with their policy priorities.

The '1992 Review' set out an assessment of the current situation in the sector of telecommunications services, arguing that the lines of action set out in the '1987 Green Paper' needed to be further developed in order to fully realise the market's potential. It argued that the technical, market and political context had changed substantially and that the introduction of new technologies such as mobile communications and ISDN remained difficult (e.g. 1992 Review, p. 21).²²⁸ The document reaffirmed that in the context of the internal market, there was a need for both harmonisation and liberalisation, but focused on competition (1992 Review, p. 7). The commitment to balancing liberalisation and harmonisation served to re-affirm the joint authority of DG Competition

²²⁵ Interview Number 11, Interview Number 20.

²²⁶ Also see Agence Europe, 22.10.1992.

²²⁷ Interview Number 9, Interview Number 19, Interview Number 20.

²²⁸ Major bottlenecks were considered to continue to exist: tariffs had not been adjusted sufficiently to costs and remained high (1992 Review, p. 18), there were delays in the offering of new networks and services (1992 Review, p. 21), and there existed a limitation of supply of high-speed lines (1992 Review pp. 21-22).

and DG Telecoms for the telecommunications sector, implying that any future policy initiative would be based on collaboration and their arranged division of labour.²²⁹ The document also set out other fields for which the Commission was considering action, most importantly announcing an examination of the possibility to extend the 'Services Directive' to liberalise mobile communications (Review 1992, p. 35). It also announced that in order to evaluate the use of infrastructures for telecommunications services, DG Competition and DG Telecoms would initiate an exploratory study into the future relationship between telecommunications networks and cable television networks (1992 Review, p. 35). As regards re-regulation, legislation on ONP would be extended in order to ensure efficient and effective interconnection and the implementation of a Community-wide licensing scheme (1992 Review, p. 36).

The commitment to full liberalisation

The 1992 Review served as basis for wide-ranging consultations taking place over a period of six months and organised by DG Telecoms. During consultations a majority of industry actors and member states changed their views towards support of full liberalisation including voice telephony.²³⁰ While consultations were still underway, a new Commission was introduced. In early 1993, Commissioner Pandolfi for Telecoms was succeeded by Martin Bangemann, a German liberal and previously Commissioner for Industry. For Competition, Commissioner Brittan was succeeded by Karel van Miert, a Belgian

²²⁹ Interview Number 14, Interview Number 19.

²³⁰ The Commission received more than 80 written comments from organisations, companies, and individuals. In addition, the consultation involved a series of hearings with more than 130 organisations as well as meetings with the Ad-Hoc High-Level Committee of National Regulators. During consultations it emerged that the impact of technological change, the new dimension of the Internal Market, high telephone charges, the poor use of the infrastructure, and international competition had caused a gradual shift of opinion. Many operators, international firms and business users urged the Commission to adopt a more far-reaching legislative programme realising complete liberalisation (see, for example, Agence Europe, 16.1.1993, 15.4.1993. Financial Times, 2.2.1993, 11. 3.1993). Member states formally endorsed the general aims stated in the 1992 Review, calling on the Commission to prepare before 1 January 1996 proposals for the future regulatory framework for a liberalised telecommunications environment (Council Resolution of 17.12.1992, Official Journal C2/5, 6.1.1993; Agence Europe, 22.11.1992).

Socialist, previously Transport Commissioner. In spite of their different political backgrounds, van Miert and Bangemann agreed on further liberalising telecommunications and supported the activities of DG Competition and DG Telecoms to advance liberalisation.²³¹ DG Competition sought a more active role in applying general competition law (notably Articles 85 and 86) to the telecommunications sector, including rulings on joint ventures and global alliances.²³² The College of Commissioners soon changed its official position towards open support of full liberalisation of voice telephony.²³³ DG Telecoms and DG Competition were tasked to refine the Commission's policy strategy by drafting an official document which would set out central policy objectives, lines of actions and timetables for their implementation.

The process of designing the new policy approach was largely limited to the working groups and personal contacts established between DG Telecoms and DG Competition.²³⁴ Other Commission DGs expressed either no interest in the two DGs' activities or simply endorsed their ideas. DG Competition and DG Telecoms prepared a 'follow-up' Communication to the 1992 Review. Drafted under the main responsibility of DG Telecoms, the document set out an agenda for the liberalisation of telecoms services, including mobile telephony, cable television networks for the provision of telecommunications services, and public

²³¹ Van Miert initiated a broad series of competition cases for various sectors and stood firmly behind the liberalisation of telecommunications. Shortly after having come to office, he stated that the Commission should not carry on with pursuing option four but commit itself to a gradual opening to full competition and the definition of a time schedule. Commissioner Bangemann for Telecommunications and Industry showed himself hesitant at first to call for complete liberalisation, but soon agreed with van Miert, on the condition that there were going to be harmonisation measures, to be drafted under the responsibility of DG Telecoms. See, for example, *Agence Europe*, 29.4.1993, 12.5.1993. *Financial Times*, 19.2.1993, 25.3.1993, 29.4.1993.

²³² *Financial Times*, 19.2.1993, 16.3.1994, 25.3.1993, 15.6.1994. For details of DG Competition's strategy in this area see speech by Herbert Ungerer (1995): 'Identifying how national authorities and the European Union will regulate liberalised telecoms', Address given at 'Investing in European Telecoms Conference', London, 14.2.1995. Speech by Karel van Miert (*Rapid database*, 17.5.1994, SPEECH/94/50). Also see High-Level Group on the Information Society (1994, p. 19). For an overview see contribution of Commission official Haag (1996, p. 120f.). Also see Thatcher (2001).

²³³ Interview Number 9, Interview Number 11, Interview Number 13, Interview Number 14.

²³⁴ Interview Number 13, Interview Number 14, Interview Number 16, Interview Number 19, Interview Number 20. The collaboration between DG IV and DG XIII has been documented in *Agence Europe*, 15.4.1993, 17.4.1993, 22.4.1993, 29.4.1993 and *Financial Times*, 19.2.1993, 10.3.1993, 11.3.1993, 25.3.1993, 29.4.1993.

voice telephony. The drafting process preceded extremely rapidly, the Communication being officially adopted by the European Commission in April 1993, less than three months after the inauguration of the new Commission.²³⁵

As previous drafts the Communication on 'The Consultation on the Review of the Situation in the Telecommunications Sector' (European Commission 1993a) envisaged a consolidation of the existing regulatory environment. It proposed the full implementation of the directives adopted so far and the adoption of pending proposals in the Council. Most importantly, the Commission announced that it would examine the possibility to liberalise mobile telephony and cable television infrastructure for the provision of already liberalised telecommunications services (European Commission 1993a, p. 33f.) and publish Green Papers on these issues. Furthermore, it proposed the opening up of public voice telephony by January 1998. As regards re-regulation, the Communication asked for a common definition of universal service principles, for the development of a framework for interconnection agreements, for the definition of principles for access charges, and for the establishment of independence of telecommunications organisations (e.g. concerning pricing policy). For each step to be taken, the document included closely defined time schedules (European Commission 1993a, Appendix, p. 29).

Within less than a year, DG Competition and DG Telecoms had developed their existing telecommunications policy from a consolidation of the provisions made in the '1987 Green Paper' towards the aim of fully liberalising the sector. During the months to follow, DG Telecoms and DG Competition continued to coordinate their efforts to tackle the liberalisation of mobile telephony, alternative infrastructure and public voice telephony. As a first step, they prepared consultative documents on the different issues of liberalisation that were later followed by the preparation of legislative proposals under the leadership of DG Competition (see section three). Assigning the main responsibility for drafting these documents to DG Telecoms re-affirmed the

²³⁵ Interview Number 13, Interview Number 14, Interview Number 19, Interview Number 20. Financial Times, 25.3.1993.

sharing of authority between the two DGs and served as an important means to reduce conflict and to facilitate coordination.²³⁶ DG Telecoms and DG Competition further intensified their coordination by exchanging several staff between the 'Telecommunications Policy' directorate of DG Telecoms and the responsible unit in DG Competition. This process was gradually underway since the early 1990s.²³⁷ Supported by senior policy-makers in the two DGs, officials considered it useful to improve the information flow between the two DGs and to link the respective units more closely together.²³⁸ For example, Herbert Ungerer, one of the leading policy-makers in DG Telecoms, moved to DG Competition. As regards the actual staff numbers, an uneven balance remained between the DG Competition and DG Telecoms. In DG Competition, only a handful of officials dealt with telecommunications, whereas in DG Telecoms, more than 50 officials were responsible for telecommunications legislation. This difference proved significant as it increased the need for collaboration between the two services: officials in DG Competition continued to rely on their colleagues in DG Telecoms because otherwise they would not be able to cope with the workload.²³⁹ This, in turn, enabled DG Telecoms to shape the agenda of DG Competition on liberalising the telecommunications sector and reduced conflict over authority. The alliance formed between the two DGs more and more developed into a 'partnership' (Interview Number 13) of intense and effective coordination.

The liberalisation of mobile telephony

In the context of preparing the follow-up Communication to the '1992 Review' (European Commission 1993a), DG Competition and DG Telecoms had agreed that the latter would engage in drafting a consultative document on mobile communications. The publication of the Green Paper on mobile and personal

²³⁶ Interview Number 9, Interview Number 11, Interview Number 19, Interview Number 20.

²³⁷ At the time, the division was called 'Electrical and electronic manufactured products, information industries, telecommunications', organised within Directorate B of DG Competition, 'Restrictive Practices, Abuse of Dominant Positions and Other Distortions of Competition I'.

²³⁸ Interview Number 9, Interview Number 11, Interview Number 19, Interview Number 20.

²³⁹ Interview Number 13, Interview Number 19, Interview Number 25.

telephony was scheduled for early 1994 (European Commission 1993a, p. 35). Officials in DG Telecoms' unit 'Regulatory Aspects of Network Access, Satellite Communications, Mobile Communications, and Frequencies' based their preliminary draft text on a number of external studies and consultations with outside actors.²⁴⁰ DG Telecoms then discussed the draft Green Paper with DG Competition. The two DGs shared a preference for full liberalisation of mobile communications. Nevertheless, coordination between them was intense since they did not always agree on the details. For example, they maintained different views concerning the balance between sectoral regulation and the reliance on general competition law. DG Competition wanted as little regulation as possible, whereas DG Telecoms wanted to set up a number of safeguards guaranteeing user rights and the proper functioning of a single European market for mobile telephony.²⁴¹

DG Competition and DG Telecoms discussed most issues in the context of their established working groups and personal networks and were usually willing to compromise. For example, they debated the requirements to be imposed on mobile operators as regards interconnection. DG Telecoms wanted to see interconnection of mobile communications networks covered by an ONP directive and implemented by National Regulatory Authorities (NRAs), whereas DG Competition preferred a minimum of regulatory requirements limiting the powers of NRAs.²⁴² In the course of their consultations the two DGs agreed that NRAs be granted supervision rights over interconnection, but without establishing further directives that would set out more detailed interconnection conditions for mobile communications (European Commission 1994a, p. 28).

The formal inter-service consultations which followed the preliminary consultations between DG Telecoms and DG Competition brought few changes to their strategy, even though a greater number of DGs now expressed an

²⁴⁰ European Commission Press Release IP/94/70, Rapid database, 27.4.1994, European Commission (1994a, p. 153). For a useful summary of the consultations see Higham (1994, p. 706).

²⁴¹ Interview Number 19, Interview Number 20, Interview Number 23, Interview Number 25.

²⁴² Interview Number 19, Interview Number 20, Interview Number 25.

interest in telecoms policy.²⁴³ For example, the DGs for the Internal Market, Industry and Consumer Protection wanted to be consulted on the Mobile Green Paper.²⁴⁴ However, inter-service consultations did not encounter serious difficulties, as these DGs broadly agreed with the priorities set out by DG Competition and DG Telecoms and limited their involvement to rather specific aspects rather than the principles of telecommunications legislation. DG Internal Market shared the approach envisaged by DG Telecoms and DG Competition due to its linkage to the realisation of the single European market. DG Industry had the same Commissioner as DG Telecoms and was therefore generally supportive, whereas DG Consumer Protection shared the concern of DG Telecoms officials to guarantee user rights and made contributions on the issue.

As a consequence, inter-service consultations did not entail delays or significant amendments. The final version of the Green Paper on mobile telephony was submitted to the College of Commissioners after a policy formulation process which had lasted less than a year and was formally adopted in a largely uncontroversial debate in April 1994 (European Commission 1994a).²⁴⁵ The Green Paper asked for amendments to the Services Directive in order to abolish special and exclusive rights for mobile telephony. For a consultative document, the document was considered 'unusually prescriptive' (Financial Times, 28.4.1994). Indeed, DG Telecoms and DG Competition did not intend to open a debate, but saw public consultations as a means 'to confirm validity of the concrete approach presented by the Commission'.²⁴⁶ The Green Paper advocated five major changes: abolishing remaining exclusive and special rights in the mobile telephony sector; the removal of all restrictions on the provision of mobile services; full freedom for mobile network operators to operate and develop their networks; unrestricted and combined offering of services via the fixed and mobile networks; and facilitating pan-European

²⁴³ Interview Number 9, Interview Number 14, Interview Number 19, Interview Number 25.

²⁴⁴ In early 1993, the DG for the Internal Market and DG Industry had been divided into two separate DGs, one for the Internal Market and one for Industry.

²⁴⁵ Interview Number 19. Also see Agence Europe, 27.4.1994.

²⁴⁶ Quoted from Agence Europe, 28.4.1994. Interview Number 14, Interview Number 19.

operation and service provision (European Commission 1994a, Annex D, p. 14of.). The Communication proposed licensing principles for mobile network operators, conditions to be placed on service providers, and provisions for interconnection. It presented an agenda for re-regulation to be achieved by applying the ONP framework to mobile communications, i.e. the principles of equality of access, transparency, non-discrimination and proportionality (European Commission 1994a, p. 36; see section three).

The liberalisation of network infrastructure

Since the publication of the '1987 Green Paper' the underlying principle of Commission action had been the distinction between telecommunications services and networks. A basic agreement on the liberalisation of all telecommunications services including public voice telephony had been settled in the context of preparing the follow-up to the '1992 Review' (European Commission 1993a). Initial attempts had been made to tackle the liberalisation of satellite and mobile communications networks. The next step towards a liberalised telecommunications market was to think about fixed and wireless networks for the provision of telecommunications services, such as cable television (CATV) networks and other 'alternative networks' (e.g. example utility or railway infrastructures). When the Green Paper on mobile communications (European Commission 1994a) was published, DG Competition and DG Telecoms were already circulating drafts of another Green Paper that dealt with the liberalisation of these infrastructures for the provision of telecommunications services. The Commission had committed itself to publish a Green Paper on the issue before 1995 (European Commission 1993a, p. 35).

The 'Telecommunications' unit in DG Competition, organised within Directorate B ('Restrictive Practices, Abuse of Dominant Positions and Other Distortions of Competition I'), argued in favour of a possible use of CATV networks for the provision of telecommunications services and sought to speed up telecommunications liberalisation by allowing operators to set up alternative networks to compete with state monopolies for the provision of

telecommunications services. Possibly, this would include voice telephony even before the agreed deadline of 1998.²⁴⁷ The idea was taken up by DG Telecoms that started to prepare a Green Paper on infrastructures and consulted with DG Competition on its content. The two Commission DGs were in accordance that increased competition in infrastructures would lead to an improvement in the supply of telecoms services in the single market. By a 'gentlemen's agreement' (Interview Number 19), they agreed to share the responsibility for the Green Paper on infrastructure. DG Telecoms would undertake the bulk of drafting work, but collaborate closely with DG Competition.

While there was a high extent of unity between DG Competition and DG Telecoms regarding the substance and details of liberalising infrastructures, the issue attracted debate on the political level of the Commission. The question of allowing the provision of voice telephony ahead of 1998 over alternative networks was particularly controversial because it attracted the opposition from several member states.²⁴⁸ Several *cabinets* disagreed on whether to allow operators to set up alternative networks for voice telephony ahead of the 1998 deadline and on whether to include 'alternative' networks other than CATV networks. Following a compromise on *cabinet* level, DG Competition and DG Telecoms were tasked to leave open in the Green Paper the final decision which infrastructures to liberalise and to await member states' reactions first.²⁴⁹ The Green Paper on Infrastructures would be split up into two parts, part one setting out general principles for infrastructure liberalisation, and part two defining the rules for issues such as licensing, universal service, interconnection and competitive safeguards, and setting timetables for action. Again, DG Competition and DG Telecoms took a waiting position until there would be sufficient support from the political level of the Commission.

As DG Competition and DG Telecoms had already sorted out their position on infrastructures, the preparation of the first Green Paper on infrastructures

²⁴⁷ Interview Number 19, Interview Number 20, Interview Number 25. Also see Financial Times, 16.3.1994, 12.5.1994. Communications Week International, 28.3.1994.

²⁴⁸ Interview Number 19, Interview Number 20. Also see Financial Times, 6.1.1994, 16.3.1994, 12.5.1994, 30.5.1994, 21.6.1994, 28.6.1994, 22.6.1994, 30.8.1994, 23.9.1994, 29.9.1994, 3.10.1994, 17.10.1994, 26.10.1994. European Voice, 12.10.1995, 23.11.1995.

²⁴⁹ Interview Number 20, Interview Number 23.

proceeded rapidly and without any significant delays.²⁵⁰ The fact that other Commission actors were presented with detailed draft texts on which there was a high extent of unity among the two DGs reduced the scope of debate and speeded up the process of formal decision-taking. In October 1994, the European Commission adopted the first Green Paper 'on the Liberalisation of Telecommunications Infrastructure and Cable Television Networks' (European Commission 1994b). The document advocated two stages for action. The first stage foresaw the immediate liberalisation of all existing and licensed networks for the carriage of already liberalised services (European Commission 1994b).²⁵¹ Public voice telephony would remain excluded and action be limited to allow companies to carry their telecommunications services on third party or their own and already authorised infrastructure. The second stage of action would fully liberalise infrastructure, bringing in line the general liberalisation of network infrastructure with the liberalisation of public voice telephony by January 1998. This would allow for the provision of new infrastructure for already liberalised services and the full use of such new as well as existing networks for the provision of public voice telephony, once liberalised (European Commission 1994b, p. 39).

The publication of Part One of the Green Paper was followed by consultations with outside actors that were organised by DG Telecoms. Consultations revealed rising support for infrastructure liberalisation (European Commission 1994d). DG Competition and DG Telecoms turned to drafting the second part of the Green Paper. In parallel with these efforts, DG Competition started to draft a Commission directive based on Article 90(3) which would prescribe a liberalisation of CATV networks for the provision of already liberalised services (see section three).²⁵² As regards the second Green Paper, the intention of DG Competition and DG Telecoms was to set out the

²⁵⁰ Interview Number 11, Interview Number 19.

²⁵¹ For detail see speeches: Ungerer (1995): 'Identifying how national authorities and the European Union will regulate liberalised telecoms', Address given at 'Investing in European Telecoms Conference', London, 14.2.1995; Ungerer (1995): 'Anforderungen an die Telekom-Struktur in Europa', Vienna, 24.5.1995. Also see Commission Press Release, IP/94/1262, 21.12.1994.

²⁵² Agence Europe, 17.11.1994, 18.11.1994, 19.11.1994.

details of how to liberalise and harmonise the provision of infrastructures.²⁵³ The content of the document was agreed by the two Commission DGs in the context of their established working groups and, following a speedy preparation process, passed the formal consultation and decision-making procedures without attracting serious debate.²⁵⁴

In January 1995, the European Commission adopted the final version of the second Green Paper on infrastructures (European Commission 1994d). Stating that the 'liberalisation of communications infrastructure is the single most important step to be taken in the context of European Telecommunications policy' (European Commission 1994d, p. 22), the document confirmed the double approach of harmonisation and liberalisation. By reaffirming the principles of the 1987 Green Paper (notably the balance between liberalisation and a common regulatory framework) it emphasised the consistency of the Commission's approach (European Commission 1994d, pp. 22 and 55). As the first Green Paper on infrastructures, the document left open whether to liberalise alternative infrastructure other than CATV.²⁵⁵ As regards re-regulation, the Green Paper discussed the major issues involved in the future regulation of network infrastructure, addressing additional safeguards required for the stage of full infrastructure liberalisation, such as universal service, interconnection and interoperability, licensing procedures, and competitive safeguards.²⁵⁶

The preparation of legislation

Setting the policy agenda to fully liberalise the telecommunications sector and to complement liberalisation with re-regulation was followed by the preparation of legislative proposals. This process centred on implementing the provisions

²⁵³ Interview Number 19, Interview Number 20. Financial Times, 22.6.1994. Also see speeches given by Herbert Ungerer of DG Competition during 1995 (op cit.).

²⁵⁴ Interview Number 19, Interview Number 20, Interview Number 25.

²⁵⁵ This move represented a concession to member states and interest groups of which a majority were still undecided on whether to support infrastructure liberalisation (European Commission 1995a, p. 23, 25). Interview Number 19, Interview Number 20, Interview Number 25.

²⁵⁶ For useful summaries see Agence Europe, 26.1.1995. Commission Press Release IP/95/61, Rapid 25.1.1995.

DG Telecoms and DG Competition had agreed on earlier. There continued to be a discussion that concerned the details of legislative proposals, for example definitions and technical specificities, but these differences were mostly solved through established modes of coordination that preceded formal inter-service consultations and therefore excluded other DGs and other Commission actors.²⁵⁷ DG Competition and DG Telecoms stuck to their division of work which gave the responsibility for liberalisation to the former and authority for re-regulatory measures to the latter. After consulting each other they presented other Commission DGs and the Legal Service with detailed draft proposals. As the following paragraphs will show, the overall preparation process did not take long and its results reflected most ideas initially expressed by the two DGs.

The liberalisation directives

Under the leadership of DG Competition and DG Telecoms that continued to coordinate their actions in their working groups and even smaller circles, the European Commission envisaged the adoption of three Commission directives according to the Article 90 procedure. These would liberalise mobile telephony, cable TV networks and public voice telephony. Drafts of all these directives were prepared by DG Competition that consulted DG Telecoms on its provisions. The preparation of a directive liberalising cable television networks had been underway in DG Competition even before the two Green Papers on infrastructure had been finalised - in spite of ongoing controversies among member states that concerned whether to bring forward the deadline for infrastructure liberalisation.²⁵⁸ DG Competition intended to grant service providers the opportunity to offer their services over cable television networks, excluding voice telephony. Officials in DG Telecoms and DG Competition made their intentions public, giving speeches and making frequently-quoted contributions to journals and conferences.²⁵⁹ There was no significant conflict

²⁵⁷ Interview Number 19, Interview Number 20, Interview Number 23, Interview Number 25.

²⁵⁸ Interview Number 19, Interview Number 20. Also see Agence Europe, 13.6.1995, 14.6.1995, 25.11.1995. European Voice, 7.12.1995, 21.12.1995, 29.2.1996. Financial Times, 22.12.1994.

²⁵⁹ See, for example, contribution made by Commission officials Haag (1996); Ungerer (1995): 'Identifying how national authorities and the European Union will regulate liberalised

over preparing the draft directive on infrastructure as the two DGs were in accordance on the provisions of the directive and the drafting authority of DG Competition over liberalisation.²⁶⁰

In December 1994, following a rapid and consistent preparation process which had lasted less than six months and had been based on intense coordination among DG Competition and DG Telecoms, the Commission officially adopted a draft Commission directive on the abolition of restrictions on the use of cable television networks (Commission Notice 1995a) - several weeks before Part Two of the Green Paper was published.²⁶¹ The draft directive on liberalising infrastructure enabled the providers of telecommunications services to offer their services over cable television networks (excluding voice telephony). In order to allow consultations that were still underway with member states and outside interests on the Green Papers on liberalising infrastructure finish, the Commission decided not to publish the draft directive before March of the following year. During negotiations with the Council, a majority of member states accused the Commission of moving too fast and behaving undemocratically, urging the Commission to slow down its reform plans. Following lengthy negotiations with the Council, the Commission adopted the final version of the directive in October 1995.²⁶²

The process of preparing the directives liberalising mobile and personal communications as well as the provision of voice telephony followed similar lines. In agreement with DG Telecoms, DG Competition prescribed the

telecoms', Address given at 'Investing in European Telecoms Conference', London, 14.2.1995; Ungerer (1995): 'Regulatory directions for satellite communications in Europe', Address given at 'Intelsat Summit', London, 2.3.1995; Ungerer (1995): 'Anforderungen an die Telekom-Struktur in Europa', Vienna, 24.5.1995; Ungerer (1996): 'Competition in the Information Society - Multimedia', speech delivered at the Annual General Meeting of the 'European MultiMedia Forum', Brussels, 19.11.1996. Also see Sterling (1998).

²⁶⁰ Interview Number 19, Interview Number 20.

²⁶¹ The publication of the draft directive was accompanied by another Commission Communication which explained the Commission's reasons and summarised the results of the public consultations (European Commission 1995a). Also see Rapid, 21.12.1994. In the literature, this has been documented by Preiskel and Higham (1995).

²⁶² Commission Directive 95/51/EC of 18.10.1995 amending Directive 90/388/EEC with regard to the abolition of restrictions on the use of cable television networks for the provision of already liberalised telecommunications services. Official Journal L256, 26.10.1995, pp. 49-54. The inter-institutional negotiations have been documented by Financial Times, 28.11.1995. European Voice, 30.11.1995, 21.12.1995, 29.2.1996.

liberalisation of mobile communications networks and provided for interconnection rules (Commission Notice 1995b).²⁶³ As regards public voice telephony, the Commission published a draft directive providing to oblige member states to liberalise all networks (including alternative infrastructures) and services other than voice telephony from 1996 and provided for the liberalisation of public voice telephony from 1 January 1998 (Commission Notice 1995c). The text also included provisions for licensing voice telephony services and public telecoms networks, numbering conditions, interconnection, and the financing of universal service. In early 1996, the Commission adopted the directives on mobile communications and on full competition.²⁶⁴ The preparation of the three liberalisation directives had proceeded without causing much debate in the European Commission, their content reflecting closely the ideas maintained by DG Competition and DG Telecoms.

Re-regulation: Updating and expanding ONP

The second cornerstone of the Commission's telecommunications policy was the establishment of a legislative framework regulating issues such as the access to networks and user conditions. While the liberalisation of the telecommunications sector was primarily directed by DG Competition, DG Telecoms acted as the main architect of harmonisation and re-regulation.²⁶⁵ In order to make their policies as coherent as possible, the two DGs stuck firmly to their previously arranged division of labour and their common practice of consulting each other.²⁶⁶ They had jointly worked out the objectives of re-

²⁶³ Financial Times, 20.7.1995. Also see Commission MEMO/95/158, 27.11.1995.

²⁶⁴ Commission Directive 96/2/EC of 16.01.1996 amending Directive 90/388/EEC with regard to mobile and personal communications and Commission Directive 96/19/EC of 13.3.1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets. Official Journal L074, 22.3.1996, pp. 13-24. In its final version, the directive on mobile communications had been amended slightly in order to specify technical specifications, the conditions to be placed on operators in licensing procedures and use of the frequencies, as well as the conditions for the granting of additional transition periods. Similarly, the final version of the directive on full competition incorporated amendments specifying the wording of its provisions without changing its substance.

²⁶⁵ See Kiessling and Blondeel (1998). Agence Europe, 27.2.1996. Financial Times, 12.9.1996.

²⁶⁶ Interview Number 13, Interview Number 19, Interview Number 20, Interview Number 23, Interview Number 25.

regulation in the context of preparing previous consultative papers, including installing safeguards to guarantee universal service, interconnection and interoperability (see section two). The drafting of legislative proposals for adoption by the Council and the European Parliament ran in parallel with the preparation of the liberalisation directives. DG Telecoms and DG Competition shared the basic guidelines aimed at creating a harmonised market, but differed as regards the details of how to realise it. Dissent mainly emerged on the balance between general competition law and sector-specific regulation. However, due to established patterns of collaboration, the two DGs were able to manage the process of policy coordination without getting entangled in more serious conflicts that would result in delays or fundamental changes of strategy.

The unit responsible in DG Telecoms' Directorate 'Telecommunications Policy' advocated detailed harmonisation measures and a comprehensive regulatory framework which would address issues such as interconnection and universal service, as well as the convergence between telecommunications and television broadcasting.²⁶⁷ Their approach centred on a flexible framework drawing on the basic principles of proportionality, transparency, non-discrimination and fair competition set out in the ONP framework.²⁶⁸ DG Competition officials tended to prefer less re-regulation than DG Telecoms. They feared that DG Telecoms would listen too much to member states' concerns because of the need to obtain approval for the harmonisation measures from the Council and the European Parliament. The unit in DG Competition was also anxious that DG Telecoms would introduce provisions contradicting the provisions of the liberalisation directives adopted. Still, there were no serious problems because DG Competition and DG Telecoms showed themselves willing to compromise in the context of their consultations.²⁶⁹ In the end, the two Directorates General arrived at solutions they both considered acceptable. As with their activities on liberalisation, the efforts taken by the two

²⁶⁷ See contribution by Commission officials Haag and Schoof (1994). Interview Number 9.

²⁶⁸ See Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision. Official Journal L192, 24.7.1990, pp. 1-9.

²⁶⁹ Interview Number 13, Interview Number 14, Interview Number 16, Interview Number 19, Interview Number 20.

DGs to draft legislation were greatly helped by the fact that they had worked out many details of legislation in the context of drafting previous consultative documents (e.g. European Commission 1992b; European Commission 1994b and d).²⁷⁰

The drafts underwent formal inter-service consultations without causing problems as other Commission services broadly endorsed them. The discussion at *cabinet* and Commissioners level was based on detailed draft texts on which there was a high level of unity among the administrative services.²⁷¹ Debate was therefore limited to technical details and definitions. In February 1995, the Commission adopted a proposal on the application of ONP to voice telephony (European Commission 1994e). This move prompted the termination of the procedure for the earlier proposal on the issue and incorporated most of the amendments made by the Council and the European Parliament in the earlier procedure (see section one). The proposal aimed at establishing the rights of users of telephone services, ensuring open and non-discriminatory access to the telephone network for all users (including service providers), and enhancing the Community-wide provision of voice telephony services (European Commission 1994e, p. 2). The directive applying ONP to voice telephony was adopted in its final version by the Council and the European Parliament in December 1995.²⁷²

As regards interconnection, another proposal on ONP was envisaged for the end of 1995, but then deliberately adopted six months earlier in order to make its publication co-incide with the adoption of the draft Commission directive on full competition prepared by DG Competition (Commission Notice 1995c;

²⁷⁰ For example, the Green Papers on Infrastructure had already established the principles of regulatory action for interconnection, interoperability and licensing, e.g. the restrictions defining the scope of licensing procedures and conditions. The Green Paper on mobile telephony (European Commission 1994a) had presented a detailed agenda for application of the ONP framework to mobile communications. The Commission proposed licensing conditions for mobile network operators, to be based on objective grounds, to be transparent, non-discriminatory, and to respect the principle of proportionality, and service providers, set out interconnection rules, and recommended that mobile network operators be allowed to install, use and share their own transmission infrastructure (European Commission 1994a, pp. 25-30).

²⁷¹ Interview Number 19.

²⁷² Directive 95/62/EC of the European Parliament and of the Council of 13.12.1995 on the application of ONP to voice telephony. Official Journal L321, 30.12.1995.

European Commission 1995b). Intended to reinforce the coherence of the Commission's policy strategy, this move serves as another indicator of the efficient collaboration between DG Telecoms and DG Competition.²⁷³ The proposal (European Commission 1995b) established a regulatory framework securing interconnection and interoperability, i.e. the linking of facilities of organisations providing telecoms networks and/or services, including universal service contributions, and requirements for non-discrimination and transparency. As regards licensing, the Commission acted by formally adopting a proposal for a directive in November 1995 (European Commission 1995c). The proposal set out an authorisation regime which would supervise access to the market and monitor compliance with the requirements imposed on operators. Covering both telecoms services and infrastructures it would prescribe the principles of objectivity, transparency, non-discrimination and proportionality. A compromise was made to adopt general rules rather than establishing a system of prior individual licensing (European Commission 1995c, p. 5).²⁷⁴

During 1996, the Commission prepared two more proposals on adapting the regulatory framework to the fully liberalised environment (containing provisions such as legally separating NRAs from telecoms operators), and the application of ONP to voice telephony and universal service (European Commission 1995d and 1996a). For universal service the Commission identified definitions and objectives.²⁷⁵ The proposals underwent inter-

²⁷³ Interview Number 13, Interview Number 14. Also see European Commission Memo, MEMO/95/158, 27.11.1995.

²⁷⁴ Interview Number 20.

²⁷⁵ According to this definition, the provision of universal service would follow the principles of transparency, non-discrimination and proportionality and be based on a minimum set of offerings that should be available on a Community basis. Universal service obligations would be limited to the dominant operators. The funding of universal service was to be based on access charges involving financial transfers between dominant operators and new market entrants (European Commission 1996b). The Commission showed itself flexible in regard to the definition and financing of universal service, emphasising that it was a dynamic and evolving concept. See Agence Europe, 14.3.1996, 20.4.1996.

institutional procedures in the Council and the European Parliament and were adopted in October 1997 and February 1998 respectively.²⁷⁶

Conclusion

In 1996 the European Commission concluded a period during which it adopted three major directives designed at fully liberalising the telecommunications sector and proposed a comprehensive re-regulatory framework (see the tables in the Appendix). The evolution of these measures that were to fundamentally transform European telecommunications markets was founded on the close collaboration of two Commission DGs, DG Competition and DG Telecoms. The chapter has shown how a relatively low level of administrative fragmentation enabled the Commission to produce high legislative outputs by acting rapidly and consistently and proposing several pieces of legislation.

In the early 1990s, the administrative fragmentation of the Commission in the telecommunications sector developed along lines similar to those of previous years (see Table 7). Only two Directorates General actively engaged in shaping the Commission's legislative strategy: DG Competition with its focus on liberalisation and DG Telecoms that sought to create a regulatory environment attracting investment and promoting new services and technologies. Both DGs saw a need to further expand existing telecommunications legislation and were in accordance on continuing the combination of liberalisation with re-regulation. With few differences on the paradigm of legislation and broad agreement on the allocation of authority, the two DGs were able to continue and intensify their collaboration. Other Commission DGs largely kept out of the preparation process as they were either not interested or simply endorsed the policy priorities advocated by DG Competition and DG Telecoms.

²⁷⁶ Directive 97/51/EC, 06.10.1997, amending Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications. Official Journal L295, 29.10.1997, pp. 23-34. Directive 98/10/EC, 26.2.1998, on the application of ONP to voice telephony and on universal service in a competitive environment. Official Journal L101, 1.4.1998, pp. 24-47. For an overview of the directives' provisions see, for example, Sandholtz (1998); Sauter (1997); Thatcher (1999).

Table 7 Indicators of administrative fragmentation in the telecommunications sector from 1990 to 1996

	liberalisation of satellite communications and consolidation of ONP	'1992 Review'	consultative papers on liberalisation	liberalisation directives	proposals for re-regulation (ONP)
number of DGs	two	two	two	two	two
differences on paradigm	low	low	low	low	low
competition for authority	low	low	low	low	low
overall level of adm. fragm.	low	low	low	low	low

From 1990 to 1996, DG Competition and DG Telecoms engaged in three broad policy projects: first, a consolidation of existing legislation and the implementation of the provisions of the 1987 'Green Paper' on Telecommunications (European Commission 1987), achieved by the liberalisation of satellite communications and the extension of the ONP framework; second, the setting of a policy agenda which proposed the liberalisation of telecommunications services (including voice telephony) and networks by 1 January 1998 to be combined with re-regulatory efforts; third, the implementation of this agenda by means of preparing legislation. It would be wrong to assume that there was at no point disagreement emerging between the two DGs. Conflict did occur, but it was limited to the issue of how to achieve the right balance between market opening and sector-specific regulation. In this context DG Telecoms usually argued in favour of detailed re-regulation and DG Competition preferred to rely on applying general competition law. The two DGs coordinated intensely, usually by consulting each other in their quasi-institutionalised working groups and through personal contacts. Their relationship was further intensified by an exchange of staff intended to improve information flows and to make more efficient use of each others' expertise. Coordination was also greatly facilitated by dividing the authority over telecommunications between the two DGs. DG Competition held primary responsibility for liberalisation and accepted the contributions made by DG Telecoms in the context of drafting consultative documents on the issue. DG

Telecoms, in turn, was in charge of re-regulation on which it consulted DG Competition. The coordinative activities employed by DG Competition and DG Telecoms were the result of deliberate action rather than a consequence of obligatory rules. Through them the two Commission DGs were able to overcome their differences and to arrive at compromises they both considered acceptable.

Coordination among DG Telecoms and DG Competition was most intense in the context of drafting the consultative documents that preceded the preparation of legislation. It was at these occasions that the two DGs resolved controversy over the details of legislation. The actual drafting of legislation usually centred on implementing the provisions they had previously agreed on. DG Competition and DG Telecoms developed detailed draft texts before discussing them in larger and more 'formalised' arenas of the Commission, for example the obligatory inter-service consultations that included other DGs. This enabled them to reduce debate and to keep conflict at a low level. As a result, the legislative outputs produced by the Commission were high (see Table 8). The setting of agendas and preparation of legislative proposals proceeded rapidly and left few gaps between initial policy drafts and finalised versions adopted on the Commission's administrative and later the political level. The Commission took a large number of decisions to propose legislation, indicated in six consultative documents and implemented by ten pieces of legislation (see Table 9, Table 10 and Table 11). The Commission sometimes deferred the proposition of legislation, but this was due to conflict that emerged on the political level of the Commission rather than dispute between the relevant units of DG Competition and DG Telecoms. The two DGs remained unified on the contentious issues, took a waiting position until the political climate turned more favourable and proceeded rapidly as soon as it did. An interesting conclusion which can be drawn from this is that even though conflict at the political level of the Commission made the taking of formal decisions more difficult, the Commission's capacity to produce legislative outputs did not reduce significantly due to a high extent of unity at the administrative level.

Table 8 Legislative outputs produced by the European Commission in the telecommunications sector from 1990 to 1996

	liberalisation of satellite communications and consolidation of ONP	'1992 Review'	consultative papers on liberalisation	liberalisation directives	proposals for re-regulation (ONP)
duration	less than twelve months	less than twelve months	less than twelve months	less than twelve months	less than twelve months
consistency	high	high	high	high	high
decision to propose legislation					
▪ proposition of legislation	✓	✓	✓	✓	✓
▪ deferment	—*	—*	—	—	—
▪ abandonment	—	—	—	—	—
overall legislative outputs	high	high	high	high	high

* As has been shown, postponing the decision whether to propose legislation was primarily due to debate which emerged on the political level of the Commission rather than conflict on the administrative level.

The following chapter contrasts the patterns of fragmentation and coordination that were observed for the telecommunications sector from 1990 to 1996 with the situation which prevailed in the audiovisual field during the same period. In the audiovisual sector much higher levels of administrative fragmentation emerged, due to a significant increase of the number of DGs that engaged in preparing legislation and the differences between them. Chapter Five will show that this high level of fragmentation made policy coordination among the participating DGs quite difficult and how it resulted in considerably lower legislative outputs, i.e. policy-making that was slow, incoherent and characterised by deferment, the abandonment of legislative initiatives and only few decisions to propose legislation.

Tables

Table 9 Major 'Green Papers' and other consultative documents published by the European Commission in the telecommunications sector from 1990 to 1996

year	title of document	DG with formal drafting responsibility
1990	'Towards European-wide systems and services – Green Paper on a common approach in the field of satellite communications in the European Community' (European Commission 1990a)	DG Telecoms
1992	'1992 Review of the situation in the telecommunications sector' (European Commission 1992b)	DG Competition
1993	'Communication on the consultation on the Review of the situation in the telecommunications sector' (European Commission 1993a)	DG Telecoms
	'Developing universal service for telecommunications in a competitive environment' (European Commission 1993d)	DG Telecoms
1994	'Green Paper on a common approach in the field of mobile and personal communications in the European Community' (European Commission 1994a)	DG Telecoms
	'Green Paper on the liberalisation of telecommunications infrastructure and cable television networks: Part One, Principles and Timetable' (European Commission 1994b)	DG Telecoms and DG Competition
1995	'Green Paper on the liberalisation of telecommunications infrastructure and cable television networks: Part Two' (European Commission 1994d)	DG Telecoms and DG Competition
	'Communication on the consultation on the Green Paper on the liberalisation of telecommunications infrastructure and cable television networks' (European Commission 1995a)	DG Telecoms and DG Competition
1996	'Communication on universal service for telecommunications in the perspective of a fully liberalised environment' (European Commission 1996b)	DG Telecoms

Table 10 Liberalisation: European Commission directives adopted by means of Article 90 between 1990 and 1996

year	directive
1994	Commission Directive 94/46/EC of 13.10.1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications
1995	Commission Directive 95/51/EC of 18.10.1995 amending Directive 90/388/EEC with regard to the abolition of restrictions on the use of cable television networks for the provision of already liberalised telecommunications services
1996	Commission Directive 96/2/EC of 16.01.1996 amending Directive 90/388/EEC with regard to mobile and personal communications Commission Directive 96/19/EC of 13.03.1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets.

Table 11 Re-regulation: European Commission legislative proposals adopted between 1990 and 1996

year	European Commission proposal
1991	Proposal for a directive on the application of ONP to leased lines (European Commission 1991a)
1992	Proposal for a directive on the application of ONP to voice telephony (European Commission 1992a)
1994	Proposal for a directive on the application of ONP to voice telephony (European Commission 1994e)
1995	Proposal for a directive on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of ONP (European Commission 1995b) Proposal for a directive on a common framework for general authorisations and individual licences in the field of telecommunications services (European Commission 1995c) Proposal for a directive amending Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications (European Commission 1995d)
1996	Proposal for a directive on the application of ONP to voice telephony and on universal service in a competitive environment (European Commission 1996a)

Chapter Five: Battles and Conflict – Coordination in the Audiovisual Sector

Introduction

The present chapter analyses the activities of the European Commission to prepare audiovisual legislation from 1990 to 1996. The 1990s marked a decade during which the audiovisual sector in Europe underwent fundamental changes. As in telecommunications, these were first and foremost triggered by technological developments. The arrival of satellite and cable transmission as well as digital technology offered better picture quality and a variety of new kinds of audiovisual services (e.g. pay-per-view, video-on-demand, and teleshopping).²⁷⁷ Linked with these challenges, another big change concerned the increasing regulatory dimension brought about through EU-level legislation.²⁷⁸ During its second major phase of legislative policy-making, the European Commission pursued several initiatives. The chapter examines how its Directorates General developed consultative documents and legislative proposals around three cornerstones: the regulation of television standards, legislation on media ownership, and a revision of the existing directive on

²⁷⁷ This has been documented in the literature. See, for example, Dyson and Humphreys (1988); Cawson and Holmes (1995); Goldberg et al. (1998).

²⁷⁸ See, for example, Dai (1996a); Goldberg et al. (1998); Humphreys (1996).

'Television without Frontiers' (see Chapter Three). These three big themes were pursued largely independently from each other and at different times.²⁷⁹

The findings of the chapter suggest that the situation of administrative fragmentation observed for the 1980s greatly changed in the early 1990s. While fragmentation remained fairly stable in the telecommunications sector (see Chapter Four), it increased significantly in the audiovisual field. Most importantly, the number of Commission DGs that sought to actively participate in preparing legislation doubled from two to four. Apart from DG Culture and DG Internal Market, two other DGs joined the policy arena: DG Competition and DG Telecoms. These two DGs gradually increased their interest in defining the objectives and provisions of audiovisual legislation, particularly DG Telecoms that sought to advance its vision of the global 'Information Society' in which the self-regulating forces of the market would make most regulation unnecessary. DG Competition wanted to strengthen its powers to implement competition law to media mergers and joint ventures, preferring case-specific action rather than detailed sectoral regulation. DG Culture with its established responsibility for audiovisual issues continued to promote European programme and production industries and sought to regulate new audiovisual services (e.g. video-on-demand or pay-per-view) in a way similar to traditional free-to-air broadcasting. DG Internal Market aimed at further developing the single audiovisual market, based on a legislative framework that combined liberalisation with minimum rules.

The different missions and outlooks on audiovisual issues held by an increasing number of DGs not only meant that the policy arena was crowding, but also that the coordination among DGs was characterised by far greater levels of conflict. The four DGs differed on the objectives of Community legislation, for example whether and to which extent market opening should be combined with sector-specific rules, and sometimes even on the actual need for it. Fragmentation further increased due to the fact that the DGs tended to

²⁷⁹ The legislative efforts taken by the Commission on the first two themes of regulation started around 1990, whereas the revision of 'Television without Frontiers' did not begin before 1993. For television standards and 'Television without Frontiers', the preparation of legislation was concluded by 1995, whereas the initiative on media ownership lasted until 1997.

compete for authority over audiovisual issues. DG Culture and DG Internal Market initially reaffirmed their arranged division of labour and authority (see Chapter Three), but conflict arose when DG Culture took over the responsibility from DG Internal Market for revising the 'Television without Frontiers' directive and thereby increased its influence at the expense of the latter. A situation of even greater rivalry occurred when DG Telecoms sought to expand its control over communications- and media-related issues, notably by defining a new regulatory approach for the audiovisual sector. This questioned the established authority of other DGs, particularly that of DG Culture. DG Competition largely kept out of competing for more influence because its interest in audiovisual issues was limited to ensure that sector-specific regulation did not develop at the expense of its existing powers to implement competition law.

The evidence presented in the chapter reveals that the high levels of administrative fragmentation that emerged in the audiovisual field in the early 1990s made policy coordination among the Commission DGs rather difficult to manage. Due to the large number of DGs and the differences between them, identifying policy problems and finding solutions was a complicated process. Because the four DGs often saw themselves unable to agree in the context of consulting each other, delays and changes to the Commission's official strategy frequently occurred. Conflict was not resolved but persisted and intensified. The Commission frequently deferred its decision whether to propose legislation and once even abandoned an important legislative initiative altogether. In spite of the intense activities of the DGs to prepare legislation, few pieces of legislation were actually proposed: two proposals on regulating television standards and the revision of the 'Television without Frontiers' directive.

The findings of the chapter suggest that whether Commission DGs manage to resolve conflict and disputes that emerge in the context of legislative policy-making crucially depends on the level of administrative fragmentation. The greater the number of participating DGs, the greater their differences on the paradigm of legislation and the fiercer their competition for influence and control, the more difficult is the management of policy coordination. Since high levels of fragmentation render many coordinative activities ineffective it is

extremely difficult for the Commission DGs to settle their conflicts, concerning for example the details of legislation. The more conflict persists and intensifies, the lower the legislative outputs produced by the European Commission.

The chapter is organised in four parts. The first part analyses the preparation of legislation on television standards. It shows how fragmentation among the DGs for Telecoms, Culture, Competition, and Internal Market and Industrial Affairs affected the course of policy formulation and made policy coordination difficult to manage. From 1993 when DG Telecoms changed its policy agenda and other DGs reduced their interest in the dossier fragmentation reduced and legislative outputs increased. The second part of the chapter examines the preparation of consultative documents and a legislative proposal to regulate media ownership. The dossier attracted the interest of four different DGs that engaged in conflicts both over the content of a possible legislative initiative and over the question of which DG would lead the preparation process. As a consequence, policy coordination was extremely difficult and resulted in low legislative outputs that culminated in the abandonment of the initiative. The third part analyses the revision of the 'Television without Frontiers' directive. It shows how the dossier attracted Commission DGs that diverged fundamentally over the paradigm of legislation and authority. A concluding section brings together the evidence gathered from the three sections and assesses dominant situations of administrative fragmentation and legislative outputs, linked with insights on the patterns of policy coordination that emerged during the period under study.

The regulation of television standards

The European Commission's attempts to establish European-wide standards for the transmission and reception of television broadcasting date back to the 1980s when the Community started to provide substantial R&D resources for developing a European broadcasting standard. This was mainly achieved through the EUREKA project, a collaborative research programme.²⁸⁰

Community institutions widely agreed that undertaking efforts towards a

²⁸⁰ For an overview see, for example, Peterson (1993).

European broadcasting system would give Europe a better chance in the international struggle for the domination of television technologies.²⁸¹ The regulation of television standards was therefore widely accepted as part of EC industrial policy.

Up until the 1980s, the dominant standard used for the transmission and reception of terrestrial broadcasting in Western Europe was the traditional PAL/SECAM system. The arrival of satellite technology and distribution by direct broadcasting by satellite (DBS) which also operated using PAL or SECAM made it possible to carry high quality images, or High-Definition-Television (HDTV). However, HDTV required more bandwidth than provided by existing standards. Firms therefore decided to use a new transmission standard, known as MAC (Multiplex Analogue Component). Consumers would have to buy satellite dishes and set-top decoders to receive satellite television and to convert MAC into the existing PAL/SECAM format in order to receive the signals at all - and also entirely new television sets if they wanted to view them in improved HDTV quality.

The success of HDTV strategically depended on whether broadcasters would use MAC rather than PAL/SECAM technology for transmission. To achieve this end, the Council of Ministers passed a directive in 1986 making the use of MAC compulsory for all direct-to-home satellite broadcasting using high power satellite transponders.²⁸² EUREKA had developed a specific European broadcasting norm for MAC, called HD-MAC. HD-MAC stood for an evolutionary approach because it would not make existing TV sets obsolete as did the Japanese standards and could be implemented by an interim norm called D2-MAC which was receivable by traditional and new wide-screen

²⁸¹ See Dai (1996); Cawson and Holmes (1995); Kaitatzi-Whitlock (1996); Peterson (1993).

²⁸² Council Directive 86/529/EEC of 3 November 1986 on the adoption of common technical specifications of the MAC/packet family of standards for direct satellite television broadcasting. Official Journal, L311/28, 6.11.1986. The MAC Directive was backed by two Council Decisions mainly designed to complement the implementation of the European HDTV strategy. Council Decision 89/630/EEC of 27.4.1989 on common action by member states to promote the adoption of a single world standard for the production of HDTV by the plenary assembly of the International Radio Committee in 1990. Official Journal L142, 25.5.1989, p. 1. Council Decision 89/337/EEC of 7.12.1989 on High-Definition Television. Official Journal L363, 13. 12. 1989, p. 30.

television sets that operated according to the 16/9 format.²⁸³ However, the 1986 Directive largely failed in achieving its purpose, mainly due to its vague formulations. Start-up satellite broadcasters in Europe did not transmit from the high-powered satellites the Directive referred to, but instead broadcast programmes on medium-powered telecommunications satellites enabling them to use the normal PAL system.²⁸⁴ Operators were therefore able to strategically circumvent regulation. Also, rather than paying the premium for MAC decoders offering higher picture quality, consumers preferred the simpler and cheaper PAL services offered by traditional broadcasts. Instead of a unified standard, the directive had produced a double market in which the traditional PAL/SECAM standards co-existed with the new, but rarely used HDTV standards.

The first directive

Setting the policy agenda

The 1986 'MAC directive' expired at the end of 1991. This prompted the European Commission to initiate a revision exercise in early 1990. Responsibility for preparing legislation on television standards was taken by DG Telecoms as part of its authority for the overall communications sector and, more specifically, its responsibility for the Eureka project and the technical aspects of communications policy.²⁸⁵ This was broadly accepted by other Commission DGs. A division called 'Telecommunications and Broadcasting' was set up within the directorate for telecommunications policy that had been responsible for preparing legislation to liberalise and re-regulate telecommunications thus far (see Chapters Three and Four).

²⁸³ See, for example, Dai (1996a); Peterson (1993).

²⁸⁴ In this context, the so-called 'BskyB Affair' in the UK in 1990/91 was the most serious backlash for the Community's MAC strategy. Rupert Murdoch's Sky Channel continued to broadcast in PAL using the Astra satellite which operated on low power and frequencies and therefore fell outside the scope of the MAC Directive. When Sky was merged with the BSB channel that had broadcast using the MAC system to form 'BskyB', broadcasting continued exclusively on PAL basis. For an overview see Dai (1996); Dai et al. (1994); Peterson (1993).

²⁸⁵ Interview Number 5, Interview Number 12.

The central concern in DG Telecoms was to promote the definition and implementation of a European broadcasting norm, preferably by proposing an extension of the existing MAC Directive to include HD-MAC as the sole standard.²⁸⁶ According to DG Telecoms, this would serve to remove the existing legal uncertainty and to fulfil the aim of building up a specifically European system for High-Definition-Television (HDTV).²⁸⁷ Its main intention was to make the use of MAC standards more binding for all satellite types and to avoid the 'loopholes' that had caused the problems in implementing the 1986 MAC Directive. For DG Telecoms, the revision of the MAC Directive represented a 'routine standardisation exercise' (Interview Number 5), but also a window of opportunity through which the DG could further consolidate its position within the Commission.²⁸⁸

Apart from DG Telecoms, three other DGs sought to participate in revising the existing directive: first and foremost DG Culture and, to a more limited extent, the DGs for Competition as well as Internal Market and Industrial Affairs. Officials in DG Culture considered the issue of television standards being part of their domain to prepare legislation on audiovisual issues.²⁸⁹ DG Culture principally welcomed a strengthening of existing provisions (European Commission 1990b, pp. 29-33). Its priority was to grant a transition period for simulcast in old (i.e. PAL) and new (i.e. MAC) standards to be followed by a deadline for all satellite broadcasters to use the MAC standard rather than prescribing the use of a new standard straightaway as envisaged by DG Telecoms.²⁹⁰ The main intention behind this was DG Culture's interest to ease the financial burden occurring for broadcasters and consumers because of the new standard. The interest of DG Competition and DG Internal Market and

²⁸⁶ Interview Number 5. Similar observations have been stated by Dai (1996a).

²⁸⁷ Besides, equipment manufacturers were to be encouraged to invest in the new technology by means of support programmes and voluntary industry agreements. For an overview see, for example, Kaitatzi-Whitlock (1996).

²⁸⁸ Interview Number 5, Interview Number 12.

²⁸⁹ Interview Number 5, Interview Number 12.

²⁹⁰ Interview Number 5, Interview Number 12, Interview Number 21. Also see Agence Europe, 28.2.1990, 10.6.1990, 13.7.1990. Unpublished Commission document. 'Objet: Stratégie pour l'introduction de la TVHD en Europe – Suites à donner aux travaux du groupe interservice', Note à l'attention prepared by DG Culture, 21.1.1991.

Industrial Affairs to shape the revision process was initially less marked than that of DG Culture, but would prove significant when drafting reached a more advanced stage (see below).

Agenda-setting started in 1990 when DG Telecoms undertook efforts to make the Community commit itself to a strengthening of the existing MAC directive. Since DG Telecoms regarded the revision a routine exercise, it did not consider it necessary to first prepare a consultative document which would explore different options of legislative action.²⁹¹ Instead, it turned straightaway towards drafting a revised directive. It produced a number of internal working documents to serve as basis for consultations with outside actors and other Commission DGs. In these documents, DG Telecoms stated that in order to create an appropriate framework for the European-wide introduction of High Definition Television (HDTV), the Commission would have to propose to reinforce standards by means of revising the existing MAC directive.²⁹² DG Telecoms committed itself to put forward a proposal for a revision during the second half of 1990.

The preparation of legislation

DG Telecoms faced an environment in which the substance of its policy approach, i.e. the strengthening of regulation on television standards, was watched with scepticism by several DGs: DG Culture, DG Competition and DG Internal Market and Industrial Affairs. While DG Telecoms and DG Culture basically agreed that the European system of HDTV needed a strengthening by means of regulation, they had less common ground on both the objectives and the details of legislation. DG Culture that was mainly concerned about the programming and production industry tended to be sceptical about what it

²⁹¹ Interview Number 5.

²⁹² Unpublished Commission documents. 'High Definition Television – Elements of a Strategy for Europe', approved by the Commission in its meeting of 16.11.1988. 'Paper on HDTV for Meeting of Commissioners on Audiovisual Policy', note prepared by DG XIII, dated 17.1.1989. Unpublished draft of European Commission (1990c), dated 3.4.1989.

considered the 'technology-driven' approach of DG Telecoms.²⁹³ It accused DG Telecoms of being 'in the companies' pockets' (Interview Number 12), particularly in those of the manufacturing firms. While DG Culture argued in favour of permitting the simulcast of services in old and new standards during a transition period, DG Telecoms favoured a more radical approach, prescribing D2-MAC as an interim standard to be replaced by HD-MAC. In the view of DG Telecoms, this would encourage the European manufacturing industry, i.e. companies such as Thomson and Philips, to increase their share in producing consumer electronics, and therefore increase investment in the European Community.²⁹⁴ DG Culture, in turn, warned that a costly compulsory standard would cause unnecessary burdens to be placed on the television production industry and the broadcasters. Further conflict arose due to the interest taken by two other Commission DGs: DG Competition and DG Internal Market and Industrial Affairs. DG Competition took little interest in influencing the details of the dossier, but spoke clearly against regulation which would in any way restrict the free market and which it considered 'excessive' (Interview Number 12).²⁹⁵ Similarly, DG Internal Market and Industrial Affairs supported to revise the existing directive, but favoured a less strict regulatory approach than DG Telecoms because it wanted to encourage investment in the consumer electronics industry.²⁹⁶

During the second half of 1990, DG Telecoms circulated informal drafts of a revised proposal for the MAC directive among interested Commission DGs. These drafts prescribed D2-MAC as an interim standard to be replaced by HD-MAC. No agreement could be reached on their central provisions. DG Competition and DG Internal Market and Industrial Affairs expressed

²⁹³ Unpublished Commission document. 'Objet: Stratégie pour l'introduction de la TVHD en Europe – Suites à donner aux travaux du groupe interservice', Note à l'attention prepared by DG Culture, 21.1.1991.

²⁹⁴ Interview Number 5. Unpublished Commission documents. 'High Definition Television – Elements of a Strategy for Europe', approved by the Commission in its meeting of 16.11.1988. 'Paper on HDTV for Meeting of Commissioners on Audiovisual Policy', note prepared by DG XIII, dated 17.1.1989. Unpublished draft of European Commission (1990c), dated 3.4.1989.

²⁹⁵ Also Interview Number 5, Interview Number 15. Similar observations have been stated by Ross (1995, p. 126).

²⁹⁶ Interview Number 12. Also see European Commission (1991c).

scepticism, considering the provisions too strict, whereas DG Culture insisted on allowing for the co-existence of old and new standards.²⁹⁷ The dossier was not accepted – neither in the preliminary talks between the DGs involved nor during formal inter-service consultations. As a consequence its provisions were debated by the *cabinets*. The *cabinet* meetings included the *cabinets* of Telecommunications Commissioner Filippo Maria Pandolfi, Culture Commissioner Jean Dondelinger, Competition Commissioner Sir Leon Brittan, and Industry Commissioner Martin Bangemann.²⁹⁸ At *cabinet* level, divisions existed similarly to those that had occurred among the Commission DGs. The *cabinet* of Commissioner Pandolfi gave priority to a uniform standard (i.e. D2-MAC) which would apply to all satellite types. The Dondelinger *cabinet* opposed the imposition of an interim standard without allowing simulcast in old PAL standards, whereas the *cabinets* of Brittan and Bangemann favoured a relaxation rather than a strengthening of rules.

Finding agreement on *cabinet* level was difficult and referring the draft text back and forth between the DGs and the *cabinets* for re-drafting and further discussion was a time-consuming process.²⁹⁹ Eventually, the *cabinets* reached a compromise which committed the Commission to the interim standard (i.e. D2-MAC), but left it up to member states whether to make it mandatory or to allow simulcast in old and new standards. DG Telecoms was tasked with finalising a draft proposal which would incorporate the revised strategy for adoption by the College of Commissioners. More than one year later than expected and less than six months before the existing MAC directive expired, the European Commission adopted its final proposal on the 'Adoption of Standards for Satellite Broadcasting of Television Signals' (European Commission 1991d) in

²⁹⁷ Interview Number 5, Interview Number 12, Interview Number 15.

²⁹⁸ The debates led at *cabinet* and Commissioner level have been extensively documented in the press. See, for example, Financial Times, 16.11.1990, 16.2.1991, 28.2.1991, 13.8.1991. Agence Europe, 28.2.1991, 31.5.1991. Also see Ross (1995, p. 125) who speculated persuasively on how the debates between Commission DGs and Commissioners were determined by conflicting interests linked to the television industry and the national origin of *cabinet* members.

²⁹⁹ Interview Number 5. Unpublished Commission document, Note for attention, DGXIII, 14.12.1990 (cit.op).

July 1991.³⁰⁰ The proposal prescribed that HD-MAC would be the only HDTV standard and be achieved through the D2-MAC interim standard. New services and operational satellites would be obliged to use D2-MAC exclusively, whereas existing services would be allowed to continue simulcast in old and new standards without any mention of a date ending it. The finalised version of the proposal differed substantially from the priorities set by DG Telecoms that had centred on making the use of D2-MAC obligatory without granting such significant exemptions. The final adoption of the directive on standards for satellite broadcasting of television signals by the European Parliament and the Council took place in May 1992.³⁰¹

The second directive

Apart from preparing the proposal on the 'Adoption of Standards for Satellite Broadcasting of Television Signals' (European Commission 1991d), the European Commission engaged in drafting a Memorandum of Understanding (MOU) as well as an 'Action Plan' to encourage the use of MAC standards.³⁰² The MOU, a legally binding document to be signed by representatives of the satellite industry, programme producers, broadcasters, and equipment manufacturers, prescribed coordinated action to promote the D2-MAC standard, contained reciprocal commitments of industry representatives and a

³⁰⁰ The finalising of the proposal was further delayed, mainly because Telecoms Commissioner Pandolfi continued to consult with the industry and frequently changed his position. Pandolfi bypassed usual procedures by submitting his own draft proposal to his fellow Commissioners for adoption. For several months, the proposal travelled up and down the Commission hierarchy and made little progress. Interview Number 5, Interview Number 15 and *Financial Times*, 28.2.1991. Similar observations have been stated by Ross (1995, pp. 127 and 182).

³⁰¹ The final adoption of the directive on standards for satellite broadcasting of television signals by the European Parliament and the Council took place in May 1992. In order to gain approval from the Council, the Commission had had to make the proposal more flexible, exempting digital television from the scope of the directive, allowing for simulcast in new and old standards, and lowering the duration of the directive (European Commission 1991e). Council Directive 92/38/EEC of 11 May 1992 on the adoption of standards for satellite broadcasting of television signals. Published in *Official Journal L137*, 20.5.1992.

³⁰² The evolution of these instruments is not analysed here because they do not constitute legislation as defined for the purpose of this study (i.e. legislation which either harmonises regulation or prescribes market opening). See, for example, Kaitatzi-Whitlock (1996).

system of financial incentives.³⁰³ The 'Action Plan' was set up to encourage the use of D2-MAC by providing funding to cover the additional costs incurring on broadcasting companies, cable distributors, and programme producers when using the new D2-MAC standard. In May 1992, the European Commission adopted a proposal for a Council decision on the 'Action Plan' (European Commission 1992d).³⁰⁴

As regards the regulating of television standards the European Commission began to fundamentally change direction in early 1993. This was due to several reasons. In January 1993, Philips, one of the leading manufacturers of consumer electronics, announced that it would suspend its planned manufacturing of programme receivers operating on the HD-MAC standard and would instead develop equipment for digital transmission.³⁰⁵ Practically overnight, the provisions of the directive on television standards became useless. Another important change concerned the Commission itself. In early 1993, a new Commission was introduced. This implied a far-reaching re-organisation on the level of Commissioners, their *cabinets*, and the senior management of the DGs. Telecommunications Commissioner Pandolfi was succeeded by Martin Bangemann whose policy priorities for television standards differed substantially from his predecessor. In DG Telecoms new staff were appointed to deal with the issue of television standards in the unit for the 'Relationship between telecommunications and broadcasting'. Following the organisational changes and recent events, DG Telecoms undertook a re-definition of its existing policy on television standards. Shortly after coming to office, Telecoms Commissioner Martin Bangemann declared that under his management, the Commission's

³⁰³ In the course of consulting with the industry on the content of the MOU, the Commission made the document more flexible, replacing it by a declaration of intent. Industry representatives adopted the MOU in June 1992. See *Financial Times*, 26.4.1991, 8.5.1991, 5.6.1992, 16.6.1992. *Agence Europe*, 26.4.1992, 6.6.1992, 17.6.1992. *Rapid*, 16.6.1992. Commission Press Release IP/91/42, 27.6.1991. Unpublished Commission documents. 'Draft Memorandum of Understanding', undated, prepared by DG XIII. 'Draft Memorandum of Understanding', dated 6.5.1992, prepared by DG XIII.

³⁰⁴ The Council adopted the 'Action Plan' in July 1993. See Council decision 93/424/EEC on an action plan for the introduction of advanced television services in Europe, adopted on 22.7.1993; *Official Journal L196*, 5.8.1993. See, for example, Kaitatzi-Whitlock (1996).

³⁰⁵ *Financial Times*, 1.2.1993. In the literature, this has been documented by Dai (1996); Kaitatzi-Whitlock (1996).

policy on regulating television standards would have humbler ambitions.³⁰⁶ Instead of prescribing the use of a specific transmission standard the Commission would concentrate on the promotion of 16/9 technology regardless of standards. The officials responsible in DG Telecoms took up this change of emphasis. It was agreed that the Commission would shift away from enforcing standards to simply promoting the demand for digital technology and applying general competition rules in cases where firms used restrictive practices.³⁰⁷ In the view of DG Telecoms, this would help the interim standard D2-MAC develop in parallel with the new digital transmission standards with no regulatory intervention being needed.

In order to adapt existing regulation to these new priorities, DG Telecoms decided that the 1992 directive on television standards would have to be repealed as soon as possible, even though the directive did not formally expire before December 1998.³⁰⁸ Although formally the dossier formally involved a large number of Commission DGs, it was generally accepted that the repeal directive would be prepared by DG Telecoms without intervention from other DGs. The main reason for this was that apart from DG Telecoms, other DGs had ceased to express an interest in actively influencing the preparation process. First of all, the authority of DG Telecoms to lead the Commission's strategy on television standards was broadly accepted.³⁰⁹ As regards the policy approach to be taken, DG Culture had largely lost interest in the issue and turned towards activities it considered of greater relevance to its organisational self-interest. This was mostly due to its newly-established authority for monitoring the implementation and revising the 'Television without Frontiers' directive (see section three).³¹⁰ The DGs for Competition and Industry broadly endorsed the refined strategy prevailing in DG Telecoms because it had already indicated that

³⁰⁶ Agence Europe, 5.1.1993, 20.2.1993, 14.3.1993. Financial Times, 9.2.1993, 19.2.1993, 4.4.1993.

³⁰⁷ Interview Number 5, Interview Number 12. Financial Times, 13.3.1993, 21.4.1993. Agence Europe, 21.4.1993, 8.5.1993. European Commission Press Release IP/93/184 of 12.3.1993. European Commission Memo, MEMO/93/52, 6.12.1993.

³⁰⁸ Interview Number 5, Interview Number 12, Interview Number 15.

³⁰⁹ Interview Number 5, Interview Number 12, Interview Number 15.

³¹⁰ Interview Number 12, 21.

it would propose much less regulation than before.³¹¹ Hence there was much greater unity on the paradigm of legislation.

During the months to follow, the reduced level of administrative fragmentation greatly facilitated the preparation of legislation. The preparation of the new proposal on television standards was almost exclusively managed by DG Telecoms and passed the obligatory procedures without meeting problems. The proposal adopted by the Commissioners closely reflected the ideas promoted in DG Telecoms and passed the Commission hierarchies within less than six months. The Commission published a draft directive on the 'use of standards for the transmission of television signals' in November 1993 (European Commission 1993e). The proposal envisaged a market-driven approach to the promotion of television standards. Instead of prescribing the use of a specifically European broadcasting norm, its provisions concentrated on facilitating the 16/9 format without imposing specific transmission standards. Also the directive left open which standards to use for conditional access systems and other gateway technologies (see Chapter Six). The draft directive was published together with a Communication (European Commission 1993d) in which DG Telecoms envisaged funding of digital technology, mainly in the context of the Commission's 'Fourth Framework Programme', as well as standardisation on the basis of voluntary agreements among industry actors, standardisation bodies, and through international co-operation (European Commission 1993d, p. 25f.).³¹² The directive was adopted under the co-decision procedure in October 1995.³¹³

³¹¹ Interview Number 12. Financial Times, 13.3.1993, 21.4.1993. Agence Europe, 21.4.1993, 8.5.1993. In the context of the Commission's re-organisation in 1993, the DG for Internal Market and Industrial Affairs had been split into two separate DGs, one for the Internal Market and Financial Services (DG XV) and one for Industry (DG III).

³¹² The 'Fourth Framework Programme' (followed by the 'Fifth Framework Programme' in 1998), intended to link research with the needs of EU citizens and the industry, provided funding in different economic sectors. For an overview see, for example, Goldberg et al. (1998).

³¹³ Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals. Official Journal L281, 23.11.1995, pp. 51-54. The provisions of the directive have been documented by Levy (1999, p. 63f.).

Legislation on media ownership

Apart from its activities to regulate standards for the transmission of television broadcasting and to revise existing legislation on 'Television without Frontiers', the European Commission undertook legislative efforts to harmonise rules on media ownership and concentration. Since the late 1980s, media companies had become increasingly engaged in mergers and acquisitions to raise capital for the financial investment required by new technologies (e.g. cable and digital transmission) and the provision of new audiovisual services, such as specialised channels, video-on-demand and pay-per-view.³¹⁴ Large media companies emerged, leading to a situation of cross-media ownership and media concentration, with possibly harmful effects on cultural diversity and pluralism. In virtually all EU member states, restrictions on media ownership existed, particularly on television broadcasting which has had a strong tradition of regulation.³¹⁵ Since the late 1980s, these rules came increasingly under pressure.³¹⁶ Member states such as Germany, France and the United Kingdom loosened restrictions on media ownership. At the same time, a 'patchwork' of different rules continued to prevail across EU member states, concerning, for example, the type, scope and methods of applying restrictions on ownership (European Commission 1992c). Community-wide regulation of media ownership did not exist. The European Commission was empowered to rule on media mergers and takeovers in the context of applying general competition law and the Merger Regulation, but before the 1990s its activities in this field were of limited significance.³¹⁷

³¹⁴ For detail see, for example, Goldberg et al. (1998); Kaitatzi-Whitlock (1996); Sanchez-Taberno (1993); Pauwels (1999).

³¹⁵ On both member states and EU level, the television sector has stood in the centre of regulation on media ownership, whereas the press sector has had a much weaker tradition of ownership regulation. Hence, one may treat the Commission's initiative on media ownership as a case of audiovisual policy.

³¹⁶ This has been documented by Harcourt (2002); Levy (1999).

³¹⁷ General competition law, notably Articles 85, 86, 90, empowers the Commission to take action against anti-competitive undertakings. The 1989 Merger Regulation required proposed mergers with sales revenues of more than 150 million to ask DG Competition for approval. It also contains an acknowledgement of the special status of the media industry, its Article 21 permitting member states to protect 'legitimate interests' by enacting national legislation designed to preserve media pluralism. See Council Regulation (EEC) No 4064/89 on the

The European Community first took up the issue of legislating on media concentration and ownership in the late 1980s. As other audiovisual issues it was first raised by the European Parliament. In the context of the Commission's Green Paper on 'Television without Frontiers' (see Chapter Three) the European Parliament had requested that media pluralism be addressed by Community legislation.³¹⁸ A majority of MEPs were concerned about pluralism and expressed these concerns in a variety of documents, such as the 'Barzanti Report'.³¹⁹ However, as the Commission did not consider such provisions necessary at the time, the Directive 'Television without Frontiers' did not contain any anti-concentration measures.³²⁰ In the early 1990s, the European Parliament intensified its calls for legislation on media ownership and suggested EU regulation.³²¹

Setting the policy agenda

In the European Commission, the issue of media ownership was first addressed by DG Culture. In the context of drafting its Communication on Audiovisual Policy published in 1990 (European Commission 1990b), the DG showed itself concerned that the European audiovisual sector would grow at the expense of pluralism and diversity (European Commission 1990b, p. 21). DG Culture recommended the encouragement of a diversity of television programmes by means of regulation. The dominant view of DG Culture and its unit 'Audiovisual Policy' was that existing legal instruments in operation at member state level were insufficient to preserve media pluralism and that Community competition

control of concentration between undertakings; Official Journal L395, 30.12.1989. For an overview of the Commission's decisions on media ownership under EU competition law during the 1990s see Harcourt (1998); Goldberg et al. (1998).

³¹⁸ See, for example, de Vries Report, A2-102/85, 30.9.1985; Barzanti Report, A2-246/87, Official Journal C 1988/49 64, 2.12.1987.

³¹⁹ Barzanti Report, A2-246/87, Official Journal C1988, 2.12.1987, p.49.

³²⁰ Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. Official Journal L298, 17.10.1989. For a summary of the contents of the directive see Chapter Three.

³²¹ Resolution of 15.2.1990, Official Journal C68, 19.3.1990, pp. 137-138. Barry Desmond Report, December 1990. Fayot/Schinzel Report, September 1992. Resolution of 16.9.1992, Official Journal C284, 2.11.1992, p. 44.

law might fail to effectively control media concentration, mainly because of difficulties in defining the rapidly changing media markets and in specifically addressing issues of pluralism.³²² In its Communication, DG Culture also warned that purely national legislation could be circumvented by international media companies.

Some of the concerns expressed by DG Culture at the time were shared by the DG Internal Market and Industrial Affairs. DG Internal Market and Industrial Affairs had an interest in removing the fragmentation of national markets by means of regulatory harmonisation (see Chapter Three). It considered a disparity of rules as creating a situation of legal uncertainty and a potential obstacle of international activities of European media operators.³²³ In spite of their different missions for and outlooks on the audiovisual sector, DG Culture and DG Internal Market and Industrial Affairs agreed that the Commission should study the question of whether to propose Community legislation on media ownership. Hence, a central conclusion of the Commission 'Communication on Audiovisual Policy' was that

'on the account of the importance it attaches to the objective of maintaining pluralism, the Commission is studying the question with a view to a possible proposal for a Directive, whose aim would be to harmonize certain aspects of national legislation in this field' (European Commission 1990b, p. 19).

It was agreed that the Commission would address the issue of media concentration in a separate document, a Green Paper that would explore the possibilities for proposing Community legislation, its possible scope and content.

The preparation of the 1992 'Green Paper' on media ownership

Following the publication of the Commission 'Communication on Audiovisual Policy' (European Commission 1990b), it was agreed by the senior

³²² See, for example, Commission Press Release IP/91/11 of 20.2.1991. Interview Number 2, Interview Number 4.

³²³ Interview Number 2, Interview Number 4, Interview Number 6, Interview Number 10, Interview Number 21.

managements of the DGs Culture and the Internal Market and Industrial Affairs that the responsibility for drafting a consultative document on media ownership would be taken by the latter. Senior policy-makers considered the staff of DG Internal Market and Industrial Affairs to have greater legal expertise to develop a legally-sound Commission strategy.³²⁴ As legislation on 'Television without Frontiers', regulation of media ownership would have to be based on the Treaty provisions for the single market and therefore be the primary responsibility of DG Internal Market (see Chapter Three). This was generally accepted in the two DGs and it was arranged that DG Internal Market would consult DG Culture on the contents of the document. In DG Internal Market and Industrial Affairs, the issue was allocated to the division called 'Media and Data Protection' within Directorate F ('Approximation of Law, Freedom of Establishment and Freedom to Provide Services; the Professions'). Previously the division had dealt with monitoring the implementation of the 'Television without Frontiers' directive.

The view taken by the officials in DG Internal Market and Industrial Affairs was mostly driven by the internal market philosophy, centring on regulated liberalisation and support of the European media industry vis-à-vis powerful US companies.³²⁵ They approached the issue of media ownership from a legal perspective, advocating a harmonisation of national legislation in order to create a single market in which media companies faced a coherent regulatory environment. In agreement with the senior level of the Directorate General, the officials responsible undertook the drafting of a consultative document arguing for a Council directive according to Article 100 on the approximation of laws. They aimed at providing an outline of the legal situation regarding media ownership rules across member states and a discussion establishing the legal basis for a Community initiative, centring on the realisation of the internal market. This was to be followed by proposals for a possible directive.

³²⁴ Interview Number 4. Another reason behind the decision was that it was generally accepted in the Commission that building any regulatory initiative on purely cultural concerns would run into serious problems touching on member states' sovereignty and that the Commission's media and audiovisual policy therefore was to be primarily developed in the context of the single market programme (see Chapter Three).

³²⁵ Interview Number 2, Interview Number 4, Interview Number 6, Interview Number 10, Interview Number 21.

During the early stages of agenda-setting, DG Internal Market and Industrial Affairs officials engaged in preliminary consultations with outside interests. Industry representatives and member states showed themselves divided as regards whether to establish Community rules and tended to oppose a legislative initiative.³²⁶ Nevertheless, DG Internal Market and Industrial Affairs was determined to act. In the Commission, it engaged in preliminary consultations with DG Culture. Their consultations mostly took place in working groups and meetings that preceded more formal inter-service consultations and therefore excluded other Commission DGs. As the two DGs agreed on the need for legislation and its substance, the consultations did not encounter serious difficulties and centred on the details of the approach to be taken.

While DG Internal Market and Industrial Affairs was mostly interested in realising the single market for audiovisual services and products, DG Culture took a keen interest in maintaining pluralism and a diversity of programmes. A concession made by DG Internal Market and Industrial Affairs to DG Culture was to give the issue of pluralism attention in the Green Paper. The two DGs agreed that the Green Paper would contain a section on pluralism and include it as an objective to the legal reasoning of why Community regulation would be necessary.³²⁷ They also arranged to add the word 'pluralism' to the title of the Green Paper. Based on the pre-consultations with DG Culture, DG Internal Market and Industrial Affairs prepared a draft document which argued for the adoption of a directive and outlined the central aims and provisions of possible legislation. Harmonisation would cover all activities of media companies, whether local, national or transnational. The scope of harmonisation would be television and radio broadcasting, the press sector possibly being dealt with as well. Legislation would define what constituted a media controller and provide for statistical methodology to measure audiences.

³²⁶ Most large media companies opposed a Community initiative, whereas smaller companies and producers welcomed it. Member states showed themselves hesitant to express clear positions at the time, as it was still unclear what the Commission would propose. Interview Number 4, Interview Number 6, Interview Number 7. Agence Europe, 1.9.1994. Financial Times, 10.8.1994.

³²⁷ Interview Number 2, Interview Number 4.

The draft Green Paper did, however, also meet with opposition which was mostly expressed by DG Competition. While other DGs either simply endorsed the strategy presented by DG Internal Market and Industrial Affairs or took little interest in the dossier, DG Competition expressed doubts over whether a directive regulating media ownership was really needed.³²⁸ Officials in DG Competition tended to view the directive an 'interventionist' strategy bearing the tendency towards 'over-regulation' which would counteract its liberalisation philosophy centring on the application of general competition law and the 1989 Merger Regulation. They asked DG Internal Market to present in the Green Paper several options the Commission might take towards controlling media concentration rather than simply proposing the adoption of a directive.

Diverging over the very need for legislation, DG Internal Market and Industrial Affairs and DG Competition were unable to agree on a compromise, first in their preliminary talks, then in the context of obligatory inter-service consultations.³²⁹ As a consequence, the dossier was forwarded to discussion in the *cabinets*. The *cabinets* involved were those of Martin Bangemann for the Internal Market, Jean Dondelinger for Culture and Audiovisual Affairs, and Sir Leon Brittan for Competition. The divisions among the *cabinets* largely corresponded to those expressed on DG level and centred on the relationship between Bangemann and Brittan. Bangemann's *cabinet* defended the existing draft, whereas Brittan's *cabinet* demanded that regulation be kept at a minimum level and the Commission would rely on the Merger Regulation and general competition law instead.³³⁰ The discussion between the *cabinets* was time-consuming and further delayed the policy formulation process. Together with referring the draft Green Paper on media concentration back and forth between DG and *cabinet* level, re-drafting took considerably more time than foreseen. Among the *cabinets*, divisions intensified, particularly when industrial players and national representatives increased their lobbying activities.³³¹ Eventually, the *cabinets* agreed that the Commission would not commit itself to a

³²⁸ Interview Number 2, Interview Number 4, Interview Number 6.

³²⁹ Interview Number 2, Interview Number 4, Interview Number 6.

³³⁰ Agence Europe, 18.9.1992, 17.11.1992.

³³¹ Interview Number 2, Interview Number 4. Agence Europe, 29.7.1992, 6.8.1992.

specified strategy, but defer the proposition of legislation and first await the results of public consultations. In the Green Paper it would present several options for Community action in the field without indicating any preference.

The 1992 'Green Paper' on media ownership

After DG Internal Market and Industrial Affairs had amended the draft document accordingly, the European Commission officially adopted its Green Paper on 'Pluralism and Media Concentration in the Single Market' (European Commission 1992e) in December 1992. The document was limited to providing a detailed outline of the existing regulatory situation in member states, followed by a discussion of the legal basis for Community action. These parts were formulated in a largely unchanged version of previous drafts prepared by DG Internal Market and Industrial Affairs and therefore revealed the commitment of DG Internal Market and Industrial Affairs to propose a directive.³³² However the overall message of the document had changed substantially. The need for legislative action was assessed in the light of several Community objectives: the completion and the functioning of the single market; industrial policy aims; audiovisual policy aims; and the respect of fundamental human rights (European Commission 1992e, p. 58-60). Most importantly, the Green Paper presented three possible options for Community action: no action; a harmonisation of legislation by means of a directive; and a non-binding recommendation which would ask national authorities to increase transparency concerning the implementation of media ownership rules. The Commission gave no preference to any of these options and as regards to the option of proposing a directive it abstained from defining its content, design, coverage and scope.³³³

³³² Interview Number 4, Interview Number 6. See European Commission (1992c, pp. 58-103) for detail.

³³³ In the literature, the document's vagueness has been documented by Hitchens (1994).

The preparation of legislation

In early 1993, a new Commission came into office. This entailed several organisational changes on Commissioner, *cabinet* and DG level. DG Internal Market and Industrial Affairs was split into two different DGs, one called DG Internal Market and Financial Affairs (DG XV), and one called DG Industry (DG III). For the Internal Market, Commissioner Vanni d'Archirafi took over from Martin Bangemann. In the newly-organised DG Internal Market, the unit responsible for the media ownership dossier was re-named 'The Media, Commercial Communications and Unfair Competition' and staffed with new officials as most officials who had previously been involved were transferred other units (e.g. 'Data Protection').

After the publication of the '1992 Green Paper' on pluralism and media ownership (European Commission 1992e), the Commission awaited reactions from outside interests as to which of the options presented should be taken. The consultations were primarily conducted by DG Internal Market. The hearings and written procedures initiated by the Commission revealed that no common position existed among outside actors, but that the general climate gradually turned more favourable for a Community initiative.³³⁴ In early 1994, after consultations had finished DG Internal Market undertook efforts to prepare a follow-up Communication to the '1992 Green Paper'. It planned to proceed with proposing the adoption of a directive, seeing its position strengthened by the new Commissioner Vanni d'Archirafi who argued in favour of a directive as well as by requests made by the European Parliament and several outside interests that called for a harmonisation of rules.³³⁵

DG Internal Market began preparing the follow-up Communication which, besides a commitment to a legislative initiative, was to include more detailed propositions for a directive harmonising media ownership rules and timetables. Following the single market logic, the draft document argued in favour of

³³⁴ Interview Number 2, Interview Number 4, Interview Number 6. Unpublished Commission document. 'Note on draft proposal on pluralism in media control', prepared by DG XV, dated 2.7.1996. Similar observations have been stated by Harcourt (1996).

³³⁵ Agence Europe, 1.9.1994. Financial Times, 2.9.1994. European Parliament Resolution of 20.1.1994, Official Journal C 1994/44/177.

ensuring the freedom of establishment of media enterprises and the free movement of media services. It proposed rules of limited scope that excluded, for example, 'internal pluralism' which touched on the structure of broadcasters and the content of programmes.³³⁶ The idea was to propose minimum rules that would grant member states a high degree of flexibility. The so-called 'audience share' would serve as a criterion to assess dominance in media markets rather than the mere number of channels owned by a media company. The draft also envisaged transparency mechanisms obliging media companies to provide relevant information to national authorities.

Other Commission DGs continued to express a great interest in shaping the Commission's strategy for media ownership and conflict re-emerged. As with the 1992 Green Paper, DG Internal Market engaged in preliminary consultations with DG Culture. Between the two DGs, debate remained limited to the details, most importantly the question of how much account should be taken of cultural issues.³³⁷ DG Culture wanted to see the aim of pluralism be covered by the directive, for example by making pluralism and the diversity of content one of its objectives. At the same time, conflict between the two DGs remained low because officials in DG Culture expressed less interest in the dossier than they had in the 1992 Green Paper. This was largely due to the fact that DG Internal Market had already incorporated many of the concerns expressed by DG Culture. Another reason was that DG Culture changed its responsibilities that now included the implementation of the 'Television without Frontiers' directive (see section three). In this context, the senior management of the DG decided that the media ownership dossier was no longer of primary interest to the DG and its realisation no longer part of its mission.³³⁸ Senior policy-makers assumed that DG Culture would lose too much

³³⁶ Unpublished Commission documents. 'Note on draft proposal on pluralism in media control', prepared by DG XV, dated 2.7.1996. 'Draft communication on pluralism and concentration in the media', several notes prepared by DG XV and DG XIII during July 1994. The draft texts have been documented in Agence Europe, 1.9.1994. Financial Times, 15.7.1994, 10.8.1994.

³³⁷ Interview Number 7, Interview Number 10, Interview Number 15, Interview Number 21. Also see Agence Europe, 26. 3.1994, 8.4.1994.

³³⁸ Interview Number 6, Interview Number 7, Interview Number 10, Interview Number 21.

time and effort engaging in the dossier and therefore decided that the service would bring itself less into inter-service consultations.

A crowding policy arena

Although DG Culture gradually withdrew from actively influencing the media ownership dossier, administrative fragmentation did not reduce as one might expect but did in fact magnify, due to an increase in the number of participating DGs. The gap left by DG Culture was filled by another Commission DG that considerably intensified its interest in influencing the preparation of the media ownership dossier: DG Telecoms. In fact, its participation caused much greater conflict on the administrative level of the Commission than that of DG Culture had previously done. This was due to the emergence of greater differences on the paradigm of legislation and more competition for policy authority. The policy arena was now filled by four DGs: DG Internal Market, DG Competition, DG Telecoms, and, to a more limited extent, DG Culture.

DG Competition continued to consider the dossier as relevant to its own activities to rule on media ownership. Since the late 1980s, DG Competition had become more active in the media sector, implementing EU competition law and the 1989 Merger Regulation to vet on mergers.³³⁹ In the context of these activities, officials in DG Competition came to view existing competition instruments as inadequate for controlling media ownership. The application of general competition law implied difficulties concerning the definition of the media markets and the Merger Regulation was limited in its applicability due to its very high turnover thresholds.³⁴⁰ After the publication of the '1992 Green Paper' on pluralism and media concentration, DG Competition became more supportive of Community legislation covering media ownership. Controversy between DG Internal Market and DG Competition reduced in so far as DG

³³⁹ For a comprehensive overview on Commission decisions on media competition matters see Harcourt (1998, p. 373); Pauwels (1996). For an overview of more recent decisions see http://www.europa.eu.int/comm/internal_market/en/media/infr/index.htm

³⁴⁰ Interview Number 6, Interview Number 10. Also see speech given by van Miert, documented in Rapid 17.5.1994, SPEECH/94/50. In the literature the changing position of DG Competition has been documented by Beltrame (1996, p. 173); Harcourt (1998, p. 384-385).

Competition now welcomed a legislative initiative.³⁴¹ While the two DGs agreed on the need for a directive, they continued to differ on the objectives and the details of the approach to be taken. For example, DG Competition asked for the definition of the 'audience share' to be brought in balance with its application of general competition law. Furthermore, it opposed the idea discussed in DG Internal Market of setting up an independent authority to monitor media concentration. In the view of DG Competition, such an authority would imply a loss of competence for DG Competition to monitor and assess media concentration.³⁴²

Even greater influence over the definition of policy priorities was sought by DG Telecoms. The DG took an increasing interest in media-related issues, including the media ownership dossier, which was closely linked to the efforts undertaken by the Directorate 'Telecommunications Policy' to develop the Commission's approach to what it called the 'Information Society'. The term 'Information Society' stood for the emergence of a variety of new communications services and applications linked to the audiovisual and telecommunications sectors, such as teleshopping, home-banking, and video-on-demand. It implied an emphasis on the information and communication industries as being key areas for growth and employment in the European Union and referred to efforts made by the European Commission to develop a new regulatory paradigm for the emerging services and applications (European Commission 1994c).

The attempts made by DG Telecoms to define a policy agenda for the 'Information Society' were significantly influenced by the recommendations of the 'Bangemann Group' (High-Level Group on the Information Society 1994), a group composed of representatives of the industry, users and consumers and chaired by Martin Bangemann, then Commissioner for Telecommunications and Industry. In the Commission, the 'Information Society' served as an

³⁴¹ Interview Number 6, Interview Number 10. Speech given by van Miert, documented in Rapid 17.5.1994, SPEECH/94/50. Similar observations have been stated by Beltrame (1996, p. 173); Harcourt (1998, pp. 384-385).

³⁴² Interview Number 2, Interview Number 10. See quotes of DG Competition officials in EMR-Expertengespräch (1993). Similar observations have been made by Beltrame (1996, p. 173).

umbrella term for a wide range of policy initiatives, including audiovisual issues.³⁴³ The 'Bangemann Report' gave priority to a deregulation of markets by eliminating existing technical constraints, abolishing public monopolies, and establishing a minimum of regulation. In July 1994, on the initiative of the Bangemann *cabinet*, the Commission adopted the so-called 'Action Plan' (European Commission 1994c). Modelled closely on the 'Bangemann Report', it was intended to establish a Commission work programme for legislative measures to be taken in the context of the 'Information Society'. Due to its linkage with the highly popular 'Bangemann Report', the ideas expressed in the 'Action Plan' soon amounted to one of the leading doctrines in the Commission.³⁴⁴

As regards the audiovisual sector, the main interest of DG Telecoms was to define a policy approach for regulating the information and communications technologies which ran along lines similar to those established for the telecommunications sector - based on far-reaching liberalisation and a 'soft' regulatory approach (see Chapter Four). In this context, it argued in favour of proposing as little regulation as possible to leave room for the application of new technologies.³⁴⁵ Against this background it was not surprising that the approach taken by DG Telecoms towards the media ownership dossier differed

³⁴³ Most of these initiatives are outside the scope of this thesis. As observed by Levy (1999, p. 124), 'the EU used the 'Information Society' as a portmanteau term to lend coherence to an extremely wide range of policies, both existing and new; to act as a mobilising slogan rather as the 1992 programme did before it; and to suggest dynamism and a preoccupation with modernisation and competitiveness'. The policy initiatives pursued by the European Commission in the context of the 'Information Society' dealt with issues of education and training, regional and social policy, consumer affairs issues and internal market projects. The present analysis is limited to the efforts taken to regulate those aspects of the Information Society falling into the sectoral boundaries of what has been defined as audiovisual and telecommunications policy respectively (see Chapter Two). This is in line with most accounts in the literature claiming that the 'Information Society' agenda focused most of all on the completion of telecoms liberalisation, its extension to new communications infrastructure, as well as a new regulatory framework for the audiovisual domain. See, for example, Campbell and Konert (1998); Levy (1999).

³⁴⁴ See, for example, Agence Europe, 3.6.1994, 23.6.1994, 30.8.1994, 9.9.1994, 27.9.1994. Financial Times, 28.6.1994.

³⁴⁵ Interview Number 6, Interview Number 7, Interview Number 10, Interview Number 15, Interview Number 17, Interview Number 21.

significantly from that of DG Internal Market.³⁴⁶ DG Telecoms was sceptical of what it called the 'over-regulation' (Interview Number 15) envisaged by DG Internal Market and called for excluding new audiovisual services (e.g. pay-per-view and video-on-demand) from the scope of any legal instrument. It also wanted to limit the regulatory framework to ownership issues emerging in the context of traditional media, i.e. broadcasting and print media, and to leave the provision of new audiovisual services untouched. DG Telecoms also opposed what it considered a too narrow definition of media ownership in terms of legal ownership because that would not take account of the control maintained by companies over access to networks and users.³⁴⁷ Underlying the opposition expressed by DG Telecoms were doubts whether media ownership legislation on Community level was needed at all.

To a significant extent, the disagreement among DG Internal Market and DG Telecoms on the content of legislation overlapped with a conflict over authority for media-related issues. The determination of DG Telecoms to define the Commission's agenda for the 'Information Society' implied a questioning of the established authority of DG Culture and DG Internal Market.³⁴⁸ Administrative fragmentation as regards media ownership therefore significantly increased. Three to four DGs actively participated in the preparation of the follow-up Communication. To varying extents, these DGs differed not only on the details, but also on the fundamental objectives of and the need for legislation. Furthermore, disagreement was linked to the question which DG would take authority over media-related issues. As a consequence, informal talks between the DGs were of little effect and quickly led into the more formalised inter-service consultations during which DG Competition and DG Telecoms made their approval of proposing a directive dependent on what would be proposed in terms of nature, level, scope and definitions.³⁴⁹ Since

³⁴⁶ Interview Number 6, Interview Number 7, Interview Number 10, Interview Number 15, Interview Number 17, Interview Number 21. Also see Financial Times, 10.8.1994.

³⁴⁷ Interview Number 6, Interview Number 15, Interview Number 21. Unpublished Commission document. 'Draft communication on pluralism and concentration', note prepared by DGXIII, dated 28.7.1994.

³⁴⁸ Interview Number 2, Interview Number 6.

³⁴⁹ Interview Number 2, Interview Number 15. Financial Times, 10.8.1994.

inter-service consultations did not lead to mutual agreement, the *cabinets* got involved to discuss the provisions of the follow-up Communication. The divisions occurring on *cabinet* level largely mirrored those between the DGs and centred both on the details of a possible directive, such as the audience share, as well as the actual need for a directive regulating media ownership.³⁵⁰

It took several *cabinet* meetings to achieve a compromise. The Commission once again deferred taking a decision on whether to propose a directive and arranged that it would simply state that a legislative initiative might be appropriate - without defining its scope and provisions. The Communication would introduce and define criteria such as the 'audience share' and a 'media controller', but refrain from identifying definite thresholds. Referring the draft text back and forth between the *cabinets* and the DGs took more time than DG Internal Market had anticipated and the Commission adopted the final version of the follow-up Communication on media pluralism and concentration (European Commission 1994f) several months later than foreseen in October 1994. Its provisions represented a significant departure from earlier versions prepared by DG Internal Market. The document stated that a Community initiative might prove necessary and that a final decision on the matter would be subject to a new round of consultations.

Preparing a draft directive

The consultations announced by the follow-up Communication on media ownership (European Commission 1994f) lasted until early 1995. The Commission announced that it would give a definite position on whether to propose a directive during the second half of the year.³⁵¹ This was delayed, not because of conflict among Commission DGs, but due to the re-organisation of the European Commission which took place in January 1995. The new Commissioner for the Internal Market, Mario Monti, extended the consultations to a third round to last until June 1995. During this final phase a

³⁵⁰ Interview Number 2, Interview Number 4, Interview Number 6, Interview Number 15. Agence Europe, 1.9.1994, 16.9.1994, 24.9.1994, Financial Times, 2.9.1994.

³⁵¹ Agence Europe, 22.9.1994.

majority of outside interests expressed approval of a regulatory initiative and concentrated on the content of EU legislation rather than the actual need for it.³⁵²

In September 1995, Commissioner Monti formally asked DG Internal Market to prepare a proposal for a directive for adoption by the Commission in early 1996.³⁵³ The European Commission's Work Programme for 1996 listed the protection of pluralism in the media in the context of upcoming legislative proposals (European Commission 1995f, p. 22). Due to the divisions that had previously occurred it was arranged to closely orient the drafting process towards the discussion on *cabinet* level.³⁵⁴ While the Internal Market *cabinet* continued to argue in favour of a directive, other *cabinets* varied between approval, hesitation and opposition, depending on the issue under consideration. This created an overall atmosphere of what interviewees described as 'lukewarm support' (Interview Number 6, Interview Number 7) for a media ownership directive.

With discussions still going on *cabinet* level, DG Internal Market engaged in further modifying its proposal for a directive. The draft texts avoided a high level of regulation. The main provisions were to oblige national authorities to prevent firms reaching more than 30 per cent of a country's television or radio audience to grow any bigger.³⁵⁵ Owners of more than one media type (print, broadcasting et cetera) would be allowed a total audience share of 10 per cent. The Commission would leave it up to member states to monitor the situation on their own territory. Public television stations were to be excluded from the

³⁵² Interview Number 2, Interview Number 6. Agence Europe 28.9.1995, European Dialogue, March/April 1995, European Voice, 18.7.1996, 25.7.1996, Financial Times, 13.11.1995. Resolutions and Opinions adopted by several EU institutions supported the adoption of a directive. See European Parliament New Press Release, B4-190/94, 26.10.1994. European Parliament Resolution of 27.10.1994, Official Journal C323, 21.11.1994, p. 157. Opinion of the Economic and Social Committee of 23.2.1995, Official Journal C110, 2. 5.1995, p. 53. Committee of the Regions, Opinion adopted on 19.7.1995, Official Journal C100, 2.4.1996, p. 48.

³⁵³ Agence Europe, 28.9.1995.

³⁵⁴ Interview Number 2, Interview Number 4.

³⁵⁵ Unpublished Commission documents. Draft proposal for a Directive on pluralism in media control', note prepared by DG XV, dated 2.7.1996. 'Proposed Directive on Media Pluralism', note prepared by DG XIII, dated 18.7.1996. Also see European Voice, 18.7.1996.

scope of the directive. DG Internal Market engaged in formal inter-service consultations with other DGs, mostly with DG Competition and DG Telecoms that expressed greatest interest in the dossier. These DGs continued to defend their own policy agendas for the dossier and there was ongoing conflict between them on the objectives of legislation, centring on the question how much regulation was needed to achieve media pluralism.

The interest expressed by DG Telecoms in the media ownership dossier continued to be great. The DG published studies and policy papers taking account of media ownership (e.g. KPMG 1996) that serve as a useful indicator of its determination to gain more authority over media-related issues.³⁵⁶ DG Telecoms continued to be generally less concerned about concentration than DG Internal Market and held the view that with an ever-increasing number of television channels pluralism would eventually be self-fulfilling.³⁵⁷ DG Telecoms therefore still doubted whether a directive should be proposed at all, but did not oppose it in principle given that certain conditions were met. For example, DG Telecoms argued against the inclusion of specialised channels to the scope of the directive and the granting of derogations for public broadcasters and asked DG Internal Market to raise audience share ceilings for multimedia ownership.³⁵⁸ Also, a directive would have to contain provisions for a speedy revision in order to enable the Commission to adapt legislation to the changes caused by digital technology. The relationship between DG Competition and DG Internal Market was less troubled, centring on the details of the directive on media ownership, such as the 'audience share', and what constituted a 'controller' of media markets.³⁵⁹ During inter-service consultations, DG Internal

³⁵⁶ Interview Number 7, Interview Number 10.

³⁵⁷ Much of the reasoning of DG Telecoms is documented in KPMG (1996, p. 19, 27, 176), a study that was produced for DG Telecoms and closely corresponded to the DG's policy priorities, including detailed statements on media ownership legislation and arguing for light-touch regulation for media pluralism. Unpublished Commission documents. 'Draft proposal for a Directive on pluralism in media control', note prepared by DG XV, dated 2.7.1996. 'Proposed Directive on Media Pluralism', note prepared by DG XIII, dated 18.7.1996.

³⁵⁸ Unpublished Commission documents. 'Draft proposal for a Directive on pluralism in media control', note prepared by DG XV, dated 2.7.1996. 'Proposed Directive on Media Pluralism', note prepared by DG XIII, dated 18.7.1996.

³⁵⁹ Interview Number 6. European Voice, 18.07.1996.

Market responded to most of the concerns raised by DG Telecoms and DG Competition and modified the draft text accordingly.

Policy coordination continued to be difficult, delayed and characterised by frequent changes to draft texts. In July 1996, DG Internal Market eventually managed to forward a draft text for a directive - first to the *cabinets* and then to the College of Commissioners that debated the draft proposal after the drafting of a directive had been underway for more than one year,. The draft text represented a framework directive limiting media ownership on the basis of an audience share of 30 per cent of a country's television or radio audience.³⁶⁰ It obliged member states to provide legislative limits on the control of television and radio broadcasting services as well as the control of media belonging to more than one category (i.e. multi-media concentration, including the press). Exemptions were granted for local media and non-profit oriented broadcasting. The draft directive also established transparency measures that would oblige member states to ensure that undertakings communicated relevant information to the responsible authorities.

In the College of Commissioners, there was no majority for the proposal mainly because several Commissioners considered its provisions too rigid.³⁶¹ This led to the formal rejection of the proposal. The rejection was prompted by a new drafting process on DG level, with new drafts being discussed in the College in October 1996 and March 1997. Again, no agreement was reached, mostly because the debate increasingly centred on the question whether to propose any legislation at all.³⁶² In spring 1997, following several years of conflict and prolonged policy formulation that had taken their departure on DG level and continued on *cabinet* and Commissioner level, the proposal was

³⁶⁰ Unpublished Commission document. 'Proposed Directive on Media Pluralism', note prepared by DG XIII, dated 18.7.1996.

³⁶¹ The voting behaviour of the College on the issue leaked through to the press where it was extensively documented. For example, see Agence Europe, 7.8.1996, 3.9.1996, 5.9.1996, 10.9.1996. European Voice, 5.9.1996. Financial Times, 4.3.1997.

³⁶² Agence Europe, 21.3.1997.

withdrawn from the official Commission agenda.³⁶³ The European Commission has never formally abandoned the initiative on media ownership nor has it resumed a formal drafting procedure. Hence, the withdrawal has effectively been an abandonment.³⁶⁴ The European Parliament and the Economic and Social Committee have continued to call for legislation on media ownership until the present day but the high extent of conflict in the Commission has continued and made a new drafting round extremely unlikely.³⁶⁵

The revision of the 'Television without Frontiers' directive

The directive 'Television without Frontiers', commonly called the broadcasting directive, had entered into force in October 1990.³⁶⁶ 'Television without Frontiers' represented the centrepiece of Community legislation of the audiovisual sector because it combined liberalisation with re-regulation and covered a wide range of issues, including advertising, quotas for the broadcast of European and so-called 'independent' productions, the right-of-reply, and the protection of young people from harmful programmes (see Chapter Three). In the European Commission, setting the agenda for a revision of the 1990 directive started in 1993. For the Commission, the main reason prompting the revision was the insufficient implementation of the directive's provisions in member states. In the early 1990s, in a response to a record of implementation which was largely a 'history of national non-compliance' (Fraser 1997, p. 219) the European Commission initiated several infringement proceedings against almost all member states. Several outside actors affected by the directive called for updating and clarifying legislation as some of its provisions were vague and

³⁶³ Interview Number 3, Interview Number 7. See Agence Europe, 21.3.1997, 9.10.1997. European Voice, 3.4.1997, 17.7.1997, 9.10.1997. Also see <http://www.epceurope.org/news/may97.shtml>

³⁶⁴ Interview Number 1, Interview Number 3, Interview Number 7.

³⁶⁵ See, for example, Harrison Report on 30.5.1997, and Opinion adopted by the Economic and Social Committee, Official Journal C140, 18.5.2000, pp. 19-23. In November 2002, there has been a European Parliament Resolution on media concentration asking the European Commission to launch a new consultation process and to draw up an updated Green Paper on the issue. P5_TA_PROV(2002)0554 of 20.11.2002.

³⁶⁶ Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities. Official Journal L298, 17.10.1989.

unclear, particularly the flexible wording on the quotas for European and independent productions. New audiovisual services had emerged (e.g. teleshopping) which fell outside the scope of the existing directive (European Commission 1995e).

Setting the policy agenda

In the European Commission, the initiative for preparing a revised proposal for the 'Television without Frontiers' directive was not taken by DG Internal Market as one might expect after it had prepared the first proposal during the 1980s (see Chapter Three). In 1993, the dossier was allocated to DG Culture. This was a consequence of the 'screening' procedure which had taken place in the Commission during 1992 and served as a basis for re-organising the policy responsibilities of several Directorates General.³⁶⁷ According to senior decision-makers in the Commission, allocating the centrepiece of the Community's audiovisual policy to DG Culture would serve to affirm the role of the traditionally weak DG.³⁶⁸ The decision was backed by Commission President Jacques Delors who was said to have an interest in strengthening the position of DG Culture. In DG Culture, formal responsibility for 'Television without Frontiers' was taken by the unit called 'Audiovisual Policy' organised within Directorate C 'Culture and Audiovisual Policy'.

The broadcasting directive had no expiry date, but Article 26 of the directive required the Commission to present a report on its implementation together with proposals for amendments it deemed necessary.³⁶⁹ DG Culture engaged in preparing a document which reported on implementation and was published as a Commission Communication (European Commission 1994g) in

³⁶⁷ In the context of the 'screening', each DG was examined by a team of senior Community civil servants. The re-organisation which followed was intended to increase the Commission's effectiveness and coherence. For an overview of the 'screening' see, for example, Edwards and Spence (1997); Ross (1995, pp. 157-65).

³⁶⁸ Interview Number 10, Interview Number 15.

³⁶⁹ Article 26 of the directive prescribed that 'not later than the end of the fifth year after the date of adoption of this Directive and every two years thereafter, the Commission shall submit to the European Parliament, the Council, and the Economic and Social Committee a report on the application of this Directive and, if necessary, make further proposals to adapt it to developments in the field of television broadcasting'.

March 1994. In the report, DG Culture declared that the flexible wording of the directive had so far impeded effective implementation in most member states. The so-called 'quota' for European works and 'independent' productions to be broadcast on television programmes which was enshrined in Articles 4 and 5 of the directive had been watered down during the Council negotiation in 1989 and created what was widely referred to as a 'loophole system' (Financial Times, 14.12.1994). Instead of defining exact quotas, the 1990 directive was limited to prescribing a quota as 'a majority of works' to be fulfilled 'where practicable and by appropriate means'. In the view taken by DG Culture, existing implementation problems could only be remedied by strengthening the wording of Articles 4 and 5. In the implementation report, it stated that 'the Commission would make it clear that the question of refining and strengthening the system set up by Articles 4 and 5 is now under consideration' (European Commission 1994g, pp. 21-22). The senior management of the DG decided that before making more detailed propositions a complete assessment of the directive's implementation would be made and outside interests be consulted. The preparation and adoption of the Communication had been largely uncontroversial in the Commission because the document mostly contained member states' reports on implementing Articles 4 and 5 and did not make more specific provisions.³⁷⁰

The preparation of legislation

With consultations with outside interests still being underway, DG Culture engaged in efforts to define more closely its policy approach towards a revision of 'Television without Frontiers' and to prepare a draft directive. Industry interests and member states were divided, either opposing or preferring a strengthening of the directive's provisions.³⁷¹ The officials in DG Culture concentrated on removing the 'loophole' concerning the quotas and instead imposing specified criteria on member states.³⁷² Other changes referred to the

³⁷⁰ Interview Number 10, Interview Number 21.

³⁷¹ Interview Number 17, Interview Number 18. Agence Europe, 10.5.1994.

³⁷² Interview Number 10, Interview Number 15, Interview Number 21.

inclusion of new audiovisual services to the broadcasting directive, such as video-on-demand and teleshopping, as these services were not regulated on Community level thus far. Before preparing more formal drafts of a revision, DG Culture engaged in preliminary consultations with interested Commission DGs. Two other DGs sought to participate in preparing a revised directive: DG Internal Market and DG Telecoms. While they broadly accepted the idea of a revision, the details and substance of the revised directive were subject to considerable debate.

DG Internal Market had a great interest in the revision process mainly because the 'Television without Frontiers' directive was part of the internal market project and because the DG had previously been tasked with the dossier (see Chapter Three).³⁷³ The officials who used to be responsible had been transferred to other units such as 'Data Protection', but were now consulted on a revision. While they principally endorsed the idea of a revision and of strengthening Articles 4 and 5, they differed with DG Culture on the other objectives to be realised in the directive. Most importantly, DG Internal Market opposed the inclusion of new audiovisual services within the scope of the directive. Although it had lost responsibility for the broadcasting directive, DG Internal Market continued to keep a strong interest in audiovisual issues.³⁷⁴ Apart from preparing legislation on media ownership (see section two), the DG engaged in developing a regulatory approach for new audiovisual services.³⁷⁵ The idea of DG Culture to include new audiovisual services to the scope of the 'Television without Frontiers' directive therefore attracted opposition by DG Internal Market. Hence, to a significant extent, the differences between DG Culture and DG Internal Market on the paradigm of legislation reflected an underlying conflict over authority.

The ideas proposed by DG Culture on revising the broadcasting directive stood in even greater contrast to the views expressed in DG Telecoms. DG Telecoms was greatly intensifying its interest in the audiovisual sector at the

³⁷³ Interview Number 10, Interview Number 15.

³⁷⁴ Interview Number 10, Interview Number 15.

³⁷⁵ Interview Number 8, Interview Number 10, Interview Number 21.

time, mostly in the context of its 'Information Society' initiative which included a 'light-touch' regulatory model (see section two). Quite naturally, this interest included the broadcasting directive. In order to encourage the application of new technologies and new audiovisual services DG Telecoms argued in favour of proposing as little regulation as possible.³⁷⁶ According to DG Telecoms, the availability of a great range of applications and services would sooner or later automatically result in greater consumer choice and diversity. As regards 'Television without Frontiers' the DG preferred to phase out the quotas on European and 'independent' productions. Similarly to DG Internal Market, DG Telecoms opposed the inclusion of new audiovisual services to the scope of the directive mainly because it took the view that these services fell under its own competence. It preferred to limit regulation to simply promoting new communications technologies and services and argued that the broadcasting directive should only cover 'traditional' television broadcasting.³⁷⁷

The conflict between the three participating DGs was of a multi-dimensional nature, touching not only on the details of legislation, but also on its paradigm and the question of influence and control. The question of whether to include new audiovisual services to the scope of the broadcasting directive and whether to strengthen the quotas could not be solved in the context of preliminary consultations between the DGs concerned. When the obligatory inter-service consultations also failed to achieve a compromise, the dossier was increasingly discussed on *cabinet* level. The debate led in the *cabinets* largely reflected the divisions that had occurred among the DGs. It centred on the issues of new audiovisual services and the quotas. Several Commissioners made their views publicly known. For example, Telecoms Commissioner Martin Bangemann publicly called the quotas 'a misguided approach and soon a thing of the past' (Financial Times, 13.7.1994). At the insistence of his colleagues, Culture Commissioner de Pinheiro announced a departure from the priorities

³⁷⁶ Interview Number 10, Interview Number 15, Interview Number 21.

³⁷⁷ Interview Number 15.

previously announced by DG Culture, committing his service to 'clarify' existing quota rules rather than strengthening them.³⁷⁸

Several draft texts of the directive circulated back and forth between the *cabinets* and the DGs for re-drafting and new rounds of discussions. DG Culture had to make substantial amendments to the draft text, partially re-instating the 'loophole' for the quotas using the original wording for Articles 4 and 5 of the 1990 directive. The preparation was delayed by several months and continued on all levels of the Commission, including the Directorates General.³⁷⁹ In May 1995, the European Commission formally adopted its proposal revising the 'Television without Frontiers' directive (European Commission 1995e). Rather than strengthening its provisions or expanding its scope, the proposal aimed at increasing the legal certainty of the directive. The quota rules were partially strengthened, but to be phased out after a period of ten years. As regards television advertising, teleshopping was included in the articles relevant to advertising, but other new audiovisual services were excluded from the scope of the directive.

In the Council, the draft directive on 'Television without Frontiers' met with divergent positions among member states centring on the quota rules.³⁸⁰ In November 1995, the Council decided to leave the quota rules as they were.³⁸¹ Reaching agreement between the Council and the European Parliament during the co-decision procedure proved difficult. In June 1997, the broadcasting directive was finally adopted, largely sticking to the quota provisions of the

³⁷⁸ Interview Number 18, Interview Number 21. *Financial Times*, 4.1.1995.

³⁷⁹ In December 1994, outgoing Competition Commissioner Brittan evoked a postponement of a decision according to Article 4 of the Rules of Procedure of the Commission (e.g. European Commission 2000) which declares that the Commission lacks the necessary competence to formally adopt a policy proposal shortly before the expiry of its mandate. See Commission Press Release IP/95/25 of 11.1.1995. The ongoing debates led in the Commission were subject to extensive press coverage. For documentation see Agence Europe, 16.12.1994, 5.1.1995, 7.1.1995, 9./10.1.1995, 28.1.1995, 2.2.1995, 8.2.1995, 9.2.1995, 24.2.1995. *Financial Times* 14.12.1994, 5.1.1995, 9.1.1995, 10.1.1995, 25.1.1995, 14.2.1995, 22.3.1995. Also see Commission Press Release IP/95/25 of 11.1.1995.

³⁸⁰ One group (e.g. Germany and Britain) opposed a tightening of quotas, whereas another group (e.g. France and Ireland) opted for a stricter regime than the one proposed by the Commission. Agence Europe, 4.4.1995. *Financial Times*, 4.4.1995.

³⁸¹ Agence Europe, 22.11.1995. *European Voice*, 23.11.1995. The Council adopted a Common Position in July 1996. See Official Journal C264, 11.9.1996.

previous directive.³⁸² On the initiative of the European Parliament, some new provisions had been introduced, covering, for example, the broadcast of major sports events and the establishment of a Contact Committee of national experts.

Conclusion

The period from 1990 to 1996 saw several initiatives in which the European Commission engaged to refine and expand existing audiovisual legislation. The Directorates General debated three major themes of legislation: the regulation of television standards, measures designed to limit media ownership and concentration, and a revision of the existing directive 'Television without Frontiers'. Legislative action was prepared for by the drafting of several consultative documents. Eventually, the Commission adopted fewer legislative proposals than expected: two proposals on regulating television standards as well as a proposal revising 'Television without Frontiers'. Although the Commission pursued the three themes of legislation separately from each other, similar developments could be identified with a view towards the factors under study. The case studies revealed high levels of administrative fragmentation that were linked with low legislative outputs, i.e. slow and inconsistent policy-making which resulted in few decisions to propose legislation and, on several occasions, in deferment and abandonment.

In the early 1990s, the audiovisual arena on the administrative level of the Commission got rather crowded, occupied by three to four Directorates General. The situation stood in stark contrast to the first phase of audiovisual policy-making in the 1980s (see Chapter Three) as well as to the developments that could be observed for the telecommunications sector during the first half of the 1990s (see Chapter Four). In addition to DG Culture and DG Internal Market, DG Competition and DG Telecoms joined the setting of DGs. Not only did twice as many DGs actively engage in drafting legislation, but there were also much higher levels of conflict between them. While DG Culture and DG

³⁸² Directive 97/36/EC of the European Parliament and of the Council of 30.6.1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities. Official Journal L202 of 30.7.1997, p. 60.

Internal largely stuck to their established policy agendas which emphasised detailed regulation (DG Culture) and internal market and liberalisation concerns (DG Internal Market), DG Competition and DG Telecoms entered the arena with a new set of policy priorities. The main interest of DG Competition was to ensure that audiovisual legislation did not develop in contradiction to its application of general competition law and that it would not amount to what it considered to be over-detailed and over-strict regulation. DG Telecoms was concerned to advance its vision of the global 'Information Society' on the basis of a legislative framework which would establish as little regulation as possible and instead entail a greater reliance on market forces.

The distinct interests and sectoral outlooks maintained in the participating DGs gave rise to substantial controversy over the paradigm of legislation. For each legislative initiative, the DGs differed not only on the details of legislation, but also on its primary objectives, for example how much regulation should be introduced and how much space be left to the self-regulating forces of the market. In the context of the media ownership initiative, disagreement even stretched to the question of whether Community legislation should be proposed at all. Furthermore, a competition for authority emerged on several occasions. While DG Competition's main interest was to ensure that its existing powers to rule on media mergers and acquisitions were not curtailed by means of Community legislation, the other DGs competed for control over defining legislative solutions. For example, little conflict existed between DG Internal Market and DG Culture on the authority for the media ownership dossier, but rivalry emerged in the context of the 'Television without Frontiers' dossier. The most serious conflict arose on media ownership and the broadcasting directive due to the fact that DG Telecoms sought to increase its influence on audiovisual policy in general. These attempts were strongly opposed by other DGs that saw their established responsibilities questioned. Together, the large number of DGs, their differences on the substance of and need for legislation, as well as the competition for policy authority amounted to high levels of administrative fragmentation (see Table 12).

Table 12 Indicators of administrative fragmentation in the audiovisual sector from 1990 to 1996

	first directive on television standards	second directive on television standards	media ownership	'Television without Frontiers'
number of DGs	four	one	four	three
differences on paradigm	high	low	high	high
competition for authority	low	low	high	high
overall level of adm. fragm.	moderate-high	low	high	high

As a result of the high level of administrative fragmentation, coordination was extremely difficult to cope with by the participating Commission DGs. More informal means of coordination that had been effective during previous years and were proving indispensable for coordination in the telecommunications sector, for example preliminary consultations conducted at the lower levels of the DG hierarchies, were of limited effect to resolve controversy (see Chapters Three and Four). Finding themselves in a situation that was characterised by rivalry and fundamental conflict it was difficult if not impossible for the participating DGs to arrive at compromises. Their debate quickly acquired a confrontational style and quickly moved into the larger and more 'politicised' arenas of the Commission, notably the *cabinets* and the College of Commissioners. Here the divisions largely mirrored those that had occurred among the DGs. The fact that in these arenas the very basics of the Commission's legislative strategy had to be discussed once again, for example whether to propose legislation at all, served to prolong the preparation process even further and made changes to initial drafts more likely.

Due to the high levels of fragmentation and the limited effect of coordinative activities the participating DGs were not able to overcome conflict and dispute. In contrast to the telecommunications sector where the DGs involved managed to resolve controversy on legislative provisions, conflict persisted and intensified. Hence the legislative outputs produced by the Commission were rather low (see Table 13). Deferments frequently occurred and substantial gaps between initial policy drafts and finalised versions were common. The lowest legislative outputs could be observed for the case of media ownership: following

long delays and several deferments of the decision whether to propose legislation the Commission abandoned the dossier altogether. The Commission produced a large number of consultative documents many of which studied the question of whether to establish Community legislation but avoided a commitment to propose legislation (see Table 14). The only exception from the patterns of fragmentation and coordination was the preparation of the second directive on television standards. Due to reduced levels of administrative fragmentation, the Commission was able to act rapidly and consistently and to propose legislation without deferments.

Table 13 Legislative outputs produced by the European Commission in the audiovisual sector from 1990 to 1996

	first directive on television standards	second directive on television standards	media ownership	'Television without Frontiers'
duration	between twelve and 24 months	less than twelve months	more than two years	more than two years
consistency	moderate	high	low	low
decision to propose legislation				
▪ proposition of legislation	✓	✓	—	✓
▪ deferment	—	—	✓	✓
▪ abandonment	—	—	✓	—
overall legislative outputs	moderate	high	low	low

Table 14 Major European Commission consultative documents and legislative proposals adopted in the audiovisual sector between 1990 and 1996

year	type of document	title of document	DG with formal drafting responsibility
1990	consultative paper	'Communication on Audiovisual Policy' (European Commission 1990b)	DG Culture
1991	legislative proposal	'Proposal for a Council Directive on the Adoption of Standards for Satellite Broadcasting of Television Signals' (European Commission 1991d)	DG Telecoms
1992	consultative paper	Commission Communication on 'Pluralism and media concentration in the single market. An assessment of the need for Community action' (European Commission 1992e)	DG Internal Market and Industrial Affairs
1993	consultative paper	'Digital Television – The Framework for a Community Policy' (European Commission 1993d)	DG Telecoms
	legislative proposal	'Commission proposal for a directive on the use of standards for the transmission of television signals' (European Commission 1993e)	DG Telecoms
1994	consultative paper	Follow-Up to the Consultation Process relating to the Green Paper on 'Pluralism and Media Concentration in the Internal Market – An Assessment of the Need for Community Action' (European Commission 1994f)	DG Internal Market
	consultative paper	Communication on 'The application of the directive 'Television without Frontiers'' (European Commission 1994g)	DG Culture
1995	legislative proposal	Report on the Application of Directive 89/552/EEC and Proposal for a European Parliament and Council Directive amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (European Commission 1995e)	DG Culture
1996	informal legislative proposal	several informal draft proposals for a directive on media ownership	DG Internal Market

The following chapter examines the most recent phase of legislative policy-making the European Commission completed in the audiovisual field thus far. Chapter Six will show that the high level of administrative fragmentation observed for the first half of the 1990s endured and at times even intensified and demonstrates how this situation affected the Commission's legislative outputs.

**Part Three:
The
European
Commission's
Changing
Policy
Agendas,
1997 – 2000**

Chapter Six: From Rivalry to Mutual Avoidance – Coordination in the Audiovisual Sector

Introduction

This chapter examines the most recent phase of legislative policy-making undertaken by the European Commission in the audiovisual field. On the national and the European Union level the debates that were led on media and audiovisual policy in the late 1990s were shaped by the growing enthusiasm of policy-makers for the 'Information Society' and 'Convergence'. 'Convergence' referred to the changes triggered by the coming together of information technology, telecommunications and audiovisual sectors and the emergence of new markets and services. The European Commission was at the forefront to contribute to this debate which centred on the question of how the existing regulatory frameworks should respond to the challenge of 'Convergence' (e.g. Levy 1999). From 1997 a process was underway in the Commission to set an agenda for adapting existing legislation. Surprisingly only two legislative proposals emerged from it – notwithstanding several attempts made by different Commission DGs to prepare a greater number of pieces of legislation. Between 1997 and 2000, the European Commission prepared several consultative papers aimed at refining the existing legislative framework, most importantly the 1997 'Green Paper on Convergence' (European Commission 1997a). Apart from proposing draft legislation to further develop existing legislation on television standards (see Chapter Five), the Commission abstained from legislative action. The present chapter shows that analysing these attempts with a view towards understanding why they failed is extremely important to further our

understanding of how administrative fragmentation affects the Commission's legislative outputs.

The evidence presented in this chapter demonstrates that the high levels of administrative fragmentation observed for the first half of the 1990s (see Chapter Five) endured and at times even intensified. Four, sometimes five Commission DGs actively engaged in setting policy agendas and preparing legislation: DG Telecoms, DG Culture, DG Internal Market, DG Competition and sometimes DG Industry. As in previous years, these DGs maintained contrasting outlooks on and interests in audiovisual legislation. DG Culture continued to defend public service broadcasting and advocated detailed regulation of audiovisual services and networks. DG Internal Market sought to advance the realisation of the internal market and to regulate new issues, for example electronic commerce and intellectual property rights, on the basis of minimum rules. DG Competition wanted to further consolidate the application of competition law and avoid changing the existing balance between sector-specific regulation and case-by-case action. DG Telecoms continued to develop what it considered an entirely new model of audiovisual regulation, aimed at subsuming audiovisual legislation under the umbrella of a new legislative framework modelled on the regulation of telecommunications. The different policy priorities and organisational interests maintained in the participating DGs resulted in high levels of conflict between them. First of all, the DGs differed substantially on the paradigm of legislation, including the question of what should be the objectives of legislation as well as whether the Commission ought to take any legislative action at all. Furthermore, there continued to be a competition for authority which mainly related to what other DGs perceived as the increasing dominance of DG Telecoms that sought to expand its influence on audiovisual policy.

As shown in Chapter Five, coordination among the participating DGs had been characterised by conflict and dispute for several years. It now turned to be even more difficult to cope with, the dominant picture being one of confrontation and rivalry. The high levels of administrative fragmentation did not simply render coordinative activities, such as preliminary consultations, less effective. In anticipation of irreconcilable differences between each other, the

Commission DGs refrained from using them at all. A central argument emerging from this is that due to the absence of coordinative activities conflict persisted and at times even intensified. Legislative policy-making was therefore slow and characterised by delays and incoherence. With the exception of legislation that developed the existing policy on television standards the Commission did not produce any legislative proposals – in spite of its original intention to do so. Instead action was limited to the drafting of documents of a purely consultative nature that avoided a commitment to propose legislation. The proposition of legislation was deferred and later abandoned. Together, these low legislative outputs amounted to a Commission behaviour which can best be described as institutional inertia.

The chapter is divided into three parts. The first section analyses the attempts made by the Commission under the leadership of DG Telecoms to install a new framework which would 'merge' the regulation of the audiovisual with that of the telecommunications sector. It shows how the attempts of DG Telecoms to initiate a new legislative framework failed due to a high level of administrative fragmentation and irreconcilable differences between the participating DGs. The second section traces the ensuing efforts taken by the Commission DGs to refine the objectives and instruments of audiovisual legislation. It demonstrates how irresolvable conflict continued to largely prevent legislative action and made the Commission keep the established sectoral model of regulation. A final section presents some concluding remarks on how administrative fragmentation operated to shape the process of coordination among the DGs in the late 1990s and how it translated into legislative outputs.

Setting the policy agenda

Since the mid-1990s, much of the Commission's audiovisual agenda had come to be defined in the context of the 'Information Society'. The term stood for a variety of new communications services and applications and served as an overarching framework for a variety of activities undertaken by the Commission many of which touched the audiovisual sector (see Chapter Five). As regards

legislation, it implied far-reaching liberalisation, a greater reliance on market forces and a minimum of regulatory intervention. Towards the end of the 1990s, the 'Information Society' started to become overtaken by the initiative on 'convergence' (European Voice 12.12.1996). The term of 'convergence' refers to the blurring of boundaries between the formerly distinct sectors of information technology, telecommunications and the audiovisual. Put in simple terms, it has been expressed as the 'ability of different network platforms to carry essentially similar kinds of services, or the coming together of consumer devices such as the telephone, television and personal computer' (European Commission 1997a, p. 8).³⁸³ Technological convergence has been linked to a number of new services and applications, such as electronic commerce, home banking, voice telephony over the internet, and near-video on demand.

While the possibility of technological convergence has been largely undisputed, its implications for other areas, for example markets and consumer behaviour, have been far more controversial and subject to speculation and debate.³⁸⁴ The extent to which 'convergence' would lead to a new regulatory model remained even more disputed. In the European Commission the debate on how 'convergence' would affect legislation turned out to be one of the most heated ones led in recent years. Its starting point was that DG Telecoms sought to refine existing audiovisual regulation and undertook efforts to build a new framework. It then encountered significant opposition to its ideas from other Commission DGs.

The emergence of a new policy paradigm

In 1996, a small group of officials in DG Telecoms turned towards setting the agenda for developing a new regulatory model in the context of 'convergence'. At the time, DG Telecoms was still in the middle of collaborating with DG Competition on proposing a comprehensive regulatory framework for telecommunications (see Chapter Four). Most of the officials who dealt with

³⁸³ For a detailed literature account of the phenomenon of convergence see, for example, Levy (1999).

³⁸⁴ This has been documented by Harcourt (2003); Ward (2003).

'convergence' were organised in the unit called 'Relationship between Telecommunications and Audiovisual Media' in Directorate A ('Telecommunications, Trans-European Networks and Postal Services').³⁸⁵ The unit had previously been responsible for the preparation of legislative proposals for television standards (see Chapter Five). After the adoption of the revised legislative proposal on television standards (European Commission 1993e), the officials were looking for a new policy target. Given the rising popularity of the 'Information Society' initiative (see Chapter Five) and the success of telecoms liberalisation (see Chapter Four), the unit intended to develop a new regulatory model on whose basis the existing audiovisual framework could be updated and refined.³⁸⁶ Examining how to regulate the new services and markets in which the traditional sectors of telecommunications, information technology and media blurred seemed an excellent opportunity to increase the unit's prestige and also the influence of DG Telecoms on communications and media-related issues, notably vis-à-vis DG Culture and DG Internal Market.³⁸⁷ Indeed, the group would make the 'convergence' initiative one of the major themes debated in the Commission during 1997.

In the view of the unit in DG Telecoms, the development of a modern, integrated communications market was crucially dependent not only on an efficient infrastructure capable of offering the full range of new services, but also on measures that would keep the European communications market open to competition and provide the regulatory safeguards necessary to attract new market entrants.³⁸⁸ Assuming that technological convergence would make formerly distinct sectoral boundaries blur, the group wanted to develop an entirely new model of regulation.³⁸⁹ It intended to replace existing vertical regulation, i.e. the application of different rules to different services (e.g. cable

³⁸⁵ The group was joined by one person from the more senior management of DG Telecoms as well as one official from the 'Telecommunications Legislation' unit.

³⁸⁶ Interview Number 15, Interview Number 17, Interview Number 21, Interview Number 24.

³⁸⁷ Interview Number 10, Interview Number 15, Interview Number 21.

³⁸⁸ See Cockborne, Clements and Watson-Brown (1999), all DG Telecoms officials at the time.

³⁸⁹ Unpublished Commission document, draft 'Green Paper on Convergence', prepared by DG Telecoms during 1997 (undated). Interview Number 10, Interview Number 15, Interview Number 21, Interview Number 24.

television broadcasts versus voice telephony) that depended on the network on which they were delivered (e.g. cable, satellite), with so-called horizontal regulation. Horizontal regulation would apply the same regulatory model to the entire communications and media sector and distinguish only between the regulation of content and infrastructure. DG Telecoms envisaged a 'light' regulatory regime, assuming that the opportunities offered by the market would automatically entail greater consumer choice and innovation. The new framework would not only regulate telecommunications, but also the audiovisual sector and include both carriage and content. As regards carriage (i.e. infrastructure), the idea was to extend the regulatory principles for telecoms infrastructure to audiovisual networks, whereas for content (e.g. programme standards), the unit responsible in DG Telecoms envisaged the reliance on self-regulation and the regulating forces of the market. This implied a gradual phasing out of existing legislation.

The approach was basically in line with the overall thrust in DG Telecoms which emphasised competition, the promotion of new kinds of services and applications, and a minimum of re-regulation (see Chapter Four).³⁹⁰ In 1996, on the initiative of the unit responsible, the Commission adopted two Communications on the Information Society, one on 'The New Emerging Priorities' (European Commission 1996f) and one on 'Preparing the Next Steps' (European Commission 1996g). The two documents emphasised the importance of the 'Information Society', calling for improving the business environment and investing in the future. As regards regulatory principles, they proposed that

'over-hasty legislation should (...) be avoided until it is clear where and what type of intervention is required. In addition, it is important to remove any obstacles that may inhibit businesses from taking new initiatives and committing investments to them' (European Commission 1996f, p. 1).

The two documents were intended as consultative papers and as they did not make specific proposals for Commission action, their adoption did not attract significant debate in the Commission.

³⁹⁰ Interview Number 10, Interview Number 15, Interview Number 21, Interview Number 24.

In order to develop more detailed policy propositions, DG Telecoms commissioned a study from KPMG to analyse the phenomenon of 'convergence' and to recommend broad policy lines. The study was intended to serve as basis for the policy recommendations to be given in a Green Paper, a consultative Commission document. The Report published by KPMG in September 1996 argued that neither existing audiovisual nor telecommunications regulation could be applied unmodified to the new industry and services and claimed that in order to minimise regulatory intervention the European Union should support a market-led approach which would be primarily based on implementing general competition law (KPMG 1996, p. 25). The recommendations made by KPMG closely corresponded to the ideas circulating in the unit responsible in DG Telecoms. In autumn 1996, DG Telecoms organised public hearings on the central issues raised in the KPMG study, mostly with industry and business interests. Then there was an interruption until the actual drafting of a Green Paper on 'Convergence' began.³⁹¹ In early summer 1997 the unit prepared an initial draft document, entitled 'Green Paper on the Regulatory Implications of the Convergence of the Telecommunications, Audiovisual and Information Technology Sectors'.³⁹² It was modelled on previous Green Papers on the liberalisation of telecoms, presenting an outline of the current market and regulatory situation and proposing lines of action to be taken.³⁹³

Most of the draft's recommendations were based on the KPMG study, adapting its central definitions, assumptions and recommendations.³⁹⁴ The draft identified a number of regulatory barriers to convergence, including a lack of

³⁹¹ The main reason for this was that besides its activities on 'Convergence', the unit was heavily involved in the Commission's infringement proceedings against the Kingdom of Spain for non-compliance with the directive on television standards (Directive 95/47/EEC). The case was complex and highly-charged and because the unit was staffed with only three officials at the time, it consumed most of their time. This led to the postponement of the drafting of its consultative document on convergence. Interview Number 24.

³⁹² Unpublished Commission document, 'Detailed Commentary Green Paper on Convergence', prepared by DG Culture, October 1997.

³⁹³ Interview Number 24. Unpublished Commission document, 'Detailed Commentary Green Paper on Convergence' prepared by DG Culture, October 1997. The drafting was supported by an official who had been closely involved in the drawing up of the Green Papers on Infrastructure and Mobile Telephony (European Commission 1994a, 1994b, 1994c).

³⁹⁴ Interview Number 15, Interview Number 21, Interview Number 24.

'technological neutrality' of existing regulation and the fact that the provision of audiovisual services was not liberalised under existing legislation.³⁹⁵ DG Telecoms proposed that competition policy ought to be the main tool of regulation – besides there should be a reliance on self-regulation and the self-fulfilling mechanisms of the market. The document proposed to keep regulatory intervention at a minimum. Highlighting the potential uncertainty which might result from ongoing sector-specific regulation, the text called for so-called 'horizontal regulation', i.e. a new single regulatory model for the telecommunications and the audiovisual sectors based on the separation between infrastructure and content.³⁹⁶ The intention of DG Telecoms was to present the option of a single regulatory model together with two other options, either a continuation of sector-specific regulation or a progressive adaptation of rules to new services. The Commission would express a clear preference for horizontal regulation.

Furthermore DG Telecoms planned to make detailed provisions both for the regulation of audiovisual content and carriage. On content, it suggested limiting regulation to free-to-air broadcasting and to treat other audiovisual services in the same way as traditional telecommunications services.³⁹⁷ Provisions were made for market entry with suggestions to liberalise cable television networks not only for the provision of telephony, but also for the carriage of audiovisual services; for access, proposing to extend existing legislation on access to telecommunications services to new audiovisual services; for licensing, arguing in favour of no licensing at all or general authorisation and declaration procedures at most; and for the so-called public interest, suggesting that its objectives were to be re-assessed on the basis of costs.

³⁹⁵ Technological neutrality implies that a service is regulated in the same manner, irrespectively of the network it is delivered by (e.g. cable, satellite) (European Commission 1999c, p. 3). Unpublished Commission document, draft 'Green Paper on Convergence', prepared by DG Telecoms during 1997 (undated).

³⁹⁶ Interview Number 15, Interview Number 21.

³⁹⁷ Unpublished Commission document, 'Green Paper on Convergence', prepared by DG Telecoms during 1997 (undated).

The preparation of the 'Green Paper' on Convergence

During the drafting of the Green Paper, the unit in DG Telecoms deliberately refrained from consulting on a preliminary basis with other Commission DGs. This stood in contrast to arrangements made earlier by the senior managements of the Directorates General for Telecoms and Culture that had agreed the two services would collaborate closely as the convergence issue touched on DG Culture's established authority over the audiovisual sector and, more specifically, content issues.³⁹⁸ The main reason was that the unit taking responsibility in DG Telecoms anticipated significant opposition to its ideas from other DGs, because they implied a questioning of their authority for the audiovisual field. Greatest resistance was feared from DG Culture whose approach towards regulating content and public interest issues was fundamentally different from the ideas of DG Telecoms. While DG Telecoms placed emphasis on the self-regulating power of market forces and the application of general competition law, it viewed DG Culture as biased in favour of public service broadcasters and independent producers as well as towards what it considered excessive levels of regulation (see Chapter Five).³⁹⁹

In order to prevent DG Culture from bringing in its views and causing widespread controversy in the Commission, the unit 'avoided' (Interview Number 15) debating the dossier with other DGs before a final draft was ready for submission to formal inter-service consultations.⁴⁰⁰ The officials involved reckoned that building on the support of Telecommunications Commissioner Martin Bangemann and his *cabinet*, the protest of DG Culture would then be simply 'swept away' (Interview Number 12). The unit also wanted to sidestep lengthy consultations with other Commission DGs that might express an interest in the dossier, including DG Competition, DG Internal Market and, to a more limited extent, the DG for Industry. Requesting a formal response from other DGs on the draft text within only ten days, DG Telecoms intended to shorten

³⁹⁸ Unpublished Commission document, draft 'Green Paper on Convergence', prepared by DG Telecoms, dated 16.10.1997.

³⁹⁹ Interview Number 15, Interview Number 22. Unpublished Commission document, note on 'Convergence Green Paper', prepared by DG Telecoms, dated 21.10.1997

⁴⁰⁰ Interview Number 17, Interview Number 22.

discussion between Commission DGs and to force them to produce their feedback in a hurry. When in mid-October 1997 the draft Green Paper reached the Commission services formally associated with the dossier, the unusual behaviour of DG Telecoms met with annoyance and protest from several Commission DGs.⁴⁰¹ As DG Telecoms had deliberately refrained from coordinating with other DGs the debate very quickly acquired a 'confrontational style' (Interview Number 24). For example, DG Culture responded to the 24 pages long draft document by sending a 28 page long commentary. Other Commission DGs, including the DGs Internal Market, Competition, and Industry also expressed their irritation at DG Telecoms bypassing usual procedures. The Commissioner for Culture and Audiovisual Affairs, Marcelino Oreja, demanded that the interservice consultations be suspended and a new drafting process launched. In late October, the Secretariat General put a halt to the procedure and formally asked DG Telecoms to extend the consultation period and to engage in a more constructive dialogue with DG Culture.⁴⁰² Taking a decision on the 'convergence' dossier was officially deferred. Instead of repressing conflict on the content of the future regulatory strategy on 'convergence' and on which Commission DG would define it, DG Telecoms found itself in a situation of confrontation, outspoken rivalry and 'jealousy' (Interview Number 24).

Discussions now mostly took place on the senior management level of the different Directorates General and, when the controversial issues could not be solved, moved on to the *cabinets*.⁴⁰³ The main debates continued to centre on DG Telecoms and DG Culture and discussions were led in what interviewees referred to as an atmosphere of confrontation and hostility.⁴⁰⁴ Foremost, DG

⁴⁰¹ Interview Number 15, Interview Number 21, Interview Number 24. European Voice, 23.7.1998. Unpublished Commission document, draft 'Green Paper on Convergence', prepared by DG Telecoms, dated 16.10.1997.

⁴⁰² Interview Number 24. Unpublished Commission document, note on 'Consultation interservice lancée par la DG XIII sur un projet de livre vert concernant les implications réglementaires de la convergence dans les secteurs des télécommunications, de l'audiovisuel et des technologies de l'information ; demande de la DG X de suspension temporaire de la procédure consultation interservice', prepared by the Secretariat General, dated 24.10.1997.

⁴⁰³ Interview Number 10, Interview Number 15, Interview Number 21.

⁴⁰⁴ Interview Number 15, Interview Number 21.

Culture and DG Telecoms disagreed on the content of the 'convergence' strategy, but their dispute also overlapped with a struggle for influence and control. DG Culture considered itself as the main authority on audiovisual issues, mainly because of its responsibility for the 'Television without Frontiers' directive. DG Culture believed that if DG Telecoms realised the vision of a single regulatory framework it would see its own role significantly reduced.⁴⁰⁵ The units in Directorate D ('Culture and Audiovisual Policy') therefore accused the unit in DG Telecoms of overstepping its competencies and questioning the role of DG Culture as a key policy-maker in the audiovisual sector. In its formal responses to the draft Green Paper, DG Culture criticised the Green Paper for making comments and proposals on subjects not falling within the competence of DG Telecoms, such as the content of audiovisual services, public interest regulation, media pluralism and cultural diversity.⁴⁰⁶ It therefore called for a rewriting of several sections of the Green Paper.

As regards the content of the Green Paper, DG Culture disagreed with most definitions and recommendations made in the draft. It demanded that the Green Paper be devoted to analysing the nature of convergence rather than jumping to conclusions about its regulatory implications. DG Culture accused DG Telecoms of taking convergence as an ideological concept rather than demonstrating that it actually took place. Contending that the activities in the different sectors had already sufficiently blurred, DG Culture considered it premature to regulate a market yet to be defined – a position which was shared by other Commission DGs, including DG Competition and DG Industry.⁴⁰⁷ DG Culture also raised doubts on the use of the KPMG study as it so clearly expressed the preferences of DG Telecoms. Indeed, the study was subject to debate even within DG Telecoms due to its bias towards the preferences of the

⁴⁰⁵ Interview Number 10, Interview Number 15, Interview Number 17, Interview Number 21, Interview Number 24. *European Voice*, 13.11.1997.

⁴⁰⁶ Unpublished Commission documents. Note on 'Green Paper on Convergence', prepared by DG Telecoms, dated 16.10.1997. Unpublished Commission document, 'Detailed Commentary Green Paper on Convergence' prepared by DG Culture, October 1997. 'Convergence Green Paper, Background Briefing', prepared by DG Telecoms, dated 21.10.1997.

⁴⁰⁷ Unpublished Commission document, note on 'Green Paper on the Regulatory Implications of the Convergence of the Telecommunications, Audio-visual and Information Technology Sectors', prepared by DG Industry, dated 24.10.1997.

unit responsible.⁴⁰⁸ Questioning the substance of the approach set out by DG Telecoms as well as the need for a new regulatory model, DG Culture called for splitting up the document into two separate Green Papers. The first document should analyse the phenomenon of convergence, whereas a second one should analyse all policy implications, without being biased towards the option of a single regulatory model.

DG Telecoms also faced significant opposition from other Commission DGs. Controversy concerned policy authority as well as the paradigm of legislation. DG Internal Market and DG Competition and, to a more limited extent, DG Industry expressed fierce opposition which was related mainly to the fear that their existing competences on media-related issues might be diminished or modified. Their main criticism was that the draft text presumed too much about the future shape of regulation without analysing alternative regulatory models.⁴⁰⁹ In order to prevent their responsibilities being questioned, for example on the regulation of electronic commerce, intellectual property rights, data protection, and copyright, senior-level policy-makers in DG Internal Market expressed a preference for the progressive adaptation of the existing regulatory framework.⁴¹⁰ The DG also doubted the feasibility of the provisions made by DG Telecoms and contended that a framework advocating as little regulation as possible would take sufficient account of the problems emerging in the audiovisual and telecommunications sectors. It therefore called for presenting the regulatory options in a more neutral way, opening a debate rather than limiting it to the sole option of a single regulatory framework.

DG Competition also disagreed widely with DG Telecoms over the Convergence Green Paper. As regards the audiovisual sector, its main interest was to consolidate the use of its powers to rule on media mergers and joint

⁴⁰⁸ Interview Number 21, Interview Number 24.

⁴⁰⁹ Unpublished Commission documents. Note on 'Green Paper on the Regulatory Implications of the Convergence of the Telecommunications, Audio-visual and Information Technology Sectors', prepared by DG Industry, dated 24.10.1997. Note on 'Interservice Consultation concerning the 'Green Paper on (...) Convergence'', prepared by DG Internal Market, dated 31.10.1997.

⁴¹⁰ Interview Number 24. Unpublished Commission document, note on 'Interservice Consultation concerning the 'Green Paper on (...) Convergence'', prepared by DG Internal Market, dated 31.10.1997.

ventures provided for by general competition law and the Merger Regulation. Since the mid-1990s, DG Competition had produced a number of important decisions, such as the rejection of the joint ventures between Bertelsmann, Kirch and Deutsche Telekom for the provision of technical services for pay-tv in 1994.⁴¹¹ The main objections raised by senior policy-makers in DG Competition against the Convergence Green Paper was that as it stood, it would have fundamental implications for the Commission's powers to implement competition rules in the media sector, particularly under the Merger Regulation.⁴¹² In the context of possible modifications to sector-specific regulation, the draft text discussed competition law concepts and terminology, for example market definitions. DG Competition objected to this as its officials believed that it was too early for the Commission to take a position on how competition rules were to be applied in a 'converged' environment before 'convergence' had actually become a reality. DG Competition also called on DG Telecoms to distinguish more clearly between areas in which existing competition law was to be applied and other areas for which new legislative measures could be introduced.

Many contentious issues could not be resolved between the different DGs and therefore shifted from the formal inter-service consultations to the *cabinets* for discussion.⁴¹³ At the time, the atmosphere among the Commissioner *cabinets* as regards media-related issues was generally tense. Mostly this was due to the ongoing struggles surrounding the preparation of a directive limiting media ownership (see Chapter Five).⁴¹⁴ The *cabinets* of the Commissioners for Culture, Internal Market and Competition re-affirmed most of the criticisms expressed on DG level. The debate led on *cabinet* level was time-consuming: when disagreement endured, the *cabinet* of Telecoms Commissioner Bangemann distanced itself from the draft Green Paper produced in DG Telecoms.

⁴¹¹ For an overview see Levy (1999, p. 86f.); Marsden (1997, p. 8f.).

⁴¹² Interview Number 24. European Voice 12.3.1998. Unpublished Commission document, note on 'Interservice Consultation on the draft Green Paper on (...) Convergence', prepared by DG Competition, dated 31.10.1997.

⁴¹³ Interview Number 10, Interview Number 15, Interview Number 21.

⁴¹⁴ European Voice, 3.4.1997, 27.11.1997, 12.3.1998. Interview Number 6, Interview Number 24.

Bangemann was said to prefer a more 'consultative' paper in order to gain sufficient internal support.⁴¹⁵ Responding to the pressure exerted by Commissioners and *cabinets*, the Director General of DG Telecoms, Robert Verrue, called for a rewriting exercise and asked the unit responsible in DG Telecoms to collaborate more closely with other DGs, particularly DG Culture. The persistence of conflict had effectively resulted in another deferment of the decision whether to propose legislation.

In an attempt to re-affirm the authority of DG Culture for issues traditionally associated with the audiovisual sector, particularly content, Commissioners Oreja and Bangemann agreed to allocate joint responsibility for the Green Paper to DG Culture and DG Telecoms. A joint working group which brought together officials of DG Culture and DG Telecoms was set up to draft the final version of the Convergence Green Paper. During their talks, the *cabinets* had agreed that they wanted the Green Paper to be ready for presentation at the December meeting of Telecoms Ministers as it should represent a 'milestone' on leading the telecommunications and media sector into the next century. Rather than provoking an outcry from established sectoral interests, they wanted to make the Green Paper trigger a debate and attract favourable opinions. DG Telecoms was therefore brought increasingly under pressure to produce a draft that would refrain from proposing radical solutions, but be acceptable to a majority of actors within and outside the Commission.⁴¹⁶

The 1997 'Green Paper' on Convergence

After intense negotiations on the different levels of the Commission hierarchy, the Commission agreed on a draft Green Paper jointly submitted by DG Culture and DG Telecoms in December 1997 (European Commission 1997a). The final version of the Green Paper was adopted several months later than foreseen and

⁴¹⁵ Unpublished Commission document, note on 'Préparation du Livre vert sur la Convergence', prepared by DG Telecoms, dated 27.10.1997.

⁴¹⁶ Interview Number 15, Interview Number 21, Interview Number 24. European Voice, 13.11.1997.

differed significantly from earlier drafts.⁴¹⁷ Entitled 'Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation', its central message reflected the far-reaching concessions DG Telecoms had made other DGs opposing a firm commitment towards a single regulatory model. The Green Paper stated that

'whilst digitalisation means that convergence is well advanced at the level of technology, this Green Paper does not automatically assume that convergence at one level inevitably leads to the same degree of convergence at other levels. Equally, there is no assumption that convergence in technologies, industries, services and/or markets will necessarily imply a need for a uniform regulatory environment (...). This Green Paper responds to the requirement for debate. It is consciously interrogative. It analyses issues, it identifies options and poses questions for public comment. It does not take positions at this stage nor reach conclusions' (European Commission 1997a, p. 4).

The Green Paper presented three options for legislative action: the building on current structures; the development of a separate model for new activities to co-exist with telecommunications and broadcasting regulation; and the progressive introduction of a new regulatory model to cover the whole range of existing and new services (European Commission 1997a, p. 40). The Commission did not indicate a clear preference for any of these options nor did it present a timetable for action. Instead, it emphasised that the Commission would await the results of public consultations and monitor market developments before committing itself to any of these options (European Commission 1997a, p. 4).

The provisions made in the Convergence Green Paper differed fundamentally from earlier versions produced by DG Telecoms as they incorporated the criticisms made by the participating DGs and *cabinets*. For example, whilst reflecting on refining or developing sector-specific regulation, the document stated that the application of competition rules would continue to play a key role in the 'Information Society' sector (European Commission 1997a, p. 13). This represented a concession made by DG Telecoms to DG

⁴¹⁷ Interview Number 15, Interview Number 17, Interview Number 21, Interview Number 24. European Voice, 12.12.1996.

Competition.⁴¹⁸ Another concession to DG Competition was that the Green Paper refrained from ultimately defining markets for the purposes of applying EU competition law. Due to intervention by DG Internal Market, the Green Paper excluded an examination of policy issues related to electronic commerce, intellectual property rights, copyright, media pluralism, data protection, encryption and digital signatures (European Commission 1997a, p. 7). DG Culture had successfully insisted on excluding questions of content and public service and managed to realise '80 to 90 per cent of what we wanted' (Interview Number 21). For example, the original proposition to treat different services or applications carried over the same network the same regardless of their actual differences in terms of content was replaced with a confirmation of sectoral specificities:

'for example, whilst a film, a song, a railway timetable and a phone conversation may all be carried in digital form, this does not result in the user treating these different services/activities as interchangeable. In the same way, regulatory approaches to each of these services, whilst potentially based on similar general principles, are likely to continue to be tailored to the specific characteristics of these different services' (European Commission 1997a, p. 25).

Due to high extents of conflict prevailing among a large number of Commission DGs, the Commission had deferred taking a definite decision over the Commission's future regulatory approach for the audiovisual domain. During the months to follow, key actors in the European Commission engaged in further attempts to define a framework for legislative action.

The preparation of legislation

The public consultations on the Convergence Green Paper (European Commission 1997a) lasted from December 1997 until May 1998 and were led by DG Telecoms. In spite of its limited proposals, the Convergence Green Paper caused substantial debate among MEPs, member states, broadcasting regulators

⁴¹⁸ Interview Number 24.

and industry interests.⁴¹⁹ The Commission announced a second consultation period on the more specific issues raised in the Green Paper which lasted until November 1998. Consultations with outside interests still being underway, the participating DGs engaged in a discussion on how to proceed. In the context of several formal inter-service meetings that involved all interested Commission DGs as well as other services such as the Legal Service, DG Culture continued to oppose any expansion of DG Telecoms' authority to content regulation and to object against a 'horizontal' model of regulation which would cover all networks and services irrespectively of the content they carried. DG Telecoms increasingly recognised that attempts to 'merge' telecommunications with audiovisual policy and to gain authority over content and public service issues would continue to meet with serious opposition from several DGs. Realising the vision of 'convergent' regulation would probably imply to engage in lengthy conflict with other Commission DGs, with few chances of success. A majority of officials in DG Telecoms believed that such disputes might hamper the DG's efforts to regulate telecoms infrastructure and services and possibly reduce its general standing in the Commission – and was therefore not as desirable as it might have seemed at first.⁴²⁰

The senior management of DG Telecoms and the Bangemann *cabinet* decided that for the time being, DG Telecoms would limit the scope of its activities.⁴²¹ This implied that the Commission's regulatory response to technological convergence would be split according to established sector-specific responsibilities. Any regulatory reform would consist of a mixture of adjusting existing legislation and progressively introducing new measures. The regulation of infrastructure would remain the responsibility of DG Telecoms that would seek to develop legislation combining the regulation of telecoms and broadcasting networks (see below). Regulating content and public interest issues would remain domain of DG Culture, DG Internal Market would

⁴¹⁹ In July 1998, under the joint responsibility of DG Telecoms and DG Culture, the Commission adopted a Working Document (European Commission 1998) summarising the responses to the Green Paper. It revealed that a majority of outside interests favoured an evolutionary approach rather than radical reform by means of 'horizontal regulation'.

⁴²⁰ Interview Number 13, Interview Number 19.

⁴²¹ Interview Number 10, Interview Number 15, Interview Number 21, Interview Number 24.

continue to draft legislation on market conditions applying to new services such as electronic commerce, and DG Competition would apply general competition rules to the media sector. The European Commission confirmed these aims in a Communication on the 'Results of the Public Consultations on the Green Paper' (European Commission 1999a) a document which was adopted in March 1999 under the joint responsibility of DG Culture and DG Telecoms. Summarising the key messages that had emerged from consultations, the Communication affirmed that the Commission would continue to develop content regulation separately from that of carriage, either by adjustments to existing legislation or by new legal measures. The main message emerging from the document was that most of what used to constitute sectoral policies would continue in the near future.

After the debacle of a single or 'convergent' regulatory model subsuming audiovisual legislation under the umbrella of the telecommunications framework, the European Commission's audiovisual policy largely continued along established lines. DG Culture kept responsibility for policy issues related to content, DG Telecoms maintained authority over carriage and network issues, DG Internal Market further developed regulation for issues such as data protection, and DG Competition continued to apply general competition law to media mergers and joint ventures, ruling on abuses of dominant positions and anti-competitive positions.⁴²² To a majority of Commission actors it was clear that the controversy over the definition of policy priorities for the audiovisual domain and over which DG would take responsibility remained unsolved. They believed that stirring up this conflict again would entail more time-consuming battles and that in order to realise their other policy priorities it would be best to avoid or to keep out of such debates.⁴²³ Rather than engaging in any further conflict with other DGs, a common strategy turned out to be what interviewees

⁴²² The legislative activities undertaken in the media units of DG Internal Market concentrated on initiatives associated with, but outside the traditional realm of audiovisual policy. They are therefore not analysed here (see Chapter Two). For example, DG Internal Market drafted measures on data protection, transparency and electronic commerce. For an overview see, for example, European Commission (2003); Goldberg et al. (1998). The same applies to the role played by DG Competition whose activities in the audiovisual field have centred on implementing the Commission's executive powers rather than preparing legislation and are therefore outside the scope of this thesis.

⁴²³ Interview Number 21, Interview Number 29.

referred to as ‘a policy of mutual avoidance’, ‘burying one’s head in the sand’ and ‘trying not to stir up any more battles’ (Interview Number 15 and 29) The result can largely be described as institutional inertia: the European Commission stuck to a minimum of action and produced very few legislative outputs.

Legislation on television standards and conditional access

In the months that followed the adoption of the 1997 ‘Convergence Green Paper’ (European Commission 1997a) the responsible directorate in DG Telecoms responded to the struggles that surrounded audiovisual policy by sticking to its established activities. First and foremost, it concentrated on further developing the EU’s telecommunications policy in the context of a far-reaching review exercise (see Chapter Seven). As regards audiovisual policy, DG Telecoms directed its attention to the regulation of television standards. Since the late 1980s legislation on television standards had represented a cornerstone of the Commission’s audiovisual policy (see Chapter Five). The existing Directive on the use of standards for the transmission of television signals adopted by the Council and the European Parliament in 1995 promoted the development of television services in wide-screen 16/9 format, irrespectively of the transmission standard used.⁴²⁴

The 1995 directive on television standards had no expiry date, but required regular revision and therefore prompted DG Telecoms to look into possible amendments. An issue that gained particular relevance in the wider context of television standards was the issue of conditional access. With increasing digitalisation new audiovisual services emerged (e.g. pay-tv, video-on-demand and electronic publishing), many of them based on so-called conditional access. Conditional access meant that the access to such services was conditional on a prior authorisation aiming at ensuring the remuneration of the service, for example by means of decoders or smart cards. In the view of DG Telecoms the use made by operators of proprietary standards for granting conditional access

⁴²⁴ Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 on the use of standards for the transmission of television signals. Official Journal L281, 23.11.1995, PP. 51-54.

to their services raised new regulatory issues, for example how to ensure the interconnection and interoperability of different types of networks.⁴²⁵ The existing directive on television standards obliged conditional access operators to provide access to their digital television services under fair, reasonable and non-discriminatory terms, but made no provisions for new gateway technologies nor for protecting conditional access systems against piracy.⁴²⁶

Responsibility for the revision of the existing directive on television standards was taken by DG Telecoms. Being a direct consequence of its established authority over television standards (see Chapter Five) this was broadly accepted among other Commission DGs. In fact, other DGs took little interest in the revision since they consented to the policy priorities expressed by DG Telecoms and the need for revising existing legislation.⁴²⁷ On the initiative of DG Internal Market, the European Commission had already adopted a proposal for a directive on the legal protection of services based on or consisting of conditional access (European Commission 1997c) in July 1997 which proposed provisions against illicit devices granting unauthorised access to conditional access services, notably by prohibiting their commercial manufacturing, distribution and marketing.⁴²⁸ DG Telecoms now engaged in further developing the Commission's policy on conditional access. An idea that had followed from the principle of 'technological neutrality' promoted by DG Telecoms was to combine the regulation of access and interconnection in telecommunications with that of broadcasting.⁴²⁹

In November 1999, on the initiative of DG Telecoms, which had been re-named 'DG Information Society' (commonly called 'DG InfSo') after the re-

⁴²⁵ European Commission (1997c). For a detailed literature account of the issue of conditional access see, for example, Levy (1999, p. 64f.).

⁴²⁶ European Commission (1997a, p. 30).

⁴²⁷ Interview Number 25, Interview Number 28.

⁴²⁸ The final version of the proposal was adopted by the European Parliament and the Council in November 1998. Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access. Official Journal L320, 28.11.1998 pp. 54 – 57.

⁴²⁹ Interview Number 25, Interview Number 28. The idea behind 'technological neutrality' is that the same rules apply to different services, irrespectively of the network they are delivered by.

organisation of the European Commission in March 1999, the Commission adopted a Communication (European Commission 1999d) reporting on the 1995 directive on television standards. The document announced that the regulation of conditional access for broadcasting would have to be combined with that for telecommunications in a new directive (European Commission 1999d, p. 3). The idea did not cause much controversy among other Commission DGs because it did not question existing regulation on other audiovisual issues (for example content) nor the authority of other DGs.⁴³⁰ The adoption of the Communication (European Commission 1999d) was therefore largely uncontroversial and, as intended by DG Telecoms, fell together with that of the 1999 'Telecommunications Review' (European Commission 1999c; see Chapter Seven). In July 2000, the Commission adopted a proposal for a directive on access and interconnection (European Commission 2000j) intended to repeal the existing directives on television standards (Directive 95/47/EC of 24.10.1995) and on interconnection (Directive 97/33/EC of 30.06.1997). The proposal carried over existing obligations of the directive on television standards to provide conditional access on fair, reasonable and non-discriminatory terms and included provisions that allowed for extending these obligations in relation to new gateways following refined market analysis procedures.⁴³¹ Hereby the European Commission concluded its most recent activities to propose audiovisual legislation thus far. As the following paragraphs show the Commission did engage in, but did not realise its attempts to propose other pieces of legislation, due to ongoing conflict and internal debate.

(Non-) Action to refine audiovisual legislation

While under the leadership of DG Telecoms the European Commission was able to produce legislative proposals on the issue of television standards and conditional access, a different situation can be observed for the remainder of

⁴³⁰ Interview Number 12, Interview Number 15.

⁴³¹ The Council and the European Parliament adopted the directive in March 2002; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive). Official Journal L108, 24.4.2002, pp. 7-20. See Chapter Seven for detail.

the Commission's legislative policy-making. A central but still unresolved issue concerned EU audiovisual legislation more generally. The controversies surrounding the preparation of the 1997 'Convergence Green Paper' (European Commission 1997a) had caused a vacuum in which uncertainty persisted as regards the objectives, direction, and scope of EU-wide legislation. The DGs that held an interest in audiovisual legislation mostly stuck to their established activities. DG Telecoms concentrated on promoting new technologies and proposing legislation on conditional access. DG Competition continued to apply general competition law and the Merger Regulation. DG Internal Market engaged in efforts to further develop regulation for media-related issues such as data protection and electronic commerce. DG Culture focused on content-related issues and on further developing and monitoring the implementation of the MEDIA Programme, a series of support measures aimed at strengthening the competitiveness of the European audiovisual industry by supporting productions and the training of professionals.⁴³² In the Commission, conflict on these initiatives was generally low as they fell under the undisputed responsibility of DG Culture and largely represented a continuation of existing policies.⁴³³

Due to its general responsibility for the audiovisual domain DG Culture also considered to refine the European Commission's overall approach to regulating the audiovisual sector. Its main interest was to establish a more coherent vision of audiovisual policy that would, for example, balance industrial and cultural policy aims and provide a comprehensive framework for future legislative action. In 1998, the 'Culture and Audiovisual Policy' unit prepared a

⁴³² For example, DG Culture prepared a number of consultative papers touching on aspects of audiovisual content, such as a Communication on 'Illegal and Harmful Content on the Internet' (European Commission 1996c) and the 'Green Paper on Minorities and Human Dignity' (European Commission 1997b) that dealt with the content of audiovisual and information services available on the internet and proposed a Council Recommendation aimed at achieving a comparable and effective level of protection of minors and human dignity. For an overview of these activities see European Commission (2003). See Council Recommendation of 24.9.1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity. Official Journal L270 of 7.10.1998, p.48. For an overview of the MEDIA Programme see http://www.europa.eu.int/comm/avpolicy/mediapro/media_en.htm and Goldberg et al. (1998).

⁴³³ Interview Number 12, Interview Number 21, Interview Number 29.

consultative document designed to outline fundamental principles of the Commission's future audiovisual policy. In the view of DG Culture, the document would serve to re-affirm the authority of DG Culture to define the lines of the Commission's audiovisual policy, particularly vis-à-vis the DG Telecoms 'domination network' (Interview Number 29). For example, DG Culture intended to state that audiovisual regulation ought to take account of public interest objectives rather than being solely directed at economic and industrial policy aims. At the same time, it was generally accepted that in order not to stir new confrontation with other Commission DGs, DG Culture would better abstain from making detailed recommendations for regulation. Hence in its draft Communication on 'Audiovisual Policy: Next Steps' (European Commission 1998b) DG Culture did not propose new lines of action, but made general statements and detailed suggestions only for the MEDIA Programme. In order not to get entangled in a new round of friction, DG Culture did neither question existing pieces of legislation nor call for any revisions.⁴³⁴

Apart from the preparation of consultative papers on the Commission's future audiovisual policy, DG Culture refrained from initiating action. In the context of its responsibility for the 'Television without Frontiers' directive, it prepared a number of reports on its implementation (e.g. European Commission 2001, 2002). A revision of the broadcasting directive began in June 2001, but has not gathered sufficient support in the Commission thus far to lead to formal legislative proposals.⁴³⁵ Some officials in the DG have come to take the position that the directive needs further updating and clarification because it leaves a number of issues unaddressed, for example audiovisual content delivered via the internet, area-specific advertising, and the granting of access to events of major importance for society.⁴³⁶ However mostly in anticipation of new conflict with other Commission DGs, the senior

⁴³⁴ Interview Number 12, Interview Number 29. Another document adopted by the European Commission on audiovisual policy was the Communication 'Principles and Guidelines for the Audiovisual Policy in the Digital Age' (European Commission 1999b) which outlined a number of principles of regulatory intervention, according to which regulation ought to be limited to a minimum necessary to guarantee legal certainty and technological neutrality.

⁴³⁵ Interview Number 10, Interview Number 21, Interview Number 27, Interview Number 29.

⁴³⁶ See European Commission (2003).

management of DG Culture decided that for the time being, the Commission would continue to carefully monitor the implementation of 'Television without Frontiers' and defer presenting proposals for a revision.⁴³⁷ Coordination on audiovisual legislation has therefore been largely absent. With the exception of legislative action on conditional access (see above), the European Commission has exhibited a behaviour of institutional inertia and has infinitely delayed or deferred the proposition of legislation.

Conclusion

The analysis of the most recent phase of legislative policy-making in the audiovisual sector showed that in spite of the challenges posed to existing legislation due to market and technological developments the Commission remained rather passive in so far as it proposed only very little binding legislation. This should not lead us to conclude that the Commission did not pursue any legislative initiatives. Quite the opposite was the case: its Directorates General engaged in extensive efforts to develop a new regulatory framework for audiovisual issues. Trying to explain the gap between initial plans and expectations and what the Commission actually did revealed that fragmentation and conflict on the administrative level of the Commission are inextricably linked to its capacity to produce legislative outputs.

As regards administrative fragmentation, the evidence presented in this chapter uncovered a continuation if not an intensification of the patterns observed for the first half of the 1990s (see Chapter Five). The main trigger of fragmentation continued to be the high number of Commission DGs that actively sought to determine the Commission's audiovisual agenda. Four to five DGs sought to influence this process: DG Culture, DG Telecoms, DG Competition, DG Internal Market, and sometimes DG Industry. Furthermore, the DGs differed

⁴³⁷ In this context, it is interesting to know that since early 2000 a senior-level official from DG Telecoms who had been a key figure in the context of the 'convergence' initiative has been head of the unit 'Culture and Audiovisual Policy' in DG Education and Culture. In the view of several officials in DG Education and Culture this has resulted in a 'DG InfSo flavour' (Interview Number 10) to the DG which makes the proposition of legislation along the lines traditionally represented by DG Education and Culture even more unlikely. Interview Number 21, Interview Number 27, Interview Number 29.

substantially on the paradigm of legislation and on the division of authority (see Table 15). This became most evident in the context of the preparation of the 1997 'Convergence Green Paper' (European Commission 1997a). Leadership was sought by DG Telecoms against the will of other DGs that feared for their established responsibilities and powers. DG Culture feared for its traditional responsibility to define audiovisual policy. DG Internal Market had an interest in controlling the definition of policy solutions for issues coming up in the context of new media and audiovisual services, for example data protection. DG Competition opposed anything that would diminish its role to rule on media mergers and acquisitions by means of general competition law. Linked to these underlying struggles for authority and based on their distinct and sometimes contrasting outlooks on audiovisual issues, the DGs also widely disagreed on the objectives of and the need for legislation. DG Telecoms sought to increase the role self-regulation and to give up sector-specific legislation, but other DGs argued in favour of leaving established sectoral models of regulation in place, either because they generally opposed 'merging' audiovisual with telecommunications legislation or because they did not consider the timing right.

Table 15 Indicators of administrative fragmentation in the audiovisual sector from 1997 to 2000

	initiative on 'convergence'	legislative proposals on television standards	other audiovisual legislation incl. 'Television without Frontiers'
number of DGs	five	one	four
differences on paradigm	high	low	high
competition for authority	high	low	high
overall level of adm. fragm.	high	low	high

Due to the high levels of administrative fragmentation, coordination among the participating DGs turned out to be extremely difficult to manage, particularly in the context of the preparation of the 1997 'Convergence Green Paper'. In anticipation of irresolvable debate with other DGs, DG Telecoms deliberately abstained from consulting with them on a preliminary or informal basis and thereby broke with common routines intended to facilitate coordination.

Instead coordination was confined to the formal inter-service consultations in which the debate quickly took on a confrontational style. As most issues remained unresolved the discussion moved on to the *cabinet* level. The ensuing multiplication of actors and an atmosphere of hostility and politicisation delayed the preparation process and made substantial changes to the initial proposals produced by DG Telecoms inevitable. Due to the absence of coordinating activities controversy and conflict were far from being settled, but endured and intensified. DG Telecoms had to give up its vision of creating 'convergent' regulation and was made to substantially amend the draft document. The decision whether to propose an entirely new regulatory framework was first deferred and later abandoned when the Commission, at the insistence of other Commission DGs and the *cabinets*, decided to leave established models of sectoral regulation in place.

The controversy that surrounded the preparation and adoption of the 1997 'Convergence Green Paper' was followed by a stage of Commission policy-making that can best be described as institutional inertia. Audiovisual policy remained a battlefield in which the different DGs continued to maintain contrasting policy agendas and jealously protected their competences. Mostly in an anticipation of irreconcilable differences they stuck to what they considered uncontroversial activities, for example the drafting of consultative papers that were limited to general statements. Otherwise they engaged in a policy of mutual avoidance. The overall result was low legislative outputs, with a minimum of legislative action being proposed (see Table 16 and Table 17). The Commission has largely put on hold the refinement of its general audiovisual agenda and the revision of the 'Television without Frontiers' directive, leaving it open whether and when it will propose legislation.

The following chapter which concludes the empirical analysis presented in the thesis examines the legislative efforts taken by the European Commission from 1997 to 2000 in the telecommunications sector. It shows that in contrast to the developments observed for the audiovisual field, the Commission was characterised by much less administrative fragmentation and therefore managed to produce higher legislative outputs. The analysis seeks to uncover to

what extent established configurations of fragmentation and outputs persisted and to assess dominant patterns of coordination.

Table 16 Legislative outputs produced by the European Commission in the audiovisual sector from 1997 to 2000

	initiative on 'convergence'	legislative proposals on television standards	other audiovisual legislation incl. 'Television without Frontiers'
duration	more than two years	less than twelve months	more than two years
consistency	low	high	low
decision to propose legislation			
▪ proposition of legislation	—	✓	—
▪ deferment	✓	—	✓
▪ abandonment	✓	—	—
overall legislative outputs	low	high	low

Table 17 Central documents and legislative proposals adopted by the European Commission in the audiovisual sector between 1997 and 2000

year	type of document	title of document	DG with formal drafting responsibility
1997	consultative document	Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation (European Commission 1997a)	DG Culture and DG Telecoms
	legislative proposal	Proposal for a European Parliament and Council Directive on the Legal Protection of Services based on, or consisting of, Conditional Access (European Commission 1997c)	DG Internal Market
1998	consultative document	Commission Communication 'Audiovisual Policy: Next Steps' (European Commission 1998b)	DG Culture
	consultative document	Commission Communication 'The Digital Age: European Audiovisual Policy' (European Commission 1998c)	DG Culture
1999	consultative document	Results of the Public Consultations on the Convergence Green Paper (European Commission 1999a)	DG Culture and DG Telecoms
	consultative document	Principles and Guidelines for the Audiovisual Policy in the Digital Age (European Commission 1999b)	DG Culture
	consultative document	The Development of the Market for Digital Television in the European Union: Report in the context of Directive 95/47/EC of the European Parliament and of the Council of 24 th October 1995 on the use of standards for the transmission of television signals (European Commission 1999d)	DG Telecoms/InfSo
2000	legislative proposal	Proposal for a Directive of the European Parliament and of the Council on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities (European Commission 2000j)	DG Telecoms/InfSo

Chapter Seven: An Ongoing Alliance – Coordination in the Telecommunications Sector

Introduction

The final chapter of the empirical analysis examines the most recent stages of agenda-setting and policy formulation that took place in the European Commission in the context of its legislative activities in the telecommunications sector. Having prepared the 1996 'Telecoms Package' which consisted of several legislative proposals aimed at the full liberalisation of telecommunications services and networks and at creating a comprehensive re-regulatory framework (see Chapter Four), the Directorates General of the Commission turned towards taking efforts to expand and refine existing legislation. Due to new market and technological developments and the fact that that competition in the telecommunications sector remained far from complete, they took the view that existing legislation needed updating and clarification. Apart from consolidating legislation on networks and infrastructures, the Commission engaged in an internal discussion on how to further develop the regulatory framework. The Commission DGs produced a central consultative document setting out the future legislative approach, called the '1999 Telecoms Review' (European Commission 1999c), and subsequently drafted a comprehensive package of re-regulatory and liberalisation directives.

The analysis reveals that the low levels of administrative fragmentation that were observed for the first half of the 1990s largely persisted and that the alliance between DG Telecoms and DG Competition continued to be the most

prominent feature of the Commission's legislative policy-making. In contrast to the high levels of administrative fragmentation that developed in the audiovisual field, there was a much lower level of fragmentation. In this context, a crucial factor appeared to be the small number of DGs: besides DG Competition and DG Telecoms, the DGs of the Commission largely refrained from seeking to actively shape the preparation of legislation. Also there was a high level of agreement between DG Telecoms and DG Competition concerning both the aims of legislation and the allocation of authority over defining them. As in previous years, the two DGs agreed to combine a policy of liberalisation with minimum re-regulation and split authority accordingly, assigning liberalisation to DG Competition and re-regulation to DG Telecoms.

Interestingly there was now more debate between the two DGs on the details of legislation that there had used to be during previous years. In particular, there was a tendency towards greater conflict on how to balance liberalisation and regulation. In this context, DG Competition and DG Telecoms differed somewhat from their established positions: DG Telecoms came to argue in favour of relaxing sectoral rules and giving priority to the application of general competition law, whereas DG Competition leant towards maintaining existing levels of regulation in order to provide a legally sound basis to market opening. The evidence reveals that DG Telecoms and DG Competition were able to cope with the increased levels of conflict over the definition of legislative provisions, due to their accordance on the paradigm of legislation and low conflict on influence and control. Because the overall level of administrative fragmentation remained low the two DGs were able to coordinate their actions, mostly by relying on established activities, including a division of labour and informal consultations. Through these activities DG Competition and DG Telecoms managed to solve their debates and were able to produce high legislative outputs. As a consequence, policy-making was fast and consistent and resulted in the proposition of several pieces of legislation. A central argument emerging from the analysis is that even an increase of conflict among Commission DGs does not necessarily result in blockage and inability to act, provided that it does not relate to the paradigm of legislation and the allocation of policy authority.

The chapter is structured into four parts that are oriented towards the central stages and dominant themes of legislative policy-making. The first section analyses the consolidation of legislation concerning cable networks by means of preparing a 'cable ownership' directive. The second section examines the setting of a new policy agenda intended to respond to recent market and technological challenges. The third section analyses the preparation of legislation which was mostly designed to consolidate and simplify the existing legal framework. In all these sections it is shown how DG Competition and DG Telecoms settled their conflict through coordination activities. This is followed by a concluding section which summarises the patterns of fragmentation, coordination and legislative outputs that emerged during the late 1990s.

The consolidation of existing legislation

An issue emerging soon after the adoption of the '1996 Telecoms Package' was how to further promote the liberalisation of cable television networks. Commission Directive 95/51/EC, also called the 'Cable Directive', allowed the use of cable television networks for the provision of all liberalised telecommunications services that from 1 January 1998 included public voice telephony. The directive had also established a separation of accounts placed on operators that jointly provided telecommunications and cable television networks. Both the 1995 'Cable Directive' and the Commission Directive on full competition contained provisions for the European Commission to carry out an assessment of the situation in the cable television sector by January 1998, with particular regard to the effects on competition of existing legislation concerning the joint provision of telecoms and cable TV networks by a single operator and the restrictions existing on the provision of cable TV capacity over telecommunications networks (European Commission 1998d, p. 4).⁴³⁸

⁴³⁸ Commission Directive 95/51/EC of 18.10.1995 amending Directive 90/388/EEC with regard to the abolition of restrictions on the use of cable television networks for the provision of already liberalised telecommunications services. Commission Directive 96/19/EC of 13.3.1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets. Official Journal L74, 22.3.1996, pp. 13-24.

In order to fulfil its obligation to review, the European Commission prepared a Communication examining whether further legislative action was required to open up cable television networks for the provision of telecommunications services. Because the issue was part of liberalising the telecommunications sector, it undisputedly fell into the domain of DG Competition and its unit 'Liberalisation directives, Article 90 cases'.⁴³⁹ The unit viewed the dossier as a consolidation exercise which would serve to continue existing policies to liberalise the telecommunications sector.⁴⁴⁰ The central issue at stake was whether the joint provision of telecommunications and cable TV networks by former monopolists would stifle the development of the telecommunications and the multi-media sector. Hence, the key question to decide on was the extent to which incumbent telecommunications operators owning cable TV networks should be allowed to hold on to their assets. One option was to oblige operators to split off their cable TV networks and make them into separate organisations if they maintained a significant ownership interest in the cable TV infrastructure. A second, less radical solution was a separation of accounts by obliging companies to create a 100 per cent subsidiary. That either of these options would be achieved by a Commission directive based on Article 86 (ex-Article 90) was endorsed by both DG Competition and the rest of the Commission as the dossier was widely accepted to build on the provisions of existing Commission directives.⁴⁴¹

In order to explore the available options, DG Competition commissioned two expert studies that were based on recent market developments and consultations with industry interests (Arthur D Little International 1997; Coudert 1997). The studies argued that the accounting separation established by the 1995 'Cable Directive' was insufficient to facilitate more competition in the emerging multi-media sector. The unit responsible in DG Competition took

⁴³⁹ At the time, the unit was organised within Directorate C ('Information, Communication, Multimedia'), Division 'Posts, telecommunications and information society coordination'.

⁴⁴⁰ Interview Number 27, Interview Number 28.

⁴⁴¹ Interview Number 23, Interview Number 27, Interview Number 28. With the Treaty of Amsterdam entering into force on 1 May 1999 the consolidation of the Treaty establishing the European Community and the Treaty on the European Union entailed a renumbering of Articles. Article 90 was renumbered Article 86. For reasons of consistency, the new numbers are used throughout the entire chapter.

up most of the reports' recommendations and planned to propose the obligatory legal separation of telecommunications and cable TV networks by means of creating a 100 per cent subsidiary.⁴⁴² The officials intended to prepare a draft Commission directive to be published together with an explanatory document which would serve as a basis for consultations with outside actors.

The ideas emerging from DG Competition were widely shared by other Commission DGs, including DG Telecoms that shared responsibility with DG Competition for the telecommunications sector (see Chapters Three and Four). Back in 1996 when the 1995 'Cable Directive' had entered into force, DG Competition and DG Telecoms had informally agreed that there would be another Commission directive on cable ownership.⁴⁴³ DG Telecoms also consented to the basic objectives of legislation. DG Competition drafted the directive on cable ownership in late 1997. As there was no serious conflict on its provisions the Commission officially adopted the draft directive in March 1998 (European Commission 1998d). The draft text clearly reflected the ideas of DG Competition. It proposed the legal separation of telecommunications and cable TV networks if owned by the same company by means of creating a 100 per cent subsidiary. As argued by DG Competition, the more radical option of full divestment was not needed, mainly because a structural separation of companies was already underway in several member states. Instead, the Commission would investigate whether full divestment was necessary on a case-by-case basis, based on the application of general competition law (European Commission 1998d). In respect to the restrictions on the provision of cable TV capacity over telecommunications networks existing in member states, the Commission proposed to maintain the *status quo* because only two member states currently maintained such restrictions. DG Competition considered the situation undefined and decided to keep it under review while taking individual action based on general competition law to prevent dominant positions.

The publication of the draft directive was followed by consultations with outside actors. The European Commission officially adopted the Cable

⁴⁴² Interview Number 27.

⁴⁴³ Interview Number 9, Interview Number 27, Interview Number 28.

Ownership Directive in June 1999.⁴⁴⁴ The final directive represented a largely unchanged version of the draft. The directive prescribed that no telecommunications operator operated its cable TV network using the same legal entity when it was controlled by a member state or being granted special rights, was dominant in a substantial part of the market for public telecommunications networks and services or when it operated a cable television network established under special or exclusive rights in the same geographic area.

Setting the policy agenda

Besides engaging in a consolidation of legislation on cable ownership, the European Commission engaged in attempts to refine the overall legislative framework for telecommunications. In the context of monitoring the implementation of existing legislation, DG Competition and DG Telecoms jointly prepared and published five reports (European Commission 1997d, 1997e, 1998e, 1998f, 1999e). The main conclusion of these reports was that there continued to be obstacles to full competition that resulted from member states' failures to implement the rules and from 'possible limitations in the framework itself' (European Commission 1999e, p. 11). According to DG Competition and DG Telecoms the legislative framework needed updating, clarification and simplification.⁴⁴⁵ The existing directives called on the Commission to undertake a review of their operation in the light of market and technological changes and to make recommendations for possible updates and clarifications (European Commission 1999c, p. 3).

From the second half of 1998 onwards the European Commission engaged in re-assessing existing legislation. This was done in the context of preparing a review, a consultative document which would set policy aims and propose

⁴⁴⁴ The adoption of the directive had been delayed by a few more months due to the resignation of the Commission in January 1999. Interview Number 28. Commission Directive 1999/64/EC of 23 June 1999 amending Directive 90/388/EEC in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities. Official Journal, L175, 10.7.1999, pp. 39-42.

⁴⁴⁵ Interview Number 9, Interview Number 27, Interview Number 28.

regulatory change. As for previous consultative documents concerning the telecommunications sector, formal drafting responsibility for the dossier was allocated to DG Telecoms and its unit 'Telecommunications Legislation' organised in Directorate A 'Telecommunications, Trans-European Networks and Services, and Postal Services' (see Chapter Four). As a first step, DG Telecoms commissioned several studies that examined regulatory issues such as interconnection, licensing, the convergence of different kinds of networks and services, and the scope for updating existing regulation.⁴⁴⁶ Its intention was to finalise a review document during 1999.⁴⁴⁷

In the context of drafting the review document DG Telecoms also took up the central messages that emerged from the public consultations on the 1997 'Green Paper on Convergence' (European Commission 1997a). One was that there would be an ongoing need to distinguish between the regulation of content and carriage (see Chapter Six). Calls were made to exclude content in the widest sense (e.g. television programmes and their licensing, electronic banking and electronic commerce) from the new regulatory model and to regulate it instead by separate measures taken either on EU or member states level (European Commission 1997a, p. 7). Another message was that regulation ought to be oriented towards the principle of 'technological neutrality' and not to 'impose, nor discriminate in favour of the use of a particular type of technology, but (...) ensure that the same service is regulated in an equivalent manner, irrespective of the means by which it is delivered' (European Commission 1999c, p. 3).⁴⁴⁸ The expert studies pointed to similar directions, recommending a regulatory framework covering all communications infrastructure (i.e. all telecommunications and broadcasting networks).⁴⁴⁹ In DG Telecoms the term 'electronic communications' increasingly replaced and

⁴⁴⁶ For an overview of and detailed references to these studies see European Commission (1999c, p. 58f.)

⁴⁴⁷ European Voice, 2.7.1998.

⁴⁴⁸ According to DG Telecoms, 'the current legislative framework is not technologically neutral. Different rules apply, for example, to services provided over mobile and fixed networks, and to access to frequencies for telecoms and broadcasting networks (...). As far as possible therefore, regulation of communications services should not differentiate between technologies over which such services are delivered' (European Commission 1999c, p. 13).

⁴⁴⁹ See European Commission (1999c, p. 58f.) for detail.

combined existing terms such as 'telecommunications' and 'broadcasting' (European Commission 1999c, p. 4).

According to DG Telecoms, the new regulatory framework would have to fulfil several aims.⁴⁵⁰ First, it should remedy the shortcomings of existing legislation and reinforce competition. Secondly, it would have to clarify and simplify existing rules, reducing the overall number of legal measure being in force from twenty to a total of six. Finally, DG Telecoms preferred to limit regulation to a minimum and to rely on self- and market-regulation instead.⁴⁵¹ In the view taken by the unit responsible, less regulation would be needed in the long term because greater competition would automatically entail greater user choice, lower prices and fair access to networks.

Apart from DG Competition, other Commission DGs took little interest in the review exercise. As with the preparation of previous consultative documents on telecommunications coordination was mostly limited to the working groups established between the two DGs (see Chapter Four).⁴⁵² DG Competition and DG Telecoms agreed on the need for updating and clarifying existing legislation and it was generally accepted that the former would keep responsibility for liberalisation whereas the latter would concentrate on re-regulation. Since late 1998 informal drafts of the review document circulated between DG Telecoms and DG Competition. It took several months until these drafts reached a more advanced stage - not because of conflict between the two DGs but because times were rather turbulent. In January 1999, the European Commission resigned. When a new Commission took over in March 1999, a fundamental re-organisation took place which caused considerable uncertainty in the DGs concerning their internal structures and working procedures.⁴⁵³ During these days many legislative activities undertaken by the Commission proceeded more slowly or came to a halt. In the context of re-organisation, DG Telecoms was re-named 'DG Information Society', commonly called 'DG InfSo'.

⁴⁵⁰ Interview Number 27, Interview Number 28. Also see European Commission (1999c).

⁴⁵¹ Interview Number 9, Interview Number 27, Interview Number 28.

⁴⁵² Interview Number 27, Interview Number 28.

⁴⁵³ Interview Number 27, Interview Number 28.

While DG Telecoms and DG Competition were in accordance on the paradigm of legislation and the division of authority they were less unified on the details of legislation the Commission would propose. For example, the two DGs differed over what constituted electronic communications services, what requirements to place on national incumbents, the setting of thresholds for SMP (Significant Market Power), and how to define the universal service concept.⁴⁵⁴ DG Competition argued in favour of sector-specific regulation, whereas DG Information Society advocated a greater reliance on market forces and leaned towards applying general competition law. To some extent the two Commission DGs now took positions that contrasted with those they had traditionally held, i.e. a preference for sector-specific legislation in DG Telecoms versus an opposition to over-strict or over-detailed regulation in DG Competition (see Chapter Four).⁴⁵⁵

In spite of the controversy that prevailed between DG Information Society and DG Competition on several issues, policy coordination did not encounter serious difficulties. Based on their mutual agreement on the objectives of legislation and the absence of struggles for authority, the two DGs managed to cope with the situation of conflict, mostly by relying on their established modes of collaboration, notably their inter-service working groups and through personal contacts between officials.⁴⁵⁶ Coordination was also facilitated by informally arranged division of work that assigned the responsibility for regulation to DG InfSo and left issues of liberalisation to DG Competition (also see below). These coordination routes enabled the two DGs to overcome debate and conflict and to arrive at compromises they both considered acceptable. Other Commission actors, including the senior levels of the DG hierarchies, the Legal Service and the *cabinets*, were supplied with detailed versions of the review document. These versions reflected a high extent of unity between DG Information Society and DG Competition and therefore reduced the scope of

⁴⁵⁴ Unpublished Commission documents. 'Subject: Meeting of national administrations and regulators - 17 June 1999', prepared by DG Competition, June 1999. Draft of 'Review of the Regulatory Framework for Electronic Communications Services: Infrastructure, Transmission and Access Services', prepared by DG Information Society, dated 31.8.1999.

⁴⁵⁵ Interview Number 27, Interview Number 28.

⁴⁵⁶ Interview Number 27, Interview Number 28.

debate and conflict potential among other actors. The dossier passed the formal decision-taking procedures and was formally adopted in a largely unchanged version after a rapid preparation process in November 1999 (European Commission 1999c).

The 1999 'Review'

According to the Communication, entitled 'Towards a new framework for electronic communications infrastructure and associated services. The 1999 Communications Review' (European Commission 1999c), the most defining principle of the future regulatory framework was 'to create a regulatory regime which can be rolled back as competition strengthens, with the ultimate objective of controlling market power through the application of Community competition law' (European Commission 1999c, p. 49). In view of the Commission, this implied encouraging self-regulatory initiatives taken by market players ('codes or practice'), to make existing regulation subject to regular reviews, and to foster the application of general competition law to the electronic communications sector. The Review envisaged regulation being technologically neutral in the sense that it would not discriminate in favour of or against the use of a particular technology, for example mobile versus fixed telephony. The document announced several harmonising directives for adoption by the Council and the European Parliament under co-decision procedure, covering licensing and authorisation, access and interconnection, universal service, and institutional and specific competition issues.⁴⁵⁷

On licensing and authorisation, the Commission declared that the existing principles governing licensing, i.e. non-discrimination, transparency, proportionality and objectivity, would remain valid, but that the aim was to simplify licensing procedures (European Commission 1999c, p. 20f.). The new framework would require national regulators to use general authorisations for both telecommunications and broadcast networks. As regards access and interconnection, the Review proposed establishing common principles for all

⁴⁵⁷ The Review also proposed measures on data protection, the management of radio spectrum, as well as numbering, naming and addressing. Because the focus of this study is on the 'classic' themes of telecommunications legislation, these issues are not dealt with here.

communications infrastructure (European Commission 1999c, p. 25f.). Regulation would cover new issues such as the access to the so-called 'local loop' (see section three), mobile network infrastructure, and broadband cable networks including the issue of conditional access (see Chapter Six).

In terms of universal service, the European Commission declared that it did not consider it necessary to extend the scope of universal service or change its definition or funding, but that it would keep the situation under review and propose measures to develop pricing principles to ensure affordability (European Commission 1999c, p. 37f.).⁴⁵⁸ As regards institutional issues, the Review argued in favour of improving the committee procedures.⁴⁵⁹ A so-called 'framework directive' would cover the provisions for the new advisory committees as well as the role and tasks of NRAs (National Regulatory Authorities) with the aim to ensure their being properly resourced, independent and actively promoting the opening up of national markets. Other key issues addressed in the Review related to the balance between sector-specific regulation and the application of general competition rules. For example, the Review suggested to replace the existing concept of SMP which regulated whether NRAs could place *ex-ante* obligations on new market entrants concerning cost-orientation and non-discrimination by the concept of 'dominant position'. It also contained a commitment of the Commission to consolidate and simplify the existing liberalisation directives in one legal measure (European Commission 1999c, p. 15).

⁴⁵⁸ The existing directives on universal service (Directive 97/33/EC and 98/10/EC) required NRAs to place obligations on network operators to ensure that a minimum of services were available to the public at an affordable price, including the provision of voice telephony, fax, and the access to the internet.

⁴⁵⁹ Under the existing legislative framework the European Commission co-operated with member states and regulatory authorities in a number of formal committees taking over advisory and regulatory functions, including the ONP committee, the Licensing Committee and the High Level Regulators Group. See European Commission (1999c, p. 51f) for detail. In the '1999 Review' the Commission suggested to replace existing committees by new groups, including the Communications Committee and the High Level Communications Group.

The preparation of legislation

As foreseen in the '1999 Review', the European Commission engaged in preparing several legislative proposals. Since these proposals mainly implemented what had previously been agreed on by DG Information Society and DG Competition, there was little conflict on their provisions.⁴⁶⁰ Furthermore, DG Information Society and DG Competition largely stuck to their established division of authority which allocated re-regulation to the former and liberalisation to the latter and therefore managed to reduce debate on competences. A centrepiece of the package were the harmonisation directives on access and interconnection, authorisation and licensing, universal service, and institutional issues – all being the responsibility of DG Information Society and commonly referred to as the '2000 Telecoms Package'. Other important themes of legislation concerned liberalisation: the opening of local network to competition and updating the existing liberalisation directives. They fell into the domain of DG Competition.

The 2000 'Telecoms Package'

On basis of the '1999 Review' (European Commission 1999c), DG Information Society conducted consultations with outside actors that lasted until February 2000.⁴⁶¹ Even before consultations were finished, DG Information Society proceeded with the drafting of harmonisation directives. It decided that it would realise most ideas set out in the 'Review', including some aspects that were disputed among outside interests.⁴⁶² An exception were the thresholds to be put in place for access and interconnection by means of the concept of SMP.

⁴⁶⁰ Interview Number 21, Interview Number 22, Interview Number 27, Interview Number 28.

⁴⁶¹ NRAs, industry associations, consumer bodies, and operators principally welcomed the propositions made by the Commission, but disagreed widely on the details. Their respective views were closely linked to their respective positions in the national telecommunications markets. Incumbents opposed what they considered too much regulation envisaged by the European Commission, whereas new market entrants asked for more detailed and stricter regulation for several areas. The NRAs showed themselves worried about their tasks being prescribed by the Commission and their powers possibly being curtailed. Interview Number 27 and 28. Financial Times, 9.11.1999.

⁴⁶² European Commission (2000a, pp. 20-21). Interview Number 28. Financial Times, 16.3.2000.

The thresholds were subject to criticism from a number of outside actors and DG Competition came to take the position that using two different thresholds (i.e. SMP and 'dominance') was too complicated and risky from a legal point of view.⁴⁶³ As issues of market definition were the authority of DG Competition, DG Information Society consulted intensely with DG Competition on adjusting the SMP criteria. The two DGs agreed that the existing SMP threshold of 25 per cent would no longer be part of the SMP definition. Instead, they decided to base the definition on a single concept, that of 'dominant position' (European Commission 2000a, p. 23-24).

Debate between DG Information Society and DG Competition remained limited to the issue of thresholds and DG Information Society proceeded rapidly in drafting a Communication on 'The Results of the Public Consultations on the 1999 Communications Review' (European Commission 2000a). The unit in DG Competition did not object to the other conclusions drawn in the document by DG InfSo. Nor did other Commission DGs interfere, mainly because they considered the dossier the exclusive responsibility of DG Information Society and because DG Information Society did not address issues that fell into related policy domains, for example audiovisual content or electronic commerce, as it had tried to do in the context of preparing the Green Paper on 'Convergence' (see Chapter Six).⁴⁶⁴ As a consequence, the document did not cause difficulties on the administrative level of the European Commission. The adoption by the *cabinets* and Commissioners was similarly uncontroversial and took place less than two months after public consultations had finished. In the Communication (European Commission 2000a), DG Information Society confirmed the maintenance of sector-specific *ex-ante* regulation in parallel with competition rules. Regulation would cover all communications infrastructures and associated telecommunications services. It announced that the Commission would soon publish proposals for a 'framework

⁴⁶³ Existing legislation combined SMP with the concept of dominant position. The Commission proposed to base the new thresholds on the concept of dominant position in particular markets, calculated in a manner consistent with general competition law practice. Interview Number 23, Interview Number 27, Interview Number 28. Also see Financial Times, 26.4.2000, 4.5.2000, 8.6.2000.

⁴⁶⁴ Interview Number 21, Interview Number 22, Interview Number 27, Interview Number 28, Interview Number 29.

directive' regulating institutional issues, together with proposals for specific directives covering licensing and authorisations, access and interconnection, and universal service, based on the principles and policy objectives set out in the '1999 Review'.

Determined to make the rest of the Commission commit itself to its chosen strategy, DG Information Society circulated four working documents among other Commission DGs and outside actors (European Commission 2000b, 2000c, 2000d, 2000e). These documents consisted of informal, but detailed proposals for the harmonisation directives. In the working documents, DG Information Society announced the publication of the draft directives for June 2000. During May and June 2000, DG Information Society engaged in consultations with DG Competition. Other DGs largely kept out of the debate as they continued to endorse the policy priorities of DG Information Society.⁴⁶⁵

The objections raised by DG Competition against the ideas of DG Information Society focused on details and mainly reflected the concern to ensure consistency with the existing directives and the Treaties.⁴⁶⁶ More serious conflict did not emerge, largely because the two DGs had already worked out a compromise on central provisions in the context of preparing the '1999 Review' (see section two). Following consultations with DG Competition, DG Information Society modified some provisions, concerning for example access and interconnection, SMP and market analysis procedures. However, the final versions of the harmonisation proposals adopted on the administrative level of the Commission differed from the earlier versions published by DG Information Society in terms of details rather than substance. In line with its previously announced time schedule the Commission officially adopted its proposals for the framework directive, the directives on authorisation, access and interconnection, and universal services in June 2000.⁴⁶⁷ In the Council and the

⁴⁶⁵ Interview Number 27, Interview Number 28.

⁴⁶⁶ Interview Number 27, Interview Number 28. European Commission (2000b, 2000c, 2000d, 2000e, 2000h, 2000i, 2000j, 2000k).

⁴⁶⁷ European Commission (2000h, 2000i, 2000j, 2000k).

European Parliament, the proposals proved controversial.⁴⁶⁸ Particularly the powers assigned to the Commission to overrule NRAs if it believed that they were not following EU law correctly attracted opposition from member states.⁴⁶⁹ The European Commission had to amend each proposal twice. The final versions of the directives were adopted in December 2001 and required member states to implement the new regulatory framework by 25 July 2003.⁴⁷⁰

Unbundling the 'Local Loop'

In spite of the full liberalisation of telecommunications by 1 January 1998, competition continued to remain restricted in some areas, particularly the local access network. Even though the use of new and alternative infrastructure (e.g. cable TV networks) by new entrants had increased user choice, alternatives did not exist in many places and the power of incumbents remained unchallenged in several member states (European Commission 2000, p. 2). In this context, the local access network continued to be what the Commission called 'one of the least competitive segments of the liberalised telecoms markets' (ibid.). Requests were made both within and outside the European Commission to unbundle what was called the 'local loop'. The term 'local loop' refers to the physical circuit between the customer's premises and the telecoms operator's local switch or equivalent facility in the local access network. New market entrants viewed this 'bottleneck' an urgent matter because in spite of the

⁴⁶⁸ Initially, it had been agreed that the Council and the Parliament would adopt the proposals by using the 'fast-track procedure' agreed at the Amsterdam Summit of 1997 implying that the Parliament would vote with a view to making the proposals immediately acceptable to a majority of member states and therefore get round the usual second reading.

⁴⁶⁹ Interview Number 2, Interview Number 7, Interview Number 28. European Voice, 21.12.2000, 1.2.2001, 29.11.2001. Financial Times, 1.2.2001, 2.2.2001, 6.4.2001, 3.8.2001. European Voice, 29.11.2001. The outcome was that the Commission would be granted veto powers but only in circumstances in which trade between member states was affected.

⁴⁷⁰ Directive 2002/19/EC of the European Parliament and of the Council of 7 March on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive). Directive 2002/20/EC of the European Parliament and of the Council of 7 March on the authorisation of electronic communications networks and services (Authorisation Directive). Directive 2002/21/EC of the European Parliament and of the Council of 7 March on a common regulatory framework for electronic communications networks and services (Framework Directive). Directive 2002/22/EC of the European Parliament and of the Council of 7 March on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive). All published in Official Journal L108, 24.4.2002.

liberalisation of public voice telephony the incumbents' power remained practically unchanged.

In the European Commission, the issue of unbundling the local loop was of particular interest to DG Competition, due to its established responsibility to open the telecommunications sector to competition.⁴⁷¹ Since 1998, the activities of the unit responsible for competition in telecommunications had included initiating legal procedures against member states' governments failing to implement full liberalisation, applying general competition law on antitrust and mergers, and drawing up guidelines on market definition and the assessment of SMP for the purpose of *ex-ante* regulation (see above).⁴⁷² As regards opening the local access network, DG Competition argued that the mere application of general competition rules to the abuse of a dominant position was insufficient to resolve problems of access to local networks because it only dealt *ex-post* with such abuse.⁴⁷³ Hence sector-specific regulation would be needed in order to avoid an undue duplication of procedures and to establish greater legal clarity. DG Competition preferred a harmonisation directive to be adopted by the European Parliament and the Council, preferably within the ONP framework that would combine elements of market opening with regulatory safeguards.⁴⁷⁴

DG Competition began to raise its concerns on competition in the local loop in the context of consulting with DG Information Society on the provisions of the '1999 Review'. According to the unit responsible in DG Competition, the

⁴⁷¹ Interview Number 9, Interview Number 23, Interview Number 27, Interview Number 28. European Commission (2000n, p. 5). Speech given by Herbert Ungerer of DG Competition on 'Ensuring efficient access to bottleneck network facilities. The case of telecommunications in the European Union'. in Florence on 13.11.1998.

⁴⁷² By the end of 1998, there were 89 infringement proceedings open against member states, 20 relating to liberalisation and 59 to the harmonisation directives. See, for example, Financial Times, 17.2.2000, 22.5.2000, 16.6.2000. As regards antitrust and mergers, DG Competition ruled on the abuse of dominant positions in a number of cases, including issues such as unfair pricing and incumbents refusing access and interconnection. For an overview of cases see http://www.europa.eu.int/comm/competition/index_en.html.

⁴⁷³ Interview Number 9, Interview Number 23, Interview Number 27, Interview Number 28. European Commission (2000n, p. 5). Speech given by Herbert Ungerer of DG Competition on 'Ensuring efficient access to bottleneck network facilities. The case of telecommunications in the European Union'. Florence, 13.11.1998.

⁴⁷⁴ The ONP framework adopted during the 1990s set out the conditions for access to and the use of specific types of networks and services. See Directive 92/44/EEC of 5.6.1992, Directive 95/62/EC of 13.12.1995, Directive 97/33/EC of 30.6.1997, Directive 98/10/EC of 26.2.1998. See Chapter Four for detail.

local loop ought to be a central part of the new Telecoms Package.⁴⁷⁵ Initially this idea met with little enthusiasm in DG Information Society as the unit responsible for telecoms legislation did not consider an unbundling of the local loop a priority. The main interest of DG Information Society was to promote competition between networks and to realise the principle of 'technological neutrality'.⁴⁷⁶ Given that in many member states, NRAs were introducing requirements for incumbents on local loop unbundling, DG Information Society showed itself reluctant to acknowledge a need for sector-specific legislation. It agreed with DG Competition that 'urgent action is required to increase competition in the local loop' (European Commission 1999c, p. 8), but preferred non-binding policy instruments (e.g. a Commission Recommendation) and the application of competition rules.

After the publication of the '1999 Review', DG Competition and DG Telecoms continued to consult on the question of how competition in the local access network could best be achieved.⁴⁷⁷ Outside interests called for including an obligation to the access directive on incumbent operators to unbundle their copper local access network. In the course of consultations, DG Information Society and DG Competition agreed that as a first step the Commission would address a non-binding Recommendation to member states. The recommendation would identify action that member states could take to address insufficient competition in the local access network where an incumbent continued to dominate both the provision of voice telephony and the development of higher bandwidth services (European Commission 2000f, p. 19-20).⁴⁷⁸ In February 2000, DG Information Society published a working

⁴⁷⁵ This position has been expressed in a number of speeches given by officials in DG Competition, for example, speech given by Herbert Ungerer on Local Loop Unbundling, stating that 'I believe that we can safely expect that the issue of unbundling of the local loop will figure top on the agenda of this year's EU telecoms review'. London Business School, 14.6.1999; speech given by Ungerer on 'New Priorities for telecommunications in a competitive world. Balance between competition rules and sector specific regulation', IIC Telecommunications Forum, Brussels, 6./7.7.1998; speech given by Ungerer on 'Beating the Bandwidth Bottleneck' at ATM Year 1998 Europe Conference, London, 16.9.1998.

⁴⁷⁶ Interview Number 27, Interview Number 28.

⁴⁷⁷ Interview 27, Interview Number 28. European Voice, 10.2.2000. Financial Times, 17.2.2000.

⁴⁷⁸ The Commission proposed that member states took steps to mandate incumbent operators to offer full unbundled local loops by the end of 2000 under cost-oriented, transparent and

document (European Commission 2000f) which defined the provisions of a possible Commission Recommendation on increasing competition in the local loop. In its Communication on the results of public consultations (European Commission 2000a, p. 25) the Commission noted that the availability of unbundled access to the local loop would increase competition and that it could help speeding up the introduction of high-speed internet access services. It therefore suggested that in addition to the measures already envisaged for access and interconnection, the Commission would propose imposing on operators with SMP an obligation to give access to unbundled elements of the local loop.

Mostly on the basis of their established working groups, the two DGs exchanged their views on the approach the Commission would take and on the content of the Commission Recommendation.⁴⁷⁹ Because the unbundling of the local loop marked an overlap between liberalisation and re-regulation, the two DGs agreed that they would share responsibility for preparing the Recommendation.⁴⁸⁰ Following a preparation process that lasted only a few months the Commission adopted a Recommendation on unbundled access to the local loop in May 2000.⁴⁸¹ The Recommendation asked member states to adopt measures to mandate full unbundled access to the local loop by 31 December 2000 and made propositions for pricing, technical conditions and collocation, transparency and the coordination of interested parties by NRAs.

Apart from consulting each other on the content of the Commission Recommendation DG Information Society and DG Competition discussed the possibility of proposing binding legislation. Following initial disagreement on the issue, the two DGs had arrived at agreement that a binding instrument was

non-discriminatory terms and conditions. Pricing of unbundled access to the local loop should be compatible with the aim of fostering fair and sustainable competition and providing investment incentives. A possible Recommendation would ask NRAs to devote particular attention to measures aiming at unbundling the local loop (European Commission 2000f, p. 19-20).

⁴⁷⁹ Interview Number 27, Interview Number 28.

⁴⁸⁰ Interview Number 27, Interview Number 28.

⁴⁸¹ Commission Recommendation 2000/417/EC of 25 May 2000 on unbundled access to the local loop: enabling the competitive provision of a full range of electronic communications services including broadband multimedia and high-speed Internet. Official Journal L156/44 of 29.6.2000.

in fact needed to effectively open the local network to competition.⁴⁸² They decided that the Commission would not pursue the adoption of a harmonisation directive as too much time would be lost until before implementation due to the need to transpose it into national legislation. They arranged that the Commission would use a 'fast-track' procedure instead, drafting a Regulation for adoption by the Council and the European Parliament that would be directly applicable in all member states it would be addressed to. DG Competition and DG Telecoms did not find it difficult to work out the content of the Regulation. It would oblige dominant operators to make available their local network to third parties by 31 December 2000, following principles such as cost-orientation. In July 2000, after a fast decision-making process, the Commission adopted a proposal for a regulation on unbundled access to the local loop (European Commission 2000) together with the adoption of the proposals for the harmonisation directives.⁴⁸³ The proposed Regulation obliged dominant operators to unbundle access to the local loop by 31 December 2000 under transparent, fair and non-discriminatory conditions. NRAs were to be asked to ensure that prices for unbundled access to the local loop would followed the principle of cost-orientation, to adopt pricing rules and to resolve disputes between undertakings in a prompt, fair and transparent manner (European Commission 2000, pp. 5-7). The adoption of the Regulation proved relatively uncontroversial in the Council and the European Parliament.⁴⁸⁴

Updating the liberalisation directives

Apart from its activities to monitor the implementation of the existing liberalisation directives, to rule on mergers in the telecommunications sector and to consult with DG Information Society on regulatory proposals, DG

⁴⁸² Interview Number 27, Interview Number 28. European Voice, 8.6.2000. 14.9.2000.

⁴⁸³ Interview Number 19, 27, 28. Also see European Voice, 8.6.2000. For a useful summary of the draft regulation see Commission Press Release, IP/00/750, 12.7.2000.

⁴⁸⁴ Regulation No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop. Official Journal, L336 of 30.12.2000, p. 4. The European Commission had adopted an amended proposal in November 2000 (European Commission 2000m).

Competition engaged in efforts to update the existing liberalisation directives. From 1999 onwards the unit for 'Liberalisation Directives, Article 86 cases' had pursued the idea of repealing all previous Commission directives on telecoms and reducing the overall number of six liberalisation directives to one single measure. The reasoning behind this was to increase the legal clarity of and simplify legislation.⁴⁸⁵ Following the preparation and adoption of the Cable Ownership Directive (see section one), DG Competition undertook the drafting of a directive on 'Competition in the Markets for Electronic Communications Networks and Services'. The plan was to publish a formal draft directive by July 2000 to co-incide with the publication of draft directives on regulatory harmonisation.

The authority of DG Competition to prepare the repeal of the existing liberalisation directives was broadly accepted by other Commission DGs, including DG Information Society that endorsed the aim of clarifying and simplifying the existing framework.⁴⁸⁶ As regards the content of the directive, disagreement between DG Competition and DG Information Society concerned the definitions and aims contained in the new directive. In the course of their consultations, the two DGs concentrated on making the provisions consistent with those contained in the harmonisation proposals and to avoid unnecessary duplication. For example, DG Information Society asked DG Competition to use and make reference to the new terms of 'electronic communications services' and 'networks' rather than the 'old' term 'telecommunications'. The two DGs also decided to delete several provision contained in the existing directives, for example the granting of derogation periods to certain member states. After an uncontroversial decision-taking process the Commission officially adopted the formal draft directive in July 2000, simultaneously with

⁴⁸⁵ See European Commission (1999c, p. 15). Interview Number 27 and 28. European Commission Press Release, IP/00/766, 12.7.2000. Unpublished Commission document, 'Objet: Implication de la 'Review 1999' pour les directives concurrence en matière de télécommunications', prepared by DG Competition, dated 10.12.1999. Interview Number 27.

⁴⁸⁶ Interview Number 27. Unpublished Commission document, 'Objet: Implication de la 'Review 1999' pour les directives concurrence en matière de télécommunications', prepared by DG Competition, dated 10.12.1999.

the harmonisation proposals.⁴⁸⁷ The formal draft directive added no new obligations to the existing obligations placed on member states to liberalise networks and services and maintained the provisions that DG Information Society and DG Competition considered necessary.⁴⁸⁸ In September 2002, the Commission adopted its 'Directive on Competition in the Markets for Electronic Communications Networks and Services' in a little-changed version.⁴⁸⁹

Conclusion

Analysing the latest stage of legislative policy-making that took place on the administrative level of the European Commission revealed a remarkable extent of unity which correlated with high legislative outputs produced by the European Commission. The Commission managed to set a new policy agenda and develop an entire set of legislative proposals and instruments that served to consolidate and simplify the existing legal framework. Legislative policy-making was rapid and characterised by a high extent of consistency between initial propositions and the content of final proposals. This success story stands in stark contrast to the configurations of high administrative fragmentation and low legislative outputs observed for the audiovisual domain during the same period (see Chapter Six). The fact that the European Commission showed such a great capacity to prepare and propose legislation might seem surprising at first glance because there was more conflict between the participating DGs over defining the details of legislative provisions than there used to be during the first half of the 1990s (see Chapter Four). Examining the linkages between administrative fragmentation and legislative outputs revealed that this conflict did not hamper

⁴⁸⁷ Notice by the Commission concerning a draft directive on competition in the markets for electronic communications services (2001/C 96/02). Official Journal, C 96, 27.3.2001, pp. 2-7.

⁴⁸⁸ European Commission Press Release, IP/00/766, 12.7.2000.

⁴⁸⁹ Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services. Official Journal, L249 of 17.9.2002, pp. 21-26. The long gap between the adoption of the formal draft directive and its final version can be explained by the fact that the European Commission waited for the harmonisation directives being adopted first.

the legislative efforts of the Commission because the DGs managed to accommodate and overcome it.

The crucial factor which continued to determine the administrative fragmentation of the Commission in the telecommunications sector and which contrasts with the audiovisual field was the small number of DGs. Only DG Competition and DG Telecoms (from 1999 called DG InfSo) got actively involved in day-to-day policy-making. Moreover, the two DGs were in basic agreement on the primary objectives of legislation and on dividing authority for telecommunications issues (see Table 18). They agreed that the existing legislative framework needed consolidation and updating. DG Competition continued to promote liberalisation, whereas DG InfSo concentrated on regulatory harmonisation. As in previous years these different agendas corresponded closely to the responsibilities kept by each DG: DG Competition claimed authority for market opening and the application of general competition law and DG InfSo sought to refine and further develop re-regulation. Hence there was little conflict on authority.

Table 18 Indicators of administrative fragmentation in the telecommunications sector from 1997 to 2000

	cable ownership directive	1999 Review	proposals for harmonisation directives	local loop unbundling	liberalisation directive
number of DGs	two	two	two	two	two
differences on paradigm	low	low	low	low	low
competition for authority	low	low	low	low	low
overall level of adm. fragm.	low	low	low	low	low

The low level of administrative fragmentation made coordination among DG InfSo and DG Competition relatively easy to manage. This might seem surprising at first because a closer look at the debates that shaped the relationship between the two DGs showed that they now differed more on the details of legislation than they had used to do. In particular, DG InfSo and DG Competition were less unified on how provisions would balance liberalisation and re-regulatory measures. In this context, the positions taken by the two DGs

differed somewhat from their established agendas as it was now DG InfSo that increasingly argued for a reduction of sectoral regulation and a greater reliance on general competition law, whereas DG Competition preferred to use regulation to achieve efficient market opening. However, because the two DGs shared a basic policy strategy and because they did not contend each others' authority they were able to cope with these disputes, largely through their established activities of coordination.

Because there was still sufficient common ground between DG InfSo and DG Competition, they engaged in intense and efficient coordination. In this context, the preliminary consultations that took place in their established working groups and through personal conversation among officials provided a primary forum for debate. While other Commission actors were largely excluded from this arena, DG Competition and DG InfSo used it to negotiate and to arrive at compromises they both considered acceptable. Another important mechanisms of coordination was the division of labour organised between the two DGs. DG InfSo was primarily responsible for drafting consultative documents and for preparing re-regulatory proposals, and DG Competition concentrated its efforts on market opening and liberalisation. At the same time, the two DGs continued to collaborate consult each other. Through the intense use of coordinative activities DG Competition and DG InfSo were able to cope with controversy and to settle their conflict. Other Commission actors were then presented with detailed draft texts that reflected a high degree of unity between DG InfSo and DG Competition and that left few issues open to discussion. This enabled the Commission to produce high legislative outputs. Policy-making was fast and coherent and resulted in the proposition of several pieces of legislation that refined the existing legal framework and introduced a comprehensive regulatory package for the liberalised telecommunications market (see Table 19 and Table 20).

Table 19 Legislative outputs produced by the European Commission in the telecommunications sector from 1997 to 2000

	cable ownership directive	1999 Review	proposals for harmonisation directives	local loop unbundling	liberalisation directive
duration	less than twelve months	less than twelve months	less than twelve months	less than twelve months	less than twelve months
consistency	high	high	high	high	high
proposition of legislation	✓	✓	✓	✓	✓
deferment	—	—	—	—	—
abandonment	—	—	—	—	—
overall legislative outputs	high	high	high	high	high

Table 20 Consultative documents, legislative proposals and legal instruments adopted by the European Commission in the telecommunications sector between 1997 and 2002

year	type of document	title of document	DG with formal drafting responsibility
1998	consultative document	Commission Communication concerning the Review under Competition Rules of the Joint Provision of Telecommunications and Cable TV Networks by a Single Operator and the Abolition of Restrictions on the Provision of Cable TV Capacity over Telecommunications Networks (European Commission 1998d)	DG Competition
	legislative proposal	Commission Notice (1998) concerning a draft Directive amending Directive 90/388/EEC in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities	DG Competition
1999	legal instrument	Commission Directive 1999/64/EC of 23 June 1999 amending Directive 90/388/EEC in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities.	DG Competition
	consultative document	Commission Communication 'Towards a new framework for electronic communications infrastructure and associated services. The 1999 Communications Review' (European Commission 1999c)	DG InfSo
2000	consultative document	Commission Communication on 'The Results of the Public Consultations on the 1999 Communications Review and Orientations for the New Regulatory Framework' (European Commission 2000a)	DG InfSo
	legal instrument	Commission Recommendation 2000/417/EC of 25 May 2000 on unbundled access to the local loop: enabling the competitive provision of a full range of electronic communications services including broadband multimedia and high-speed Internet	DG Competition and DG InfSo
	consultative document	Commission Communication on 'Unbundled Access to the Local Loop' (European Commission 2000n)	DG Competition and DG InfSo
	legislative proposals	<ul style="list-style-type: none"> ▪ Proposal for a Directive of the European Parliament and of the Council on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities (European Commission 2000j) ▪ Proposal for a Directive of the European Parliament and of the Council on the Authorisation of Electronic Communications Networks and Services (European Commission 2000i) 	DG InfSo DG InfSo

		<ul style="list-style-type: none"> ▪ Proposal for a Directive of the European Parliament and of the Council on Universal Service and Users' Rights relating to Electronic Communications Networks and Services (European Commission 2000k) ▪ Proposal for a Directive of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communications Networks and Services (European Commission 2000h) 	DG InfSo DG InfSo
2001	legislative proposal	Commission Notice (2001) concerning a draft Directive on competition in the markets for electronic communications services	DG Competition
2002	legal instrument	Commission Directive 2002/77/EC of 16.9.2002 on competition in the markets for electronic communications networks and services	DG Competition

A conclusion which emerges from analysing this final stage of the Commission's legislative policy-making in telecommunications and comparing it to the situation that was observed for the audiovisual field (see Chapter Six) is that while one may see plenty of reason to question established sectoral boundaries and speculate about a new 'convergent' communications and media sector, one must acknowledge that no such convergence has taken place as far as the European Commission is concerned. Both the administrative fragmentation and the legislative outputs produced by the Commission have followed sectoral patterns and it seems likely that they will continue to do so in the future. The following chapter presents the conclusion of the thesis and relates the empirical findings of the preceding chapters to the key conceptual issues and arguments raised in Chapter One.

Conclusion

Inspired by the ongoing need to advance our understanding of how the European Commission operates and how its internal divisions affect the ways in which it sets policy agendas, formulates policies and takes decisions, this study has sought to uncover the conditions and patterns underlying the Commission's legislative policy-making. This chapter summarises the key issues addressed in the thesis and relates them to the empirical findings. A first section presents the main conceptual questions and arguments linked with the notion of the Commission as a 'fragmented' institution. The second section relates them to the empirical findings of the study. This is followed by a third section which discusses the implications of these findings for conceptualising the Commission in a way which challenges our existing views of its role in the EU legislative process and raises implications for further research.

Re-conceptualising the European Commission

While the complexity, instability, fluidity and openness of the European Commission as an institution or organisational system have been widely acknowledged, we continue to know relatively little about what exactly is going on inside. The existing literature leans towards pointing out either the power or the inability of the Commission to fulfil its role as a motor of European integration. Depending on where we stand we may picture the Commission as a power-mad 'competence maximizer' or as a blocked policy-maker whose turf wars and administrative overload prevent it from efficient management and action.⁴⁹⁰ I have argued that most images of the Commission are not only

⁴⁹⁰ See, for example, Cini (2001); Hix (1999); Laffan (1997); Majone (1996); Moravcsik (1993 and 1998); Peterson (1999); Pollack (1994 and 2003); Stevens (2001).

exaggerated, but also ignore the fundamental question how exactly the Commission's inner life affects its policy-making behaviour, particularly its variation across different policy areas. Why does the Commission sometimes appear a unified and determined policy entrepreneur, but dead-locked and paralysed some other time? How can this variation be linked with the fact that the Commission is not a single-minded actor, but an arena composed of a whole array of organisations and individuals?

Seeking to contribute to the EU policy process literature and, more specifically, to the literature that has emerged claiming that 'fragmentation' is a central feature of the Commission and substantially shapes its policy outputs, I have chosen to look inside the 'black box' of the Commission. While several contributors have acknowledged the variety of dimensions across which the Commission is 'fragmented', including factors such as culture, outside interests and personalities, less has been said about how exactly such fragmentation impacts on the Commission's policy outputs and how it varies.⁴⁹¹ Taking up the notion that fragmentation is an ever-present feature of the Commission and the ways it operates, the aim pursued in this thesis was to define a single, but fundamental aspect of fragmentation and to analyse in depth how it manifests itself. The focus of my study has been the organisational dimension of fragmentation occurring on the administrative level of the Commission. The so-called administrative arm of the Commission keeps responsibility for the preparation of legislative initiatives, a cornerstone of the Commission's tasks and functions.⁴⁹² The most defining principle characterising the administrative level of the Commission is the functional specialisation of different Directorates General (DGs).⁴⁹³

According to the principle of functional specialisation, different Commission DGs keep different tasks and functions that are usually linked to different policy sectors. Moreover, the DGs maintain distinct policy agendas and

⁴⁹¹ See, for example, Christiansen (2001); Cini (2000); Egeberg (2004); Hooghe (2001); Page (1997); Peters (1994 and 2001); Ross (1995).

⁴⁹² See Cini (1996); Edwards and Spence (1997); Nugent (2001 and 2002); Peters (1994 and 2001); Stevens (2001).

⁴⁹³ See Metcalfe (1994); Nugent (2001); Peters (2001).

preferences.⁴⁹⁴ Policy-making on the administrative level of the Commission is therefore characterised by a plurality of actors. However far from being autonomous, these actors find themselves in a situation of interdependence. This is due to several reasons, the most important being the cross-cutting nature of most legislative initiatives and the far-reaching specialisation of the DGs, that result in overlapping policy responsibilities. Furthermore, the Commission's decision-making procedures require DGs to consult and to seek agreement from each other before they may pass on legislative files to formal decision-taking on the political level of the Commission.⁴⁹⁵ Fragmentation therefore creates a situation in which plurality and interdependence co-exist. In order to uncover and explain how this affects legislative policy-making I have conceptualised the process through which a group of Commission DGs engage in preparing legislation as a process of policy coordination.

The literature on policy coordination depicts decision-making in fragmented institutional environments as being characterised by the mutual interdependence of the organisational actors involved.⁴⁹⁶ Plurality and interdependence and the resulting complexity and uncertainty create a 'multiorganizational setting' (Chisholm 1989, p. 5). Within this setting, organisational actors respond to fragmentation by engaging in a process of coordination. Used as an umbrella term, 'coordination' comprises a variety of activities designed to overcome conflict and to accommodate fragmentation, to facilitate collaboration and to build a consensus in order to make an institution capable of action.

With its notions of plurality and interdependence, the concept of policy coordination provides a useful way of conceptualising the European Commission and the interactions between the organisations and actors it is composed of. With fragmentation being an ever-present feature, legislative policy-making in the Commission always involves some degree of debate and conflict, for example on the details of EU legislation. Variation occurs in how

⁴⁹⁴ E.g. Page (1997); Peters (2001); Spence (1997).

⁴⁹⁵ E.g. Egeberg (2002); Page (1997); Peters (2001).

⁴⁹⁶ See, for example, Allison and Zelikow (1999); Chisholm (1989); Hanf and Scharpf (1978); Hayward and Wright (2002); Peters (1998); Seidman (1980).

actors manage this debate and whether they can overcome conflict. The major aim pursued in the empirical analysis has been to show that this variation crucially depends on the level of administrative fragmentation. The central research question has been how variation on administrative fragmentation affects the Commission's legislative outputs, i.e. whether and how it proposes EU legislation. Administrative fragmentation varies across different policy domains and can be assessed by using three indicators: the number of DGs that actively engage in the preparation of legislation; the differences that exist between these DGs on the paradigm of legislation including the need for and the primary objectives of legislation; and their competition for authority. The legislative outputs produced by the European Commission may take on the form of consultative documents, formal legislative proposals or binding legal instruments and have been operationalised by using three indicators: the duration of the Commission's legislative policy-making; the consistency of the Commission's propositions; and the decision whether to propose legislation.

The empirical findings

Using a qualitatively oriented research design, I traced the evolution of central legislative initiatives taken by the European Commission to liberalise and harmonise the telecommunications and the audiovisual sectors from the early 1980s to the year 2000. The two policy domains were chosen with a view towards their variation on the explanatory variable under study. Furthermore, the background conditions against which the Commission prepared legislative initiatives make the two sectors interesting subjects of a cross-sectoral comparison. During the past two decades, they both underwent fundamental technological, economic and regulatory changes. The preparation of EU-wide legislation was based on a combination of liberalisation and re-regulation which took account of the fact that the two sectors are essentially 'cross-cutting', i.e. touching on several issue dimensions (e.g. technological, economic, and the public interest). In other words, the European Commission addressed similar themes of legislation, notably liberalisation, a harmonisation of market conditions and the regulation of the so-called 'public interest'. I analysed and

cross-checked several sources of evidence: interviews, press reports, official documentation and unpublished documentary sources produced by the European Commission.

The empirical evidence demonstrated significant and enduring variation on both administrative fragmentation and legislative outputs across the two policy domains. As regards administrative fragmentation, the dominant picture was one of low fragmentation in the telecommunications sector and a tendency towards high fragmentation in the audiovisual domain. In telecommunications, two DGs (DG Telecoms and DG Competition) collaborated on the basis of a shared paradigm of legislation and an agreed division of authority for telecommunications issues (see Table 21). In the audiovisual field, a rather similar picture could be observed for the first phase of legislative policy-making during which the policy arena was limited to DG Culture and DG Internal Market and Industrial Affairs. However, the situation changed quite fundamentally in the early 1990s when the number of DGs doubled to four, including DG Culture, DG Internal Market, DG Competition, and DG Telecoms. The four DGs disagreed on the paradigm of legislation and disputed each others' authority for audiovisual issues. The Commission's legislative outputs were high in the telecommunications sector, with legislative policy-making being rapid, consistent and characterised by numerous decisions to propose legislation (see Table 22). They ranked considerably lower in the audiovisual field where, following relatively high legislative outputs during the 1980s, the preparation of legislation tended to be a slow and time-consuming process characterised by inconsistencies, deferments and the abandonment of legislative initiatives, and with only few pieces of legislation being proposed.

Table 21 Variation on administrative fragmentation in the audiovisual and telecommunications sectors

	period 1984 - 1989		period 1990 - 1996		period 1997 - 2000	
	audiovisual sector	telecoms sector	audiovisual sector	telecoms sector	audiovisual sector	telecoms sector
number of DGs	two	two	three to four	two	four to five	two
differences on paradigm	low	low	high	low	high	low
competition for authority	low	low	high	low	high	low
overall level of adm. fragm.	low	low	high	low	high	low

Table 22 Variation on legislative outputs produced by the European Commission in the audiovisual and telecommunications sectors

	period 1984 - 1989		period 1990 - 1996		period 1997 - 2000	
	audiovisual sector	telecoms sector	audiovisual sector	telecoms sector	audiovisual sector	telecoms sector
duration	short	short	long	short	long	short
consistency	high	high	low	high	low	high
proposition of legislation	✓	✓	(✓)	✓	(✓)	✓
deferment	—	—	✓	—	✓	—
abandonment	—	—	✓	—	✓	—
overall legislative outputs	high	high	low	high	low	high

The empirical analysis was organised in three parts. The first part covered the initiation of legislation in the Commission which took place from 1984 to 1989 (Chapter Three). The second part examined the period from 1990 to 1996 during which the Commission refined and expanded existing legislation (Chapters Four and Five). The third part analysed the most recent phase of legislative policy-making completed by the European Commission thus far, reaching from 1997 to 2000 (Chapters Six and Seven).

The period 1984 to 1989

The European Commission did not initiate Community legislation in the two policy areas before the mid-1980s and started acting largely in response to

technological and economic changes as well as regulatory reforms underway in several member states. In both domains, the central issue at stake was to realise a common market which would attract greater investment and promote new technologies and services. The European Commission proposed limited measures to open up markets to competition and to provide for a minimum of regulatory harmonisation. In the audiovisual domain, it prepared a directive on 'Television without Frontiers' which combined elements of liberalisation and re-regulation, whereas in the telecommunications sector it drafted two Commission directives liberalising terminal equipment and value-added telecommunications services and proposed a re-regulatory proposal that centred on the Open Network Provision (ONP).

The empirical evidence demonstrated that in both policy domains the initiation of legislative policies was marked by low levels of administrative fragmentation (see Chapter Three). In each sector, two DGs took over the preparation of consultative documents and legislative proposals: DG Internal Market and Industrial Affairs and DG Culture in the audiovisual field, and DG Competition and DG Telecoms in telecommunications. There was either none or very little input of other DGs. While in each policy area, the participating DGs maintained different tasks and agendas on audiovisual and telecommunications policy respectively, they were in accordance on the paradigm of legislation, i.e. a combination of liberalisation and re-regulation, and on dividing authority. In the audiovisual field, DG Internal Market and Industrial Affairs concentrated on liberalisation and market conditions and DG Culture focused on re-regulation in the name of the public interest. In the telecommunications sector, DG Competition was responsible for liberalisation and DG Telecoms dealt with re-regulation. Debate and conflict centred on the details of legislation, for example advertising limits in the audiovisual sector and access conditions for telecoms operators in telecommunications.

Since administrative fragmentation was low the DGs managed to solve their debates, mostly by relying on 'informal' routes of coordination. In this context, pre-consultations conducted in issue-related working groups and through personal contacts among officials were identified as being of primary importance in facilitating consensus. Contentious issues were usually solved

during these consultations. Other Commission actors were largely excluded and later supplied with detailed draft texts on which there was a high extent of unity among the participating DGs. Furthermore the participating DGs engaged in a division of work. The voluntary arrangement of dividing different responsibilities between different DGs helped to further reduce conflict and to facilitate compromising. Together these coordination routes reduced debate and therefore the incidence of delays and substantial changes to legislative proposals. Legislative outputs were high, with policy-making being rapid and consistent and resulting in several positive decisions to propose legislation.

The period 1990 to 1996

Following the limited steps undertaken to liberalise and re-regulate the audiovisual and the telecommunications sectors during the 1980s, the Commission engaged in attempts to further develop and expand legislation in the early 1990s. In telecommunications, it prepared several liberalisation directives designed to fully open telecommunications networks and services as well as legislative proposals intended to establish a comprehensive re-regulatory framework. In the audiovisual field, the Commission concentrated on three major legislative projects each of which combined elements of market opening and re-regulation: legislation on television standards; legislation on media ownership and concentration; and a revision of the directive 'Television without Frontiers'. In both policy areas, the preparation of legislative proposals and legal instruments was preceded by the drafting of consultative documents setting out policy priorities and timetables for future action.

In contrast to the similar levels of administrative fragmentation previously observed, the early 1990s saw fundamental differences emerge between the two policy domains. In the telecommunications sector, fragmentation continued at a low level (see Chapter Four). Legislative policy-making continued to be jointly undertaken by DG Competition and DG Telecoms. The two DGs were in accordance not only on the need for more far-reaching legislation, but also on its primary objective, i.e. a combination of further market opening with re-regulation of market entry and user rights. Competition for authority was low

since the two DGs accepted a distribution of authority: DG Competition took over the bulk of drafting work for liberalisation measures and DG Telecoms concentrated on re-regulation. Conflict between the two DGs centred on the details of the legislative initiatives, for example the timing of legislative proposals and how provisions would balance liberalisation with re-regulation.

Quite the opposite applied to the audiovisual field where administrative fragmentation quickly took a different direction (see Chapter Five). The number of participating DGs doubled from two to four, now including DG Telecoms and DG Competition in addition to DG Internal Market and DG Culture. These four DGs developed rather different policy agendas and their views on audiovisual legislation were not easy to reconcile - including those of DG Internal Market and DG Culture that now differed more fundamentally on the paradigm of legislation than they had in the 1980s. Not only were the details of legislation subject to dispute, but also its primary objectives and sometimes the very need for it. For example, the basic issue whether the European Commission should propose EU-wide legislation on media ownership was highly contentious among the DGs. The DGs also tended to compete for policy authority. For example, rivalry prevailed as regards the question which DG would control defining the re-regulatory provisions contained in the 'Television without Frontiers' directive. The conflict over authority was fiercest between DG Culture with its traditional responsibility for audiovisual legislation and DG Telecoms that sought to increase its competence over communications- and media-related issues.

The empirical evidence revealed that the different configurations of administrative fragmentation prevailing in the two policy areas resulted in rather different scenarios of policy coordination. In telecommunications, coordination did not encounter serious difficulties. The units responsible in DG Competition and DG Telecoms intensified their collaboration and gradually turned their relationship into a partnership or alliance based on informal coordination modes. In order to improve the information flow between the units responsible and to further ease the building of consensus, the relevant units exchanged several staff. Debate was mostly solved in the context of informal consensus-building activities taking place in the working groups and

through personal contacts that largely excluded other Commission actors. Legislative initiatives usually entered the obligatory procedures of policy-making only after the two DGs had agreed on most details of legislation. DG Competition and DG Telecoms also stuck to their division of work which allocated liberalisation issues to the former and re-regulation to the latter and served to further reduce conflict and debate. Due to the use of several coordinative activities the overall process of legislative policy-making was fast and changes to the Commission's official strategy rare. The Commission prepared and adopted four liberalisation directives that fully opened telecommunications networks and services to competition by 1 January 1998, including public voice telephony. Furthermore, it drafted several proposals designed to establish a comprehensive re-regulatory framework that would cover a wide range of issues, including interconnection, interoperability, and universal service.

In contrast to the high legislative outputs produced by the Commission in telecommunications, the situation developed rather differently in the audiovisual field. Relationships between the DGs were characterised by rivalry and competition and coordination tended to be difficult. Due to the high levels of administrative fragmentation, informal consensus-building activities were of limited effectiveness to solve conflict over the details of legislation. Facing a situation in which there was little common ground, the relevant units were less able (and perhaps less willing) to negotiate a settlement. Coordination was therefore transferred to the more formal arenas of the European Commission, including the senior levels of the DGs, other administrative services, the *cabinets* and the College of Commissioners. The number of actors multiplied and with them increased the differences on the paradigm of legislation and the competition for authority. In these 'crowded' arenas, actors debated the very basics of legislation rather than detailed draft texts previously agreed on by the DG units. Hence, policy formulation was much more 'politicised' and more prone to delays and changes of direction than in telecommunications. Furthermore, communicating decisions between the different levels of the Commission and referring them back and forth for modification and re-drafting between the DG with drafting responsibility and other Commission actors was a

time-consuming process. Fragmentation and conflict largely endured and resulted in low legislative outputs.⁴⁹⁷ The preparation process was slow and often took several years. The official position taken by the European Commission on whether and what kind of legislation to propose changed frequently. For example, whether the Commission would propose legislation on media ownership was subject to debate for more than six years and ultimately resulted in no legislative action at all. The deferment of the decision whether to propose legislation did in fact occur more frequently than the actual proposition of legislation and few legislative proposals were made: two proposals for directives regulating television standards and a revised proposal on 'Television without Frontiers'.

The period 1997 to 2000

The latest phase of legislative policy-making completed by the European Commission thus far lasted fewer than five years but was characterised by major legislative initiatives in both domains. The period 1997 to 2000 saw efforts undertaken by the Commission to consolidate, clarify and refine existing legislation in both the audiovisual and the telecommunications sector, triggered by technological and market developments. In telecommunications, these efforts culminated in the adoption of the '2000 Telecoms Package' which contained several draft proposals on re-regulation, followed by a Commission directive repealing all previous liberalisation directives. In the audiovisual field, legislative action revealed fewer visible results: apart from two proposals regulating so-called 'conditional access' systems for the reception and transmission of television services, no legislative proposals emerged - in spite of a long and intense agenda-setting process during which several legislative options and possible initiatives were discussed.

The levels of administrative fragmentation developed rather differently across the two policy domains and provided scope for significant variation. In the audiovisual field, administrative fragmentation reached even higher levels

⁴⁹⁷ An exception was the second phase of legislation on television standards which was characterised by low levels of administrative fragmentation that resulted in relatively high legislative outputs (see Chapter Five).

than during previous years (see Chapter Six). Four, sometimes five Commission DGs participated in the preparation of legislative initiatives: DG Culture, DG Internal Market, DG Competition, DG Telecoms/InfSo, and DG Industry. These DGs diverged significantly on the need for and the substance of EU-wide legislation and competed for authority over audiovisual issues. The conflict between them reached its peak in 1997 when DG Telecoms pursued its 'Convergence' initiative which implied the creation of a new regulatory framework 'merging' audiovisual with telecommunications regulation, an idea which was strongly opposed by other DGs, most fervently DG Culture that feared for its established authority over audiovisual legislation. The paradigm of legislation was also subject to heated controversies. For example, the participating DGs found themselves unable to agree whether the Commission should continue sectoral regulation or instead opt for an entirely new regulatory model. In contrast, the administrative fragmentation of the Commission in telecommunications remained low (see Chapter Seven). The setting of participating DGs was limited to DG Competition and DG Telecoms/InfSo that were united on the need for and the primary objectives of legislation and accepted a division of authority which assigned liberalisation to the former and re-regulation to the latter. Debate centred on the details of legislation, for example the timing of legislative proposals and how legislative provisions would balance the application of general competition rules with sector-specific regulation.

The empirical analysis illustrated how contrasting levels of administrative fragmentation related to different legislative outputs produced by the Commission in the two policy domains. Due to the high level of fragmentation policy coordination was difficult and intricate in the audiovisual field and rendered informal consensus-building activities largely ineffective. Because the distance between the DGs was too great to be overcome by informal coordination routes, controversial issues were mostly debated in the 'formal' arenas of the Commission where actors multiplied and conflict intensified. This made the coordination process more time-consuming and caused frequent changes of the Commission's strategy. The preparation of legislative documents took considerably more time than foreseen and draft texts underwent many

changes before a majority of Commission actors considered them acceptable. This became most evident in the context of the 'Convergence' initiative pursued by DG Telecoms which met with outright opposition from other DGs. The Commission eventually abandoned proposing a new regulatory model and instead confirmed to leave established models of sectoral regulation in place. After that, the dominant behaviour expressed by the Commission was institutional inertia. Because the DGs saw themselves unable to agree on the need for and the objectives of audiovisual legislation and continued to conflict over authority, they deferred decisions on whether to propose legislation or simply avoided initiating further legislative action. The DGs engaged in a policy of 'mutual avoidance' and stuck to their established sectoral activities and routines.⁴⁹⁸ For example, the revision of the 'Television without Frontiers' directive did not lead to a formal drafting exercise, but instead resulted in the adoption of several consultative documents that have been rather evasive on whether the Commission would propose legislation in the future, due to ongoing disagreement on the issue.

In stark contrast to the low legislative outputs produced by the European Commission in the audiovisual field, the telecommunications sector was characterised by more rapid and more consistent legislative policy-making that resulted in the proposition of several pieces of legislation. Policy coordination was greatly facilitated by the low level of administrative fragmentation. Between DG Competition and DG Telecoms/InfSo, slightly more conflict emerged over the details of legislation than during previous years, but the two DGs were able to resolve it because they agreed on the paradigm of legislation and did not seriously question each others' authority for telecommunications issues. By means of informal consultations, the two DGs managed to sort out most of their differences before the dossiers reached other Commission actors. Together with an efficient division of labour these served to speed up the process of legislative policy-making and enabled the Commission to adopt legislative proposals that

⁴⁹⁸ An exception was the preparation and adoption of legislative proposals revising existing legislation on television standards that resulted in draft proposals regulating 'conditional access'. Since the dossier largely represented a continuation of existing legislation drafted by DG Telecoms/InfSo it did not encounter great interest nor serious opposition from other DGs. In this case, policy coordination met with few difficulties and resulted in the rapid and consistent preparation of legislative proposals (see Chapter Six).

were mostly in line with previous announcements and commitments. The Commission adopted a large number of legislative proposals, including several consultative documents, re-regulatory proposals and two more liberalisation directives.

Fragmentation and coordination in the European Commission

The empirical findings unveil how different levels of administrative fragmentation translated into distinct settings of plurality and interdependence in the two sectors under study. A central conclusion that has emerged is that when trying to explain the policy-making behaviour of the Commission the matter is not whether there is conflict between the DGs engaging in the preparation of legislation, but whether and how it is resolved. While conflict and controversy are ever-present features of 'multi-organisational' settings like the European Commission, significant variation may occur on their degree. The focus being on administrative fragmentation, this thesis has defined it by the number of DGs, their differences on the paradigm of legislation and their competition for authority. Low levels of fragmentation usually enable the Commission to overcome internal conflicts and to take legislative action. In contrast, high fragmentation results in the persistence of dispute and debate and therefore lowers the Commission's capacity to act. The different levels of fragmentation can be linked with the emergence of distinct scenarios of policy coordination that are characterised by different coordination paths or routes. In this context, it is useful to distinguish between 'formal' versus 'informal' coordination. A central finding was that these different routes vary in terms of whether and how intensely the DGs made use of them as well as their effectiveness to settle conflict and to cope with a given situation of fragmentation.

Informal routes of coordination are frequently used by Commission DGs to facilitate the building of consensus. Such coordination is undertaken in the less formalised arenas of the Commission, for example by means of preliminary consultations that take place in issue-related inter-service working groups on the lower levels of the DG hierarchies or through personal contacts between

officials, by means of exchanging staff or informally arranging a division of labour. Such consultations imply information exchange, bargaining, mutual pay-offs, and compromising and are aimed at building up trust and establishing long-term relationships. They provide an opportunity to discuss contentious issues in a small community and to find an answer to them before they enter larger arenas in which flexibility reduces and uncertainty increases, because actors multiply and more formal procedures must be observed. Due to the fact that the Commission's rules of procedures leave considerable scope for the use of such consensus-building activities or 'routines', Commission DGs nearly always engage in some kind of informal coordination - but there is significant variation in terms of the extent to which they do so. It has been shown that this variation can be linked with the incidence of administrative fragmentation. Low levels of administrative fragmentation (i.e. smaller numbers of actors and little distance between them) entail a greater reliance of actors on informal coordination and therefore render coordination more flexible and relaxed. In contrast, high levels of administrative fragmentation leave such informal mechanisms less effective. The greater the plurality of actors, the smaller the common ground between them and the lower their ability and willingness to make concessions. The chances that an agreement can be found on an informal basis and that conflict be resolved are therefore seriously diminished.

In contrast to informal coordination, formal coordination modes centre on pre-defined procedures and rules. The most important routes identified in this study are hierarchical decision-making, the 'coordinative' functions maintained by the Legal Service and the Secretariat General, as well as the obligatory inter-service consultations among DGs. These procedures constitute an essential part of all legislative policy-making insofar as actors must adhere to them to be able to put policy proposals forward to formal decision-taking. However, there is great variation on the extent to which they dominate the coordination process. Because high levels of administrative fragmentation render informal coordination routes less effective they prompt the use of formal ones at a much earlier stage of the coordination process. The use of such formal mechanisms, in turn, increases the plurality of actors each of which is likely to have its own positions and preferences. Due to the involvement of senior decision-makers in

the DGs, other administrative services, the *cabinets* and so on coordination gets more complex and 'politicised'. The fact that a greater number of and potentially more diverse positions must be reconciled and that decisions must be communicated back and forth between the different actors on different hierarchical levels makes the overall coordination process more time-consuming, more prone to changes and the actual proposition of legislation less likely.

For the two policy domains under study, two dominant coordination scenarios were observed. In the telecommunications, coordination mostly relied on informal routes, whereas in the audiovisual field, formal procedures dominated (see Table 23). In this context, the number of DGs appeared to be the most crucial factor affecting the emergence of the respective coordination scenarios. Throughout the empirical analysis, a greater number of DGs co-varied with greater distance between them, i.e. more conflict on the paradigm of legislation and more competition for policy authority, whereas a smaller number seemed to correlate with less differences and less competition. Most importantly, the fact that the number of DGs in the audiovisual field doubled from two to four in the early 1990s created a central momentum of variation between the two policy sectors. This suggests that the decision made by a DG to join the preparation process is at least partly caused by a perception held in the DG that it must do so in order to realise its interests vis-à-vis other DGs. The number of DGs might therefore reflect conflict on both the paradigm of legislation and authority and therefore be a function thereof. Two hypotheses emerge from this. One is that a small number of DGs (i.e. a two-actor constellation), results in what one may call 'bilateral' policy coordination, a coordination scenario in which informal coordination routes prevail, serve to overcome conflict and therefore lead to high legislative outputs. The other is that a larger number of DGs (i.e. more than two) leads to 'multilateral' coordination and a scenario dominated by formal coordination routes. In this scenario, conflict persists or intensifies and therefore results in lower legislative outputs. Due to the limited scope and purpose of this study, particularly the small number of cases and the qualitatively-oriented research design, it is not possible to generalise on this matter. Hence further research would be helpful

to assess to which extent the number of actors alone may determine fragmentation on the Commission's administrative level.

Table 23 The dominant coordination scenarios in the audiovisual and telecommunications sectors

	period 1984 - 1989		period 1990 - 1996		period 1997 - 2000	
	audiovisual sector	telecoms sector	audiovisual sector	telecoms sector	audiovisual sector	telecoms sector
coordination scenario	informal	informal	formal	informal	formal	informal

The different patterns and scenarios of coordination that can be observed in the European Commission and the ways in which they are linked with fragmentation and policy outputs confirm the central assumptions of the theoretical literature on policy coordination. In order to identify and classify different coordination routes the literature distinguishes between 'formal' and 'informal' coordination.⁴⁹⁹ Formal coordination centres on the principle of hierarchy and coercion, whereas informal coordination implies a variety of consensus-building activities that take place in less formalised arenas. The literature says that organisational actors often consider formal coordination of limited usefulness in producing coherent institutional behaviour and in realising their own goals because it tends to transfer conflict to other, possibly more 'political' arenas where it may intensify rather than being solved.⁵⁰⁰ In the meantime, organisational actors would face unwanted delays, uncertainty, and a waste of scarce resources (e.g. staff, time and energy). Organisational actors may therefore use alternative approaches to coordination, having at their disposal a number of informal routines designed to facilitate coordination, including bargaining, incremental or sequential decision-making, policy framing, improving information flows, and the building of alliances.⁵⁰¹ Being problem-oriented and pragmatic, many of these activities are based on long-term

⁴⁹⁹ Alexander (1993); Chisholm (1989); Davis (1995); Hanf and Scharpf (1978); Hayward and Wright (2002); Lindblom (1965); Peters (1998); Scharpf (1997); Seidman (1980); Simon (1997).

⁵⁰⁰ Chisholm (1989); Peters (1998); Scharpf (1997); Seidman (1980); Simon (1997).

⁵⁰¹ In the literature, there is a variety of terms characterising informal coordination, such as 'coordinating styles' (Hayward and Wright 2002), standard operating procedures and routines (Allison and Zelikow 1999; Davis 1995), and 'coordination mechanisms' (Chisholm 1989; Seidman 1980).

relationships and trust. Most importantly, they are deliberately used by organisational actors.⁵⁰² Informal coordination routes greatly facilitate the coordination process, but high levels of conflict render them less effective.⁵⁰³

Uncovering patterns of policy coordination occurring in the European Commission has served to establish and illustrate causal relationships between fragmentation and policy outputs. Given that no systematic work has previously been undertaken on policy coordination in the Commission, I concentrated on dominant and routine patterns rather than providing a comprehensive account of all possible coordination modes. Further research would be useful to uncover other coordination routes and to explain under what conditions they are used. The policy coordination literature lists a variety of possible routes, including issue-framing, sequential decision-making or alliances with external constituencies.⁵⁰⁴ Increasing our knowledge of how coordination operates in the European Commission would not only foster our comprehension of how coordination operates in the European Commission, but also contribute to the theoretical literature on coordination and questions of a more general nature, for example under what conditions different coordination mechanisms are used and why informal coordination routes are more effective in managing coordination than formal ones.

Together, the concepts of fragmentation and coordination provide a useful lens to analyse the policy-making processes underway in the European Commission. Taking up the insights of contributions that view policy-making in the Commission as a pluralist process through which different organisations and actors engage in conflict and competition the thesis has conceptualised how fragmentation manifests itself and how it varies.⁵⁰⁵ Moving beyond the two empirical cases one may discern the Commission as a complex bureaucracy whose actions cannot be forecast simply by referring to its role as a 'motor' of

⁵⁰² Alexander (1993); Chisholm (1989); Davis (1995); Hanf and Scharpf (1978); Hayward and Wright (2002); Lindblom (1965); Seidman (1980).

⁵⁰³ E.g. Chisholm (1989); Seidman (1980).

⁵⁰⁴ See, for example, Chisholm (1989); Davis (1995); Hayward and Wright (2002); Seidman (1980).

⁵⁰⁵ See, for example, Peters (1991, 1994 and 2001).

European integration or, alternatively, its fragmentedness. This implies to challenge existing notions of the European Commission, including that of a single-minded 'competence maximizer' and that of a 'fragmented' or incoherent policy-maker being largely incapable of action.⁵⁰⁶ Policy-making in the European Commission is nearly always characterised by conflict and fragmentation. It is not the presence of conflict and fragmentation as such which affects the Commission's ability to prepare and propose legislation, but the ways in which they vary. The Commission can overcome low degrees of fragmentation and therefore be highly capable to act. In contrast, a high level of fragmentation makes it difficult to overcome conflict and debate and therefore makes the taking of action much more problematic or even impossible. Analysing the impact of administrative fragmentation is therefore important to enhance our understanding of variation in the Commission's legislative capacities.

Moving beyond the European Commission, there are also lessons that may be drawn for our understanding of the overall process of legislative policy-making in the European Union. EU policies may be the result not only of relations between the Commission and other actors (e.g. the European Parliament or the Council of Ministers), but also be affected by the processes that take place in the European Commission and therefore the variation on the Commission's legislative capacity. The multitude of factors that affect EU policy-making, for example member states and business interests, operate not only through established channels such as the Council and the European Parliament, but also through the Commission. Insofar as these factors can be expected to affect the fragmentation of the Commission, they impact on its behaviour. In order to enhance our understanding of the EU policy process we must acknowledge that the Commission is neither the ruthless activist that never tires of expanding EU authority and its own competences nor generally prone to inefficiency, mismanagement and blockage. Rather than fulfilling a pre-defined part and pursuing a predictable agenda, it is capable of playing

⁵⁰⁶ E.g. Christiansen (2001b); Hix (1999); Laffan (1997); Majone (1996); Metcalfe (2000); Moravcsik (1993 and 1998); Peterson (1999); Pollack (1994 and 2003); Schmidt (1998a); Stevens (2001); Stone Sweet and Sandholtz (1998).

different roles. While one may think of a variety of reasons that affect which role the Commission takes up in the given circumstances, it all comes to nothing if we do not take account of the fact that all these reasons must take the passage through its internal life. Only then can we understand what the Commission does - and what it does not do.

Appendix

Sources of Evidence

European Commission documents

Each year, the European Commission publishes several tens of thousands of pages of text, all accessible to the public, that include a broad range of documents ranging from information memos to formal legislative proposals. These publications not only document the content of the European Commission's policies, but also the progress that has been made in relation to them. They demonstrate changes in the European Commission's policy strategies and serve as a useful indicator of the three dimensions of the chosen dependent variable (speed, consistency, and the decision whether to propose legislation). At the same time, one must be aware that such documentation, however detailed, only reveals what Commission actors want the public to know. For example, when the European Commission changes its policy strategy, it does not always give a full account of its reasons for doing so in its official documentation. Hence, the reading of the official documents had to be complemented by information from other sources.

For the policy initiatives under study, access to official documentation was generally good and a representative sample of documents was obtained for all of them, both in printed and electronic format. The sources of official information used were as follows.

1. Information sources monitoring the EU policy-making process, for example 'Prelex', 'Celex' and 'Rapid'. These databases are provided for by the European Union and offer detailed information on the content and progress of legislative initiatives. For example, they document the

chronology of a dossier, the participation of different DGs, and provide links to related procedures and legislative initiatives.

2. **European Commission Work Programmes.** These are published annually and list the European Commission's official agenda, including details on policy proposals to be expected in the course of the year and their central aims. The complete reference to these documents can be found in a separate section of the Bibliography, whereas in the empirical analysis they are referred to in terms of authorship and the year the documents were published (e.g. 'European Commission 1994c').
3. **Consultative papers published by the European Commission (so-called COM Documents).** They provide detailed information on the policy priorities of the Commission for a given legislative initiative, outlining major aims and timetables, offering detail on the positions of outside actors et cetera. The complete reference to these documents can be found in a separate section of the Bibliography, whereas in the empirical analysis they are referred to in terms of authorship and the year the documents were published (e.g. 'European Commission 1994c').
4. **Formal policy proposals and legal instruments adopted by the European Commission, usually accompanied by an explanatory memorandum in which the European Commission sets out the motivation for and the aims of harmonising legislation.** The complete reference to these documents can be found in a separate section of the Bibliography, whereas in the empirical analysis they are referred to in terms of authorship and the year the documents were published (e.g. 'European Commission 1994c').
5. **Press releases issued by individual DGs or Commissioners (often called 'MEMOs').** These are intended to inform the public about the time schedule and aims envisaged for a policy initiative. Usually they are supplied by the Rapid database provided for by the European Union institutions. Full references are stated in the footnotes in the empirical analysis.

6. Speeches given by senior DG officials, *cabinet* members or Commissioners. They provide details on the positions taken in individual DGs and contain information as regards the aims and time schedules of legislative initiatives. Usually they are supplied by the Rapid database provided for by the European Union institutions. In the empirical analysis, full references are provided in the footnotes.
7. Statements and comments of Commission officials. Usually, they are made available as contributions in journals (e.g. *Telecommunications Policy*, *Utilities Law Review*) or in published conference reports. Strictly speaking, this kind of information does not constitute 'official' Commission documentation as it usually contains a disclaimer saying that the author expresses his/her personal view rather than an official Commission position. However, because the focus of this study is on the positions taken by single actors in the Commission rather than 'the' Commission as such and because the officials who publish their views are the ones who actually draft policy proposals, I decided to use it as an additional source of official documentation. The complete references to these documents can be found in a separate section of the Bibliography, while in the empirical analysis the fact that an author is or used to be a Commission official is clearly indicated in the footnotes.

The empirical analysis also refers to other sources of official documentation, including the EC Bulletin and the Official Journal. These sources document the outcomes of the inter-institutional process, for example publishing the final policy instruments adopted by the European Parliament and the Council. They are not used as a source of evidence but serve the useful purpose of providing background information. Bibliographic references can be found in the footnotes.

Press reports

Information about the processes that precede the adoption of Commission documents and about the kinds of discussion that take place in the European Commission can be obtained from international newspapers documenting the

European Commission's activities. Three international newspapers cover policy-making in the European Commission in detail: *Agence Europe* (a European daily dealing exclusively with EU Politics), *European Voice* (a European weekly covering EU news and analysis), and the *Financial Times* (international daily covering business and political affairs, including the EU).⁵⁰⁷ These newspapers contain interviews with and statements from Commissioners or DG officials, carry the comments of lobbyists on the European Commission's behaviour, and cover the most central events surrounding the development of legislative initiatives. For the two policy sectors under study, the newspaper coverage was generally very good as they both represent high-profile business areas. For each policy initiative, a representative sample of press cuttings was obtained, both from archives and electronically. In the empirical analysis, reference to the press cuttings is made in the footnotes (e.g. 'Financial Times, 24.2.1993').

Interviews

Between May 2002 and January 2004, I conducted 29 interviews, mostly with Commission officials (see Table 24).⁵⁰⁸ Having identified from the Commission organograms of the past two decades a number of key positions (e.g. Head of Unit, Advisor) in the relevant DGs, I chose interviewees with a view towards their involvement in the legislative initiatives under study. I also used a 'snowballing technique' by asking my interviewees to identify others I should see. The aim was to reach people having undertaken the actual drafting of legislative initiatives and those they coordinated with in other DGs as well as more senior officials who were responsible for providing direction and taking decisions. The officials I interviewed came from several ranks of the Commission hierarchy.⁵⁰⁹ I

⁵⁰⁷ Most national newspapers do not deal with the activities of the European Commission in great detail (for detail see de Vreese 2001).

⁵⁰⁸ I put forward 21 requests to possible interviewees; three individuals refused to be interviewed at all, mostly citing time constraints. The overall response rate was therefore quite high. With some interviewees, I conducted more than one interview as they were closely involved in separate sets of major legislative initiatives.

⁵⁰⁹ In the European Commission, there are five different staff grades, the grade relevant for this study being the A-Grade, which has been called 'the policy-making and policy management grade' (Nugent 2001, p. 169). Other grades are for translators and interpreters, administrative, clerical and secretarial staff as well as employees undertaking service and manual

conducted interviews with officials from the following DGs: DG Competition, DG Education and Culture, DG Internal Market (now called DG Enterprise), and DG Telecoms (now called DG Information Society). The sample reflects at least three interviewees for each legislative initiative under study, usually two with officials from the DG with drafting responsibility as well as at least one with officials from other DGs participating in the preparation of legislation. I also conducted seven interviews with actors from outside the European Commission, mostly lobbyists and MEPs who were closely involved in the legislative initiatives under study and therefore able to provide detailed information on the debate observed in the Commission.

jobs (for an overview see Nugent 2001, p. 168f.). The A-Grade is divided into eight points, reaching from A8 to A1. Seniority increases down the scale. For example, A1 is a director general or equivalent, whereas A8 is an assistant administrator. The officials I interviewed included principal advisers (A2), heads of unit or division (A3), principal administrators (A4-A5) as well as assistant administrators (A6-A8). See Table 24 for detail.

Table 24 List of interviewees

Name	Institution/ Company	Position(s) held⁵¹⁰	No. of meetings	Date(s)
Pascal Albrechtskirchinger	ZDF (Zweites Deutsches Fernsehen)	Delegate to the European Institutions	2	07/05/02 27/01/03
Roberto Barzanti	European Parliament	Member of the European Parliament	1	03/04/03
Cornelis Berben	European Commission, DG Information Society	Assistant, Head of Sector, Deputy Head of Unit	3	22/11/02 22/01/03 22/05/03
Ulf Brühann	European Commission, DG Internal Market	Head of Division, Head of Unit, Adviser	2	08/05/02 18/11/02
Bernard Clements	European Commission, DG Information Society	Assistant/Administrator	1	15/05/03
Costas Daskalakis	European Commission, DG Education and Culture	Deputy Head of Unit, Head of Unit	1	22/11/02
Andreas Hamann	Landesanstalt für Kommunikation Baden-Württemberg	Consultant	1	14/05/01
Christian Hocepiéd	European Commission, DG Competition	Assistant/Administrator Head of Unit, Head of Sector	4	19/11/02 27/01/03 22/03/03 20/01/04
Suzanne Jessel-Picoury	European Commission, DG Internal Market	Head of Unit	1	07/05/02
Angela Mills	EPC (European Publishers Council)	Executive Director	2	25/09/02 05/12/02
Peter Scott	European Commission, DG Information Society	Head of Unit, Head of Sector	2	22/11/02 30/01/04
Aviva Silver	European Commission, DG Education and Culture	Assistant/Administrator	2	19/11/02 30/01/04
Carole Tongue	European Parliament	Member of the European Parliament	1	27/09/02
Xavier Troussard	European Commission, DG Education and Culture	Deputy Head of Unit	1	22/01/03
Herbert Ungerer	European Commission,	Head of Unit, Head of Division, Adviser	1	18/11/02

⁵¹⁰ The information refers to the position(s) held during the period under study.

	DG Telecoms and DG Competition			
Paul Verhoef	European Commission, DG Information Society	Head of Unit, Adviser	1	22/11/02
Adam Watson-Brown	European Commission, DG Information Society	Assistant/Administrator Head of Sector	2	08/05/02 21/11/02
Philip Whitehead	European Parliament	Member of the European Parliament	1	15/01/03

The interviews lasted from 30 minutes to 3,5 hours, with the average length being one hour and 15 minutes.⁵¹¹ Interviews were semi-structured, following a set open-ended questions that centred on the course of policy development in the European Commission and the involvement of the interviewee, other officials and DGs. Due to the political sensitivity of the questions (including interviewees' views on contested policy issues, officials' behaviour in tricky decision-taking situations, and the actions taken by individual Commissioners and member states' governments), interviews were conducted on a non-attributable basis. Table 24 supplies the names and positions of the people I interviewed, including details on when and how often I saw them. In the empirical analysis, each interview is coded using numbers (e.g. 'Interview Number 6'). As interviewees supplied highly confidential information, I did not tape the interviews, but took extensive notes during and shortly after each interview.

Unpublished documentary sources

I also used unpublished European Commission documents, such as internal working documents, info sheets, notes and correspondence (i.e. letters and electronic mail) exchanged between different Commission DGs, as well as and preliminary drafts of legislative proposals and documents. This material represented a useful source of additional evidence in those cases where other

⁵¹¹ Of the 29 interviews, 22 were conducted face-to-face in Brussels. The remaining interviews were conducted on the phone, as the interviewees were either too inconveniently located for me to see them or simply insisted on talking to me over the phone outside regular office hours due to time constraints. 21 interviews were conducted in English and eight in German. Seven interviews were followed up either by e-mail or on the telephone to get additional information.

sources did not provide all the detail I needed. It offered detailed information about the process during which Commission DGs prepared legislation, including their positions, disputes and the finding of compromises. Some of these documents were available on open access, following a written application to the European Commission and a rather lengthy delivery procedure.⁵¹² Some were supplied in confidentiality by my interviewees. In the interest of the persons supplying the documents, I chose not to quote from the material directly and to limit reference to providing the date and title or subject of the document as well as citing the DG from which it originates.

⁵¹² Regulation 1049/2001 of 30 May 2001 grants a right of access to European Union institutions' documents, including the European Commission, to any Union citizen. These documents include preparatory and internal documents produced by the European Commission.

Acronyms

CAP	Common Agricultural Policy
CATV	Cable Television
CEPT	Conférence Européenne des Administrations des Postes et des Télécommunications
DBS	Direct Broadcasting by Satellite
DG	Directorate General of the European Commission
DG III	Directorate General Internal Market and Industrial Affairs
DG IV	Directorate General Competition
DG X	Directorate General Information and Culture
DG XIII	Directorate Telecommunications
DG XV DG	Internal Market and Financial Services
EBU	European Broadcasting Union
EC	European Community
ECOSOC	Economic and Social Committee
EMS	European Monetary System
EU	European Union
HDTV	High Definition Television
IT	Information Technology
ITTF	Information Technology Task Force
ITU	International Telecommunications Union
MAC	Multiplex Analogue Component
MEP	Member of the European Parliament
MOU	Memorandum of Understanding
NCA	National Competition Authority
NRA	National Regulatory Authority
ONP	Open Network Provision
PAL	Phase Alternating Line
PSB	Public Service Broadcasting
PTO	Public Telecommunications Operator
R&D	Research and Development
SECAM	Système Électronique pour Couleur avec Mémoire
SEM	Single European Market

SMP	Significant Market Power
TEN	Trans-European Networks
TEU	Treaty on the European Union
VAN	Value-Added Telecommunications Services

Glossary

Audience Share – criterion used to assess dominance in media markets by means of measuring audiences

Conditional access – access to communications services granted by operators providing these services, made conditional on a prior authorisation aiming at ensuring the remuneration of the service, for example by means of decoders or smart cards

D2-MAC – see MAC

Electronic Communications – a term used by the European Commission which has come to increasingly replace and combine existing terms such as ‘telecommunications’ and ‘broadcasting’ in the late 1990s.

Equipment – referring to both the network (lines and switches) and the terminal equipment (consumer devices) connected to these networks (e.g. telephones, modems, television sets).

HD-MAC – see MAC

Infrastructure – the network that carries telecommunications and audiovisual services, including copper wires, terrestrial transmission of broadcasting, satellites, broadband and cable television networks.

Interconnection – referring to the conditions of access to networks granted by PTOs to users and competitive service providers including, for example, standards and interfaces, tariff principles and the provision of frequencies.

Interoperability – the linking of facilities of different organisations providing telecommunications networks and/or services

Local Loop – referring to the physical circuit between the customer’s premises and the telecoms operator’s local switch or equivalent facility in the local access network.

MAC – Multiplex Analogue Component, a technical standard used for the transmission and reception of television broadcasting in the context of

so-called High-Definition-Television. In the 1980s, specifically European broadcasting norms were developed, called HD-MAC and D2-MAC.

Open Network Provision – concerns the harmonisation of conditions for open and efficient access to and use of public telecommunications networks and services

PAL/SECAM – the technical standards used for the transmission and reception of traditional free-to-air television broadcasting.

Significant Market Power – concept used as a trigger to apply specific obligations to telecommunications operators with more than a distinct market share of specified markets (e.g. fixed telephony, mobile telephony).

Television Quota – the placing of obligations on television broadcasters to transmit a minimum of productions of European and ‘independent’ origin

Universal Service – the provision of a basic telecommunications services (e.g. voice telephony) and a network access supporting these services at an affordable price

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