"Fortress Europe" in the Telecommunications Sector as a Consequence of "Europe 1992": Reality or Imagination?

Marc Andre Al
University of Leiden

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“Fortress Europe” in the Telecommunications Sector as a Consequence of “Europe 1992”: Reality or Imagination?

Marc André Al*

As more and more services are transacted both nationally and internationally through data flows, telecommunications becomes not simply one sector among many, but something much more important—the central nervous system of the international economy.¹

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* In April 1992, the author finished his study of Dutch law with specialization in international law at the University of Leiden, the Netherlands. This Article is an adaptation of the author’s final paper under the title “‘Fortress Europe’ in the Telecommunications Sector: Reality or Imagination?”

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This Article was born out of frustration. Many Americans have accused the European Community (EC) of protectionism and of discriminating against U.S. companies. These accusations became more prevalent as the end of 1992 drew near, the year which preceded the establishment of the Internal Market in the European Community. The EC’s alleged protectionism and discrimination even received a name: “Fortress Europe.” An article about Fortress Europe, however, was not possible because it would involve too many aspects of international trade. Instead, this Article focuses on the protectionism and discrimination which the EC allegedly practices in the telecommunications sector, an area of significant economic interest, but it excludes questions of the mass media and communication via satellite. Many facts and conclusions in this Article are of a general nature and apply to trade and relations between the EC and any country. However, this Article is limited to products, producers, and service providers from the United States, because the accusations of protectionism and discrimination, and the idea for this Article, originated there.

1992 will be remembered in history as the year that ended with the Internal Market opening among EC Member States. The goal of securing the free movement of goods, services, capital, and people motivated the creation of the Internal Market. With the opening of the Internal Market, the EC member states will eliminate remaining non-tariff barriers and will harmonize market regulations on an EC-wide basis. This will permit companies to compete freely in an open market.

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The EC member states seek to create an economic entity which, in many respects, will be comparable to the U.S. With the Internal Market in place, the EC's market should begin to assume a place of equal importance to that of the U.S. The realization of the aims of the Single European Act is what is now referred to as "Europe 1992," or, as the French more correctly say, "Europe 1993." This Article refers to the realization of the Single European Act's aims as the 1992 Program.

The changes resulting from the completion of the Internal Market generally can be welcomed from an economic point of view because absolute and comparative cost advantages can be better exploited. However, some countries outside the EC have raised questions about the 1992 Program and fear that it will have protectionist effects. This fear increased when the European Commission declared that European Economic Community (EEC) firms, not outsiders, should be the main beneficiaries of the frontier-free EEC.

The term Fortress Europe is the paradox which encompasses the closing of the EC's market for non-member states as the market opens for member states.

Focusing the inquiry at hand, this Article examines the extent to which the accusation and fear of Fortress Europe is realistic in the telecommunications sector as a result of the 1992 Program. Because the EC's commercial policy exists within a framework of international obligations and the EC's own treaty system, this Article must first address two issues. The first issue is whether access to the EC telecommunication equipment and services markets can and will be restricted for non-member telecommunication equipment and services, such as from the U.S., as a result of the 1992 Program. The second issue is whether within the Community there can and will be discrimination against non-member telecommunication equipment and service providers as a result of the 1992 Program.

The inquiry into the validity of the Fortress Europe accusation consists of an analysis of the EC's international obligations under the General Agreement on Tariffs and Trade (GATT) and under EC telecommunications legislation. This analysis makes possible a
determination of whether the international obligations of the EC and its legislation permit its alleged discriminatory behavior. When one state accuses another state of protectionism, the degree of trade liberalization within the accusing state inevitably shapes its perception of what constitutes protectionism. Therefore, because the U.S. is the accuser, this Article provides an overview of the U.S. telecommunications sector to determine the degree of trade liberalization within it. A comparison between the telecommunications sectors of the two trade blocks then follows. This Article concludes with an assessment of the validity of the Fortress Europe accusation: the U.S. fear of protectionism is a misconception without factual or legal basis.

II. THE CURRENT IMPORTANCE OF TELECOMMUNICATIONS

Telecommunications are already, and will be increasingly, of vital importance to economic, social, and cultural development worldwide. Telecommunications also play a role in the international balance of trade. Although the EC continues to have an overall positive trade balance worldwide in telecommunication equipment, its external trade surplus fell in 1985 for the third consecutive year to ECU 1247 million from ECU 1533 million in 1984. More important, however, is that the trade deficits with the U.S. and Japan, two major trading partners of the EC, widened by 25 percent and 61 percent respectively. In 1988, the trade deficit with the U.S. was approximately $418 million. The trade position in the telecommunications-related services market is more difficult to estimate, although it is clear that the high revenue international value-added services market is dominated by U.S. providers. Basic international telecommunication services, on the other hand, are jointly provided by Community and external telecommunications operators, with revenues shared according to negotiated accounting rates.

The telecommunications market actually consists of two very different markets. First, there is a market in telecommunication equipment and technology, which includes switching and transmission equipment, as well as terminal equipment. Second, there is a market for

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9. In economic terms, their importance can be seen in the following figures. The conglomerate sector of the management and transportation of information represented in 1987 already more than ECU 500 billion worldwide. Commission of the European Communities, Towards a Dynamic European Community—Green Paper on the development of the common market for telecommunications services and equipment: Communication from the Commission, COM (87) 290 final, pt. 1 at 2 (1987) [hereinafter Green Paper]. The world market for telecommunication equipment had reached ECU 90 billion in 1986, of which 17.5 billion was accounted for by the EC. Id. At the same time, EC revenue from telecommunication services amounted to 62.5 billion in 1985. Id. According to the Green Paper, the telecommunications sector might account for seven percent of Community GDP by the end of the century, compared to only two percent in 1984. Id. Public and private investments in the Community’s telecommunications sector will total ECU 500 to 1000 billion before the year 2000. Id., pt. 1 at 2 and pt. 3 at 18. However, the overall effect on the economy will be even larger; due to the multiplier effect, equal to 1.5, it should fall between ECU 750 and 1500 billion. Id., pt. 3 at 48. By the year 2000, more than 60 percent of EC employment will be strongly information related and will therefore increasingly depend on telecommunications. HERBERT UNGERER, TELECOMMUNICATIONS IN EUROPE: FREE CHOICE FOR THE USER IN EUROPE'S 1992 MARKET: THE CHALLENGE FOR THE EUROPEAN COMMUNITY 89 (1989).

10. Green Paper, supra note 9, pt. 3 at 158.


12. Green Paper, supra note 9, pt. 3 at 158.
consumer telecommunication services. With some prominent exceptions, the European market for value-added services is still in its infancy. As a result of changes in society, demand for value-added services will steadily grow. With increasing technical and legal opportunities to provide these services, the European market will become increasingly important for both EC and non-EC service providers.

III. ANALYSIS OF THE TERM "FORTRESS EUROPE"

A. Towards a Definition of the Term

The Fortress Europe campaign was born in Washington, D.C. during the debate over the Omnibus Trade Bill early in 1988. Outcries from lobbyists of financial service providers were initially echoed by government spokespersons, as the apparent need to find culprits for the trade deficit and for tough talk for political consumption in the U.S. Congress fed the campaign. The outcries have not diminished since. Although literature, magazines, and newspapers make extensive use of the term, no definition of Fortress Europe appears to exist anywhere. This probably follows from the fact that the term describes a feeling of fear that the EC’s market would be closed off to non-EC products, producers, and service providers with the establishment of the Internal Market at the end of 1992.

Although formal definition of Fortress Europe eludes formulation, it is possible to distinguish two key elements. The first element centers on a fear of decreasing access to the EC market for companies and products originating outside the EC. This clearly is an external element of the internal EC measures undertaken to establish the Internal Market. The second element is a fear of discrimination in intra-Community trade of these non-Community companies and products. This alleged discrimination will lead to favoring Community companies and products over non-Community companies and products.

B. EC and Non-EC Companies

To lay the groundwork for an analysis of the EC's international obligations under GATT and its telecommunications legislation, as these obligations pertain to the allegedly decreasing access to the EC for non-EC telecommunications products and companies and to disfavoring these products and companies in the EC, it is necessary to first establish what is considered a non-EC company. Two types of non-EC companies exist. The first type is geographically determined, and the second type has a political nature.

13. See, e.g., French Teletel and Reuters financial services.
16. In 1988, U.S. Trade Representative Clayton Yeutter, for example, complained in a letter to Willy De Clercq, then Member of the Commission responsible for foreign trade, about hints of protectionism in De Clercq's speeches about the 1992 Program. Blanca Riemer et al., Laying the Foundation for a Great Wall of Europe, BUS. WEEK, Aug. 1, 1988, at 40.
17. The term "products" includes both equipment and services.
18. The special name and description of these two types of companies will be followed throughout this Article, superseding the nonspecialized meanings of the two names.
The General Programmes for the abolition of restrictions on freedom of establishment and for the abolition of the restrictions on freedom to provide services mention "favoured companies." These are companies which have their registered office, central administration, or principal place of business within the Community. Any company that does not meet these geographical requirements is a "non-Community company." This Article will call this type of company the "real" non-Community company, in order to distinguish it from the second type of non-Community company, which it will call the "political" non-Community company. The latter term will refer to real Community companies established according to the law of one of the member states of the EC, which may nevertheless be viewed as non-Community companies by the public and by the company itself. An example of such a company would be the Dutch branch of AT&T Network Systems International. Even though this company is settled in Hilversum, The Netherlands, and is established according to Dutch law, it is often perceived as an American company.

Existing discussions on the question of disfavoring non-Community companies within the EC concentrate on this second, political, type of company. The political aspect of such companies should lie in a genuine link with a non-EC country. B.A. Bozek relates that "in the Nottebohm case, the [International] Court [of Justice] defined the effective and real nationality of an individual as the juridical expression of the social fact of the individual’s connection with his country by his behavior, his activities, his family ties, his tradition, his interests, sentiments and establishment." Bozek then ponders the question whether or not these criteria could be relevant for the nationality of ships, but concludes they could not. Similar comparisons between natural persons and inanimate objects have been rejected. Although a like discussion may extend to the nationality of companies, it will not be necessary, since, as will be shown, the U.S. fear of protectionism is a misconception without factual or legal basis.

C. The Source of the Fear of Fortress Europe

Authors greatly disagree on the degree to which protectionism and discrimination will increase with the realization of the Internal Market. Unfortunately, much of their work lacks legal arguments and covers a host of aspects of trade in few pages. For example, although

20. *Id.* at 3.
21. See EEC TREATY, supra note 5, art. 58.
23. *Id.* at 4.
24. "All these are criteria characteristic of human beings, but irrelevant for an inanimate object", B.A. Boczek, FLAGS OF CONVENIENCE. AN INTERNATIONAL LEGAL STUDY (1962), quoted in H.W. Wefers Bettink, Open Registry, the Genuine Link and the 1986 Convention on Registration Conditions for Ships, in NETHERLANDS YEARBOOK OF INTERNATIONAL LAW, vol. XVIII, at 84 n.44.
one author concludes that "the factual cumulative outcome of '1992' is liberal and will greatly improve access [to the Community],"26 another writes that "the coming of the internal market heralds the closing of Europe to outside parties and the beginning of an era of new and unprecedented protectionism on the part of the members of the EC."27 A fear exists that import quotas, reciprocity requirements, local content standards, minimum direct investment standards, market segment insulation policies, and domestic company definitions will result in preferential treatment for EC firms.

The European Commission and Member State officials have denied that the 1992 Program is intended to operate against anyone. The Commission expects world trade to increase as a result of the realization of the Internal Market, thus benefitting both EC and non-EC countries.28 Nonetheless, U.S. trade officials have referred to the Internal Market as "the Infernal Market,"29 and a commentator has written that "the prospect of economic integration [in Europe] threatens to produce new trade barriers that will shut out U.S. goods."30

IV. THE EC'S INTERNATIONAL OBLIGATIONS AND ITS TELECOMMUNICATIONS LEGISLATION VERSUS THE PERCEPTION OF FORTRESS EUROPE

A. Fundamental Telecommunications Concepts

The exchange of information is an economically vital activity, even to the extent that it affects the contemporary balance of power. As modern society's central nervous system, telecommunications is a particularly critical area. The convergence of telecommunications, computing, and the application of electronics in general has made possible the introduction of a wide variety of new services.

Before describing the legal framework applicable to it, it is necessary to define telecommunications. "Telecommunications embraces any transmission, emission or reception of signs, signals, writing, images, and sounds or intelligence of any nature by wire, radio, optical, and other electromagnetic systems."31 The telecommunications industry can be divided into four sub-fields: network equipment, which is transmission and switching equipment; terminal equipment, which is customer access equipment; basic services, principally voice communications; and enhanced or value-added services, which is manipulation of information, such as data processing conducted through telephone lines.32

27. Jarvis, supra note 3, at 230.
29. Id.

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In order to understand the current legislative framework of telecommunications in Europe, it is necessary to describe its historical background. The situation in the individual EC Member States has been largely similar to that in the Netherlands. Therefore, by way of example, the Dutch national legal framework applicable to telecommunications will be described. However, the discussion of Dutch law will focus on the years preceding 1989, when the Dutch Staatsbedrijf der Post, Telegrafie en Telefonie (PTT) gained independence as a result of the European Commission’s 1987 Green Paper on telecommunications.

B. Old European Telecommunications Monopolies

1. Preliminaries

Since the late 1960s, the telephone has developed from a service restricted mainly to business and emergency use, to a feature present in two out of every three households in the EC. The task of placing the telephone within the reach of every consumer and business user, independent of status, geographic location, and frequency of use, has made the public service mandate the overriding business objective of telecommunications administrations in Europe. This emphasis on public service, mainly interpreted as general telephone coverage, has led to an extended monopoly regime for the provision of the network, telephone, and telex services, as well as telephone sets, with the aim of ensuring the financing of general network and telephone penetration. In most European countries, this aim is further achieved by heavily subsidizing rentals and connections through usage-related call charges. In all European countries, long-distance rates have served to subsidize local rates.

2. The Dutch Model

Telecommunications legislation in the Netherlands established its roots at the turn of the century. The same is true of legislation in other European countries. Diagram 1 shows the connections in Dutch telecommunications regulation.

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33. Except in the U.K., where the telecommunications market started to be liberalized somewhat earlier.
34. The English translation of the name of this entity is State Enterprise of Post, Telegraph, and Telephone Service.
35. Ungerer, supra note 9, at 30.
36. Substantial differences in general telephone service penetration persist both between European countries and between the world leaders in telecommunication penetration. An overview of telephone penetration in the EC and in the U.S. has been included in Appendix III.
37. Ungerer, supra note 9, at 30.
# Connections in Dutch Telecommunication Regulation

## Key to Table

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>T en T-wet</td>
<td>Telegraph &amp; Telephone Act</td>
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<tr>
<td>RTR</td>
<td>State Telephone Code</td>
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<tr>
<td>TGB</td>
<td>Telegraph Decree</td>
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<tr>
<td>TXB</td>
<td>Telex Decree</td>
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<tr>
<td>DN-1</td>
<td>Data Network Decree</td>
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<tr>
<td>AWW</td>
<td>Indication Act</td>
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<td>AV</td>
<td>General Terms Dir. - Gen. PTT</td>
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<td>3.2b/3 sex 3</td>
<td>Articles from T en T-wet</td>
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<tr>
<td>AW</td>
<td>Indication Order 1970</td>
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<td>SMV</td>
<td>Standard Authorization Conditions</td>
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<td>KB</td>
<td>Cable Decree</td>
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<td>OW</td>
<td>Radio and TV Act</td>
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Dutch legislation reserved to the state the right to provide telecommunication services. Later, the PTT replaced the state in this role. The PTT was to comply with the general directives of the *Telegraaf- en Telefoonwet 1904*38 (T- en T wet). The *Aanwijzingswet PTT 1954*39 governed the PTT's performance of its tasks, and it mentioned the borders within which the PTT could carry out its "statal activities." The T- en T wet did not prohibit third parties from supplying telecommunication services. The possibility of concessions to third parties was left open, and the *Aanwijzingswet* did not obligate the PTT to subject its services'...

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38. The English translation is the Telegraph and Telephone Law of 1904.
39. The English translation is the Indication Act Concerning the PTT of 1954.
use to conditions. Nevertheless, an *Algemene Maatregel van Bestuur*\(^{40}\) (AMvB), which roughly compares to the British Order in Council, regulated the primary structure of all telecommunication services and granted the right to provide the services to the PTT.

The *Algemene Voorwaarden*,\(^{41}\) enacted by the Director-General of the PTT, regulated the details of telecommunications services. They were often easily changeable provisions. The *Algemene Voorwaarden* were then incorporated into all contracts between users and the PTT. Restrictions relating to the use of the telecommunications media, the admissibility of terminal equipment, and the use and maintenance of the terminal equipment, lie primarily in the *Algemene Voorwaarden*. Thus, the introduction of new equipment and services was subject to PTT, rather than State, restrictions. The PTT effectively controlled the communications media as a means of transport: it controlled terminal equipment; the use of communications media and terminal equipment; and the maintenance of communications media.

Since in practice a concession has never been granted to a third party, the PTT enjoyed a factual monopoly for the construction and use of the public telegraph and telephone system. The conditions and indemnification for the use of services provided by the PTT were regulated by AMvBs insofar as they were not regulated by formal law.\(^{42}\) Four such AMvBs existed: (1) *Rijkstelefoonreglement*,\(^{43}\) (2) *Telegraafbesluit*,\(^{44}\) (3) *Telexbesluit*,\(^{45}\) and (4) *Datanetbesluit*.\(^{46}\) The AMvBs contained general regulations relating to the telegraph, telephone, telex, and data network systems. Every AMvB provided that the Director-General of the PTT could issue further regulations in the *Algemene Voorwaarden*. The PTT's Director-General has issued such regulations governing the specifications of the services and user terms, and regulations concerning terminal equipment are now present in the *Algemene Voorwaarden*.\(^{47}\) In specific cases, only type-approved terminal equipment may be connected to the network. Similar combinations of legislation and contractual regulation existed in the other EC Member States.

3. **Telecommunications in the EC**

The structure of the telecommunication equipment industry in the EC was deeply marked by the period of close cooperation between the national telecommunications

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40. An AMvB is considered to be law in a material sense of the word but not in a formal sense. Contrary to a formal law, an AMvB is issued by Royal Decree by the executive, without having passed the Second and First Chambers of Parliament. T. Kooymans, *Compendium van het Staatsrecht*, para. 15 at 18 (5th ed. 1987).

41. The English translation of these regulations is General Terms.

42. See supra note 40 and accompanying text.

43. The English translation is State Telephone Code.

44. The English translation is Telegraph Decree.

45. The English translation is Telex Decree.

46. The English translation is Data Network Decree.

47. Examples of *Algemene Voorwaarden* are: (1) *Voorwaarden telefoonaansluitingen* (Terms for telephone connections); (2) *Voorwaarden verkrijg en gebruik telexaansluitingen* (Terms for obtaining and use of telex connections); (3) *Aansluitvoorwaarden openbaar datanet* (Connection terms for the public data network); (4) *Voorwaarden beschikbaarstelling telegraaf-en telefoonhuurlijnen* (Terms for the availability of telegraph and telephone leased lines); and (5) *Algemene voorwaarden bedrijfstelecommunicatie-installaties* (General terms for company telecommunications installations).
administrations and a small number of national suppliers which specialized in the particularities of national network technology. This cooperation developed during the rapid buildup of the network in most European countries, and it encouraged governments to further reinforce the closing of national markets. It is therefore not surprising that the efforts of the European Commission throughout the 1970s to open the telecommunications markets, in particular the procurement and equipment markets, were unsuccessful up to the end of that decade. Moreover, all Member States, except for the U.K., had and still have only one operator and one physical network.\textsuperscript{48} Thus, European telecommunications entered the 1980s with a fragmented, nationally focused, monopolistic telecommunications structure in which national markets were largely closed to competition from other Member States. Against this background, it is no surprise that there was little intra-EC trade. Telecommunication equipment exports were roughly 23 percent of output, but only 30 percent of this went to EC markets.\textsuperscript{49}

Apart from selective procurement and certification policies, incompatible standards and input specificity are also responsible for this peculiarly closed market structure.\textsuperscript{50} Input specificity, which is usually experienced in terms of specific national standards on quality specifications, makes it difficult to open up the national markets quickly, given the high adjustment costs of moving from one type of system or standard to another. But even when technical standards are converging, buyer passivity can still reinforce input specificity.\textsuperscript{51}

The entire situation had to change when, at the beginning of the 1980s, the underlying structure encountered major difficulties. The technological base of communications changed fundamentally. Within a few years, at an accelerating rate since 1980, the telecommunications sector was propelled into the high technology field, subject to the characteristics of the computer market: rapid innovation, substantially shorter depreciation times, economies of scale and scope, and aggressive international competition. Exports and imports of telecommunication equipment are now distributed fairly unevenly, with Germany being the greatest exporter to non-EC countries, followed by France and the U.K. The U.K. is the largest importer, followed by Germany, Italy, and the Netherlands. Equipment imports, in 1987, accounted for much less than 10 percent of final demand, a further confirmation of the national orientation of these markets. In addition to a small amount of intra-EC trade, more than 50 percent of telecommunication equipment imports came from the U.S. and Japan.\textsuperscript{52}

\begin{itemize}
\item \textsuperscript{48} There are several operators in Denmark, France, Italy, and Portugal, but their responsibilities are strictly delineated according to geographic and functional lines. J. Mfiller, The Benefits of Completing the Internal Market for Telecommunication Services in the Community, in RESEARCH ON THE "COST OF NON-EUROPE"—BASIC FINDINGS, VOL. 10, at 9 n.5 (1988) [hereinafter Mfiller’s Services].
\item \textsuperscript{49} J. Mller, The Benefits of Completing the Internal Market for Telecommunication Equipment in the Community, in RESEARCH ON THE "COST OF NON-EUROPE"—BASIC FINDINGS, VOL. 10, at 14 (1988) [hereinafter Mller’s Equipment].
\item \textsuperscript{50} Buyer or input specificity means that the supplier delivers a good or a service which is specifically customized to the user’s need, for example, allowing compatibility with previous investments in a complex network system.
\item \textsuperscript{51} Mller’s Equipment, supra note 49 at 14-15.
\item \textsuperscript{52} Id. at 14.
\end{itemize}
With the introduction of the Integrated Services Digital Network (ISDN), data and image transmissions are expected to increase significantly. Important applications can also be expected with respect to Value-added Network Services (VANS). VANS will most likely consist mainly of the following services: message storing, processing and distribution; code and protocol conversion between different data processing systems; information retrieval services; information processing services; and safety and alarm services.

C. The 1984 Action Programme, the 1987 Green Paper, and Other Programs

As is clear from the preceding discussion, the EC's market in telecommunication equipment and services was, until recently, characterized by a lack of intra-EC trade. National monopolies prevailed and no new producers and service providers were allowed to enter this market. Although the normal rules of the EEC Treaty apply fully to telecommunications, the Commission considered it important to set out a special policy in this field because of the importance of the telecommunications sector and the special position of the corporations involved. The Commission set out the policy in its 1984 Action Programme on Telecommunications and in its 1987 Green Paper on Telecommunications.

1. The 1984 Action Programme

In the 1984 Action Programme, the Commission undertook its first in-depth analysis of the economic, social, and technical importance of the sector. It stated that:

New technologies will fulfill a pump-priming role in the evolutionary process that is taking place. Such technologies are at work not only in telecommunications terminals, but also in the components sphere. These technologies are, in particular: digitization, which makes it possible to process much more sophisticated data; the use of optical fibers which makes it possible to transmit information at considerably higher rates and at much lower cost; the integration of micro-electronics components and software; and the development of cable and satellite links. The resulting convergence of telecommunications, data-processing and

53. Müller's Services, supra note 48 at 2-3.
54. "Value-added service" is defined by Longley and Shain as "a communication service using communications common carrier networks for transmission and providing added data services with separate additional equipment. Added services may include store and forward message switching, terminal and host interfacing." LONELY AND SHAIN, DICTIONARY OF INFORMATION TECHNOLOGY (2d ed. 1986).
55. Müller's Services supra note 48 at 4-5.
56. See supra notes 9-14 and accompanying text (discussing the emerging technical and legal opportunities for telecommunication providers).
57. See supra notes 35-55 and accompanying text (discussing the extensive governmental regulations of past telecommunication services).
59. Green Paper, supra note 9, COM(87)290 final.
audio-visual media will alter the nature of telecommunications and considerably widen the range of services proposed.\(^6\)

The report emphasized that "the economic and social impact will be considerable"\(^6\)\(^1\) and set out a six-point action program with the following objectives:

Placing at the disposal of users, as quickly as possible and at the lowest cost, the equipment and services they require in order to ensure that they are sufficiently competitive; stimulating European production of telecommunication equipment and services in order to create a climate in which the Community industry can maintain its strong position on the European market and stay in first place among world exporters; allowing carriers to take up the technological and industrial challenges with which they will be faced.\(^6\)

The Council of Ministers confirmed the proposals at its meeting of December 17, 1984, and agreed on a four-part program of work.\(^6\)\(^3\) The first part is the creation of a Community market for telecommunication equipment and terminals via a standardization policy aimed at the effective implementation in the Community of common standards derived from international standards, the progressive application of procedures for the mutual recognition of type approval for terminals, and the opening up of access to public telecommunications contracts, the first phase of which was initiated by the Council's Recommendation of November 12, 1984.\(^6\)\(^4\) The second part is improving the development of advanced telecommunications services and networks by opening discussions, based on available studies, on the implementation of infrastructure projects of common interest and on the launching of a development programme for the technology required in the long term for the implementation of future wide-band networks, and by defining and progressively setting up a video-communications system to link the various political authorities in the Community.\(^6\)

The third part is improved access for less-favored regions of the Community, through the appropriate use of Community financial instruments, to the benefit of the development of advanced services and networks.\(^6\)\(^6\) Finally, the fourth part is the coordination of negotiated positions within the international organizations dealing with telecommunications, based on discussions carried out jointly with the Working Party of Senior Officials on Telecommunications.\(^6\)

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\(^{60}\) Id. pt. 3 at 19-20.
\(^{61}\) Id. pt. 3, at 20.
\(^{62}\) Id. pt. 3, at 19-20.
\(^{63}\) Minutes of 979th Meeting of the Council, December 17, 1984, quoted in Green Paper, supra note 9, pt. 3 at 20-21 [hereinafter 979th Meeting Minutes].
\(^{64}\) Council's Recommendation of 12 November 1984, 84/550/EEC.
\(^{65}\) 979th Meeting Minutes, supra note 63.
\(^{66}\) Id.
\(^{67}\) Id.
2. The 1987 Green Paper on Telecommunications

When the Commission issued the 1987 Green Paper, its aim was to launch a Europe-wide debate on the future regulatory conditions of telecommunications, with a view to the overriding objective of the 1992 market. The Green Paper therefore addressed itself explicitly to the following: the Council; the European Parliament; the Economic and Social Committee; telecommunications administrations; recognized private operating agencies; European telecommunications, data-processing, and services industries; users of telecommunications services; and trade unions and other organizations which represent social interests in this area. The objective was reached, given the fact that by January 1988 more than 45 organizations in the field, at the Community, national, and international levels, had responded to the Green Paper.

In the Green Paper, the Commission proposed more competition in a Europe-wide market in order to develop the full potential of telecommunications in a quickly changing environment. In order to achieve a single Community market by the end of 1992, Europe needed this increase in competition. With the 1992 objective in mind, the Commission then set out three clear objectives: (1) a common market in telecommunications terminal equipment; (2) a common market in telecommunication services, in order to allow telecommunications to develop into the all-pervasive infrastructure for the Community’s service and technology market of the 1992 Program; and (3) a common market in network equipment, to ensure the Community’s future position in large-scale information technology. This market is closely linked with the Community’s Research and Development (R&D) policy and the opening of the procurement of the telecommunications administrations. Since the presentation of the Green Paper, the Commission has been pressing the issue of liberalization.

Some of the measures have taken effect already, such as the liberalization of telecommunications terminal equipment. Others were due to take effect on or before January 1, 1993. It is clear that a vast change can be expected in the telecommunication equipment and services sectors with the completion of the Internal Market.

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68. Green Paper, supra note 9, pt. 3, at 19.
69. Id. pt. 2, at 2.
72. An overview of the actions taken to date in response to the Green Paper are presented in Appendix I.
D. Trade in Telecommunication Equipment and Services

Can U.S. telecommunications manufacturers, equipment, and services be discriminated against as a result of the 1992 Program? If so, a Fortress Europe would indeed exist. This Article will now examine this question by addressing four issues.

1. Transatlantic Trade in Telecommunication Equipment

The first issue is whether the 1992 Program can lead to decreased access for U.S. telecommunication equipment. Because most international trade in goods presently occurs within the framework of the General Agreement on Tariffs and Trade (GATT), discussion of this issue will begin with a short introduction to the Agreement, its main principles, and the position of the Member States and the Community within the GATT. Subsequently, the discussion will address six specific U.S. concerns about access to the EC telecommunication equipment market.

a. The General Agreement on Tariffs and Trade

The GATT was the result of a round of negotiations, started in 1947 by 23 countries, addressing the reduction of customs tariffs. The GATT is simultaneously a legal framework for the conduct of trade relations between its member countries (Contracting Parties), a forum for trade negotiations and the adaptation of its legal framework, and an organ for conciliation and settlement of disputes. The purpose of the GATT was the reestablishment of world trade, which had declined significantly as a result of protectionism and bilateralism following the 1930's and World War II.

The GATT rules are based on the following principles: (1) Trade without discrimination, which is furthered by the use of the Most Favoured Nation (MFN) clause and by applying...
the principle of national treatment;\textsuperscript{78} and (2) fair and transparent trade.\textsuperscript{79} The principles of the General Agreement may be summarized in one sentence: "trade restrictions must as much as possible be visible, goal oriented and price sensitive."\textsuperscript{80} In case of serious unforeseen economic difficulties, Contracting Parties may invoke escape clauses which have been incorporated in the Agreement. Finally, developing countries have a preferential status in the GATT.

Amendments to the text of the General Agreement require a two-thirds majority of all GATT members.\textsuperscript{81} Members which do not sign the new rules are not bound by them.\textsuperscript{82} This results in old and new texts existing side-by-side, which is one of the major causes of the system’s complexity. Because it is often difficult to obtain a two-thirds majority, the Contracting Parties increasingly seek recourse in the conclusion of separate agreements, which may be incorporated in the GATT system. As stand-alone treaties, the codes bind only those nations which sign and ratify them. Nevertheless, non-signatories may derive rights from these codes, since trade advantages are multilateralized through the MFN clause. This situation occurs when a code falls within the terms of the General Agreement and the code provides for more favorable treatment than that provided for in the GATT.\textsuperscript{83} The GATT Contracting Parties in November 1979 adopted a decision which takes this position.\textsuperscript{84} During the forty-four years since the GATT came into effect on January 1, 1948,\textsuperscript{85} there has been a spectacular development in world trade. The number of member countries has also greatly increased from 23, in 1948, to 102 at the present time.\textsuperscript{86} Negotiations on the conditions of membership are under way with several countries.\textsuperscript{87}

Under the GATT, a Contracting Party is defined as “those governments which are applying the provisions of this Agreement under Articles XXVI or XXXIII or pursuant to the Protocol of Provisional Application.”\textsuperscript{88} All twelve EEC Member States were already

\begin{itemize}
\item \textsuperscript{78} \textit{Id.} art. III (requiring that products manufactured in one Contracting Party and imported into another Contracting Party not be treated differently than products produced in the second Contracting Party).
\item \textsuperscript{79} \textit{Id.} arts. X and XI (providing that protection of markets may only be achieved through the use of customs duties, so qualitative restrictions or quantitative restrictions, which are restrictions such as quotas which can block the price mechanism and thereby block the functioning of the market economy in international trade exchanges, are in principle prohibited). \textsc{Long, supra} note 75, at 9.
\item \textsuperscript{80} G. Feketekuty, unpublished text of a lecture, \textsc{cited in} ARNOLD COLLENNEUR, GENERAL AGREEMENT ON TRADE IN SERVICES, \textsc{schets van een mogelijk juridisch kader voor grensoverschrijdende dienstverlening, skriptie in het kader van internationaal ekonomisch recht} 16 (1988).
\item \textsuperscript{81} \textsc{GATT, supra} note 74, art. XXX(1) (Amendments to articles I, II and XXX of GATT require unanimity, however).
\item \textsuperscript{82} \textit{Id.} art. XXX(2).
\item \textsc{John H. Jackson, World Trade and the Law of GATT, a Legal Analysis of the GATT} 28 (1990); \textsc{Wolfgang Benedek, Die Rechtsormung des GATT aus volkerrechtlicher Sicht} 105-106 (1990).
\item \textsuperscript{84} Decision of 28 November 1979, L/4905, \textsc{GATT, Basic Instruments and Selected Documents}, 26th Supp. (1980), at 201 [hereinafter BISD].
\item \textsuperscript{85} Applied provisionally as from that date pursuant to the Protocol of Provisional Application, 55 U.N.T.S. 308.
\item \textsuperscript{86} El Salvador became the 102d Contracting Party on May 22, 1991. \textsc{Europe} \textsc{No.} 5500, May 29, 1991, at 16.
\item \textsuperscript{87} Guatemala signed its Protocol of Accession to GATT on April 14, 1991 and will become a GATT member 30 days after ratification by its legislative body. Algeria, Bulgaria, China, Honduras, and Paraguay are in the process of negotiating membership. \textsc{GATT, Activities 1990, An Annual Review of the Work of the GATT} 130-31 (1991).
\item \textsuperscript{88} \textsc{GATT, supra} note 74, art. XXXII(1).
\end{itemize}
GATT members when they concluded or subsequently acceded to the Treaties establishing the European Communities. It is possible to argue that the EEC is a "separate customs territory possessing full autonomy" over GATT matters. Because Article XXXIII of the GATT allows a "separate customs territory possessing full autonomy in the conduct of its external commercial relations and of other matters provided for in this Agreement" to become a Contracting Party, the Community could itself become a Contracting Party. It may be further argued that the Community's participation in the GATT as a Contracting Party sui generis for more than a quarter-century has already resulted in a tacitly agreed membership sui generis. Since the GATT Dillon Round of 1960-61, the European Commission has exercised almost all rights and obligations of the Member States in the various GATT bodies, except in the Budget Committee.

However, the Community has not taken steps to formally become a Contracting Party. As long as the current voting rules do not change, this situation, oddly enough, results in a stronger position for the Community than it would have if it were a Contracting Party. The Community now effectively has twelve votes, rather than one, because each Member State casts its vote as a Contracting Party.

The legal position of the Community and its Member States can be illustrated clearly by looking at the question of liability. Member States and the Community are jointly liable for compliance with the GATT rules, although this does not mean joint liability. "[O]wing to their recognition of the Community's status, third states are obliged to address the Community first." Recourse against the Member States remains only a subsidiary possibility. This is applicable both where the violation of the GATT obligation has been committed by the Community itself and where it is committed by a Member State.

According to the GATT case-law of the European Court of Justice (ECJ), the GATT forms an integral part of Community law, with a legal rank inferior to the EC Treaties but superior to secondary Community law, that is, regulations, directives and decisions, and the national laws of the Member States. Even so, the ECJ has considered "the spirit, the
general scheme and the terms of the General Agreement” and has concluded that the Agreement “is characterised by the great flexibility of its provisions” and “is not capable of conferring on citizens of the Community rights which they can invoke before the courts.”97 Thus, although the GATT provisions are binding for the EEC and the Member States, individuals cannot invoke the GATT provisions in the national courts or before the European Court of Justice. The provisions do not have direct effect.

b. U.S. Concerns

Although the U.S. government generally supports the creation of the Internal Market, it has voiced concerns about its implementation and its consequences on U.S. products and manufacturers. This Article will now analyze six specific U.S. concerns about access to the EC telecommunication equipment market.

i. Introduction of Quantitative Restrictions

The first U.S. concern involves quantitative import restrictions which, it is feared, may be placed on products on an EC-wide basis in order to protect national and regional industries. With the advent of the Internal Market, border controls between Member States will be removed, and all national quotas need to be abolished. This effectively leaves three options to protect sensitive markets: lower EC quotas, higher tariffs, or Voluntary Export Restraints (VERs).

J. Pelkmans expects lower quotas to be generally resisted by the liberal countries.98 There are no quantitative EC restrictions at the current time applicable to telecommunication equipment, and EC strategy is oriented towards abolishing them in other areas. It is unlikely that quantitative restrictions will be introduced any time soon. VERs are subject to the same policy of abnomishment as quantitative measures, although they may still be used for a transitory period.99

ii. Elimination of Import Duties

The U.S. has requested a total abolition of current import duties on telecommunication equipment.100 Although it is noble to strive towards lowering or abolishing import duties, this is not a relevant matter in a discussion of Fortress Europe. The current import duties are allowed by the GATT and cannot be increased without violating article XXVIII bis of the Agreement. Moreover, they are not a result of the 1992 Program. Protectionism to date should not be confused with the 1992 Program.101 The real problems for non-Community manufacturers seem to be hidden in non-tariff barriers at the Member State level.

99. Id., at 133.
100. 1991 U.S. Report, supra note 11, at 79.
iii. The Standard Setting Process

The European standard-setting process is a third U.S. concern. The formal regional European process for standard development allegedly is not open to persons or firms not based in Europe, that is, real non-Community firms. For telecommunications, this is simply not true. The EC does allow certain non-European experts, including experts from private companies from third countries, to observe plenary and technical assembly meetings of the European Telecommunications Standards Institute (ETSI), because most telecommunications standards are mandatory in the EC. In related fields, the EC has a good reason for keeping the meetings closed: duplication of existing international standards organizations, such as the International Standards Organization (ISO) and the International Electrotechnical Commission (IEC), is to be avoided. Moreover, member organizations commit to adopting agreed regional standards without deviation when they join regional, but not necessarily EC, organizations. The fact that the meetings are closed does not have very drastic effects because first, to the extent appropriate, the EC adopts existing international standards, and second, the EC standards are generally not mandatory, except in the case of telecommunications, but rather represent only one way of demonstrating conformity to essential requirements.

iv. Mandatory Testing and Certification in the EC

The U.S. fears that its manufacturers may be required to have tests conducted in the EC. This would be costly, especially since in many cases tests have been performed already for U.S. market requirements. Products are normally approved by notified bodies in the Member States. However, manufacturers may also maintain their own quality system, which must then be approved and periodically inspected by one of the notified bodies. Because non-Member States may also participate in this certification scheme, terminal equipment can be manufactured, tested, and certified in the U.S., shipped to one of the Member States, and then marketed and sold in any of the Member States.

The U.S. is also concerned that third country testing laboratories may not be able to become notified bodies and that the EC might require reciprocal commercial guarantees for mutual recognition that go beyond what is necessary to ensure safety and to protect customers. Negotiations between the U.S. Trade Representative and the European Commission will have to resolve this matter.

v. Government Procurement

The public telecommunications administrations in the Community have traditionally
been by far the largest buyers of telecommunication equipment, with a share of more than
70 percent of total purchases. However, only two percent of public contracts in the
Community are being awarded to companies from a different Member State than the one
where the contract is tendered. Extra-Community procurement occurs even less. This
de facto situation of local procurement is now slowly changing as a result of two Council
directives that have been in force for some years. The directives are intended to bring about
liberalization of national contract award procedures, in order to improve competition from
companies based in other Member States. The first directive concerns award procedures
for public works contracts, and the other involves award procedures for public supply
contracts. Both directives, however, exclude the telecommunications sector from their
applicability.

Therefore, on September 17, 1990, the Council adopted a directive on the
procurement procedures of entities operating in the water, energy, transport, and
telecommunications sectors. The directive obliges tendering bodies of all branches of
government to award contracts on the ground of either the criterion of the economically most
advantageous offer or the lowest price. This directive is of particular interest to U.S.
suppliers. The U.S. government seeks access to these markets on a non-discriminatory basis
for its suppliers but fears that they will be excluded from the tenders. This fear is caused by
article 29 of the directive, which stipulates that any tender made may be rejected where the
proportion of the products originating in third countries exceeds 50 percent of the total value.
However, the Community has from the start declared that this and similar provisions were
negotiable. The directive will apply in full to products originating in countries in which
special reciprocity agreements have been concluded. Although the U.S. does not yet belong
to this group of countries, bilateral negotiations are now underway. Negotiations are
also underway in a multilateral context: the coverage of the GATT Government Procurement
Code (GPC) is to be expanded to include the excluded sectors.

104. The total value of telecommunication equipment and services procurement in the Community
approximates ECU 200 billion annually, or around 8% to 9% of GDP. COM(86)375 final, 10.2.1987.
105. COMMISSIE VAN DE EUROPSE GEMEENSCHAP, EEN GEMEENSCHAPPELIJKE MARKT VOOR DIENSTEN
Award of Public Works Contracts, 1971 O.J. (L 185) 5 16.8.1971; 1971 O.J. English Special Edition (II) at 682,
109. Id.
111. GATT, BISD, 26th Suppl. (1980) 33; expanded in 1987 and entered into force on February 14, 1988;
GATT, BISD, 34th Suppl. (1988) 12 [hereinafter GPC]. Because the subject of this code is explicitly excluded
from the General Agreement, Jackson and Benedek argue that it is one of the codes to which the GATT MFN
clause does not apply. JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 28-29 (1990); BENEDEK, supra
note 83, at 106. See supra notes 81-87 and accompanying text (discussing amendments to the text of the GATT).
The "excluded sectors" are given this name because they are excluded from the application of the "normal"
The GPC applies to large purchases worth the equivalent of at least 150,000 Special Drawing Rights by certain entities under the direct and substantial control of the Parties, that is, governments.\(^1\) Also, it provides for national treatment and non-discrimination.\(^1\) The code aims to reduce and ultimately to eliminate non-tariff barriers in the government procurement sector, thereby increasing international trade. By publishing proposed purchases and conditions for participation, the contracts and their award procedures are brought under stricter international discipline.

The GPC requires that contracts be awarded to the lowest tender or the tender which is determined to be the most advantageous.\(^4\) Admittedly, this leaves a certain margin of discretion to the awarding entity, but this margin is controlled by the Contracting Parties. Unsuccessful tenderers and their governments have a right to information\(^5\) in order to ensure that the purchase was made fairly and impartially. A consultation and dispute settlement procedure has been set up, which is characterized by the installation of a Committee on Government Procurement. The ultimate remedy which the Committee can authorize is a suspension of the application of the Code.\(^1\) Although the Code has an escape clause regarding security interests, public morals and order, and health,\(^1\) this has very little bearing on the U.S.-EC relationship in the telecommunications sector.

The difference between the bilateral and the multilateral negotiations is that while the expansion of the GPC will cause the 50 percent content rule to disappear only at the level of the national governments, full application of the directive, which is the goal of the bilateral negotiations, will result in the abolition of the content rule at all levels of government. Conclusion of either the bilateral or multilateral negotiations, or both, will end discrimination of U.S. tenders. As a result, the U.S. manufacturers' access to the public telecommunication equipment market will increase enormously.

**vi. Rules of Origin**

The negotiations on public procurement will also automatically end the sixth U.S. concern, EC rule of origin interpretations. This concern goes far beyond the telecommunications sector. Virtually no multilateral rules exist for rules of origin, although they are an issue in the GATT Uruguay Round negotiations.\(^1\) The U.S. is concerned that real non-Community companies will have to invest in EC production facilities because the public procurement directives 77/62, relative to the award of public supply contracts, and 71/305, relative to the award of public works contracts.

\(^{112.}\) GPC, supra note 111, art. II.
\(^{113.}\) *Id.* art. V:14(t).
\(^{114.}\) *Id.* art. V:14.
\(^{115.}\) *Id.* art. VI:4, 6.
\(^{116.}\) *Id.* art. VII:14.
\(^{117.}\) *Id.* art. VIII.
EC adheres to the rule of the last substantial transformation. However, rules of origin are only important in sectors that are subject to quantitative restrictions, VERs, and monitoring arrangements, or sectors where local content percentages apply. As discussed, there are no EC quantitative restrictions or VERs presently applicable to telecommunication equipment, nor are they expected any time soon. With a bilateral or multilateral public procurement agreement, the current, non-mandatory content percentage will disappear. Finally, as this Article will discuss below, there are no monitoring arrangements in effect.

c. Assessment and Conclusion

Quantitative restrictions to access for U.S. telecommunication equipment to the Community would clearly be in conflict with the Community’s international obligations under the GATT. No quantitative restrictions currently exist, nor are they expected any time soon. Import duties exist but do not block access to the market altogether, which would violate the GATT. Import duties are not a violation of the GATT, are not caused by the 1992 Program, and should not be invoked in Fortress Europe discussions.

In direct contradiction to the accusations of discrimination and protectionism, the EC’s standardization and harmonization program, which is a direct result of the 1992 Program, will actually simplify access to the market. Negotiations may establish possibilities for non-Community testing laboratories to become notified bodies.

As soon as multilateral GATT Government Procurement Code or bilateral EC-U.S. negotiations result in agreements, U.S. tenders cannot be discriminated against for public procurement of telecommunication equipment. Multilateral negotiations will probably result in expansion of the GATT Government Procurement Code to the excluded sectors, which will lead to increased access to the telecommunication equipment markets of all Code signatories. A bilateral agreement would have the advantage of obliging not only central governments, but also provinces and municipalities, to consider U.S. tenders. Abolition of the 50 percent local content rule will in turn lead to the disappearance of the U.S. concern regarding the EC rule of origin interpretation.

No proof has been found that the 1992 Program leads to restrictive access to the Community for U.S. telecommunication equipment. Rather, it has been found that internal EC measures which are a direct result of the 1992 Program will facilitate access for this equipment. The 1992 Program can thus be said to improve access to the EC, even if some matters may not benefit real non-Community companies as soon as real Community companies, since some matters still have to be negotiated with non-Member States. Thus, as far as access restrictions for U.S. telecommunication equipment are concerned, the Fortress Europe accusation is not well founded.

119. See infra notes 121-42 and accompanying text (discussing intra-Community trade in telecommunications equipment).
120. Currently, 23 countries are signatories.
2. Intra-Community Trade in Telecommunication Equipment

Having examined the extra-Community factor of the Fortress Europe accusation, it now becomes important to examine the intra-Community factor. The next issue addressed is whether U.S. telecommunication equipment is being disfavored, or will be disfavored, in intra-Community trade compared to equipment originating in the Member States as a consequence of the 1992 Program. Two questions will be answered: first, does U.S. equipment receive national treatment in each Member State, as required by article III of the GATT, and, second, will such equipment receive Community treatment?

a. National Treatment of U.S. Telecommunication Equipment

The elimination of customs duties between Member States and the elimination of quantitative restrictions between Member States apply equally to products originating in Member States and to products coming from third countries which are in “free circulation” in Member States. Third country products become “entitled to ‘free circulation’ in Member States,” as soon as import formalities have been complied with and any customs duties have been paid. From that moment on, these third country products are “definitely and wholly assimilated to products originating in Member States” and, like products originating in Member States, may not be discriminated against compared to national products. This means that non-Community equipment receives national treatment once it has been imported into one of the Member States.

b. Formal Community Treatment of U.S. Telecommunications Equipment

The second and more important question to be answered here is whether receiving national treatment means that the foreign product also receives Community treatment. This question is more difficult because the answer depends in part on the question of whether a Common Commercial Policy exists for the product concerned, which here is telecommunications. Existence of a Common Commercial Policy in the sense of article 113 of the EEC Treaty entails that Member States can no longer maintain national commercial policies in the concerned area and therefore can no longer invoke article 115 of the EEC Treaty, which would allow them to take measures to protect these national commercial policies. However, for the Common Commercial Policy to take full effect, it must be

121. If a product or company receives “national” or “Community treatment,” it is treated as if it were a product or company originating in the country concerned or in the Community.
122. EEC Treaty, supra note 5, arts. 12-17.
123. Id. arts. 30-37.
124. Id. art. 9, par. 2.
125. Id. art. 10, par. 1.
127. EEC Treaty, supra note 5, art. 7, par. 1. The fact that some products which are in free circulation may not freely be traded between Member States is a different matter. The focus here is on products which have been admitted in the Member State concerned.
"a real Common Commercial Policy," based on uniform principles regarding conditions of importation, irrespective of the Member State concerned.\textsuperscript{129}

All telecommunication equipment is covered by Regulation 288/82/EEC on Common Rules for Imports.\textsuperscript{130} This means that the normal rules for the free movement of goods apply to telecommunication equipment originating in the U.S. and that this equipment is treated as if it originates in the EC. That is, it receives Community treatment. Although the situation appears settled, in reality it is not. As discussed above,\textsuperscript{131} the telecommunication equipment market is known for its lack of intra-Community trade. This applies not only to telecommunication equipment originating in the Member States, but also to equipment originating in third countries, which is in free circulation in the Community. It is here that a real problem can be found for non-Community products. The national EC manufacturers may sell relatively little in other Member States, but they have their home market to rely on, which is not true for U.S. manufacturers. The latter cannot make use of economies of scale because standards are different in the diverse Member States and because they only have small market shares in each individual Member State. Thus, even if it can be shown that no formal disfavoring would exist in putative intra-EEC trade, the current market structure results in a less favorable position for non-Community telecommunication equipment. Therefore, in a material sense, this equipment does not receive Community treatment.

c. Material Non-Community Treatment: Limited Intra-Community Trade

The lack of intra-EEC trade is caused by four major factors: (1) preferences of the national governments; (2) national prohibitions on the sale of terminal equipment; (3) differences in standards; and (4) selective certification and testing policies.

Procurement preferences of national governments are now covered by Directive 90/531/EEC.\textsuperscript{132} The forthcoming\textsuperscript{133} special review procedure, which extends the applicability of Directive 89/665/EEC\textsuperscript{134} to the excluded sectors, will guarantee a way of recourse to companies which feel that a Member State continues to buy locally without valid economic reasons. Therefore, this factor will soon lose its meaning.

The second cause of the small amount of intra-EEC telecommunication equipment trade was the national prohibitions to sell this equipment privately. A large portion of the private telecommunications market is accounted for by telecommunications terminal equipment. The Commission defines "terminal equipment" as:

\begin{itemize}
  \item \textsuperscript{129} Case 41/76, Donckerwolcke, supra note 126, consideration 25, at 1936, and case 242/84, Tezi, supra note 128, considerations 38 & 39, at 943.
  \item \textsuperscript{130} 9.2.1982 O.J. (L 35) 1, as last amended by Regulation 2978/91, 7.10.1991 O.J. (L 284) 1.
  \item \textsuperscript{131} See supra notes 35-55 and accompanying text.
  \item \textsuperscript{132} See supra notes 104-32 and accompanying text.
  \item \textsuperscript{133} Revised Commission proposal for a Council Directive coordinating the laws, regulations, and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, COM(91) 158 final - SYN 292, submitted to the Council on June 4, 1991.
  \item \textsuperscript{134} Council Directive of December 21, 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, 50.12.1989 O.J. (L 395) 33.
\end{itemize}
[E]quipment directly or indirectly connected to the termination of a public telecommunications network to send, process or receive information. A connection is indirect if equipment is placed between the terminal and the termination of the network. In either case (direct or indirect), the connection may be made by wire, optical fibre or electromagnetically. Terminal equipment also means receive-only satellite stations not reconnected to the public network of a Member State. Member States frequently reserved special or exclusive rights for the sale of these products. According to the Commission, these rights were often "exercised in such a way as, in practice, to disadvantage equipment from other Member States, notably by preventing users from freely choosing the equipment that best suits their needs in terms of price and quality. . . ." It is quite obvious that equipment from non-Community origin shared this disadvantaged treatment in every respect. Finding that this practice violated article 37, paragraphs 1 and 2, and articles 86 and 90(1) of the EEC Treaty, the Commission issued Directive 88/301/EEC. The legal basis of the directive was challenged in the Telecommunications case. However, the ECJ found for the Commission on the exclusive importation and marketing of telecommunications equipment issues and on the issue of exclusive rights to connect, bring into service, and maintain terminal equipment. This brought about a withdrawal of these exclusive rights by the Member States. Therefore, users now have a free choice between the various types of equipment available, including terminal equipment imported from third countries, subject only to restrictions regarding essential non-economic requirements.

Different technical standards, testing and certification policies, and differences in existing systems currently make research prohibitively expensive and access to the equipment market difficult. The main thrust of the Community’s standardization policy in the information technology (IT) and telecommunications fields is to achieve a significant increase in conformity with accepted standards for products and services marketed and used within the Community. The policy thus involves formally adopting standards at a European level, and, as far as possible, adopting existing international standards for that purpose. Although some technical specifications concerning the essential requirements for products may be mandatory, others are not. Manufacturers may choose between European Standards (ENs), which give immediate access to the entire EC market, or any alternative standard,

136. Id. consideration 5.
139. "Essential requirements" are the non-economic reasons in the general interest which may cause a Member State to restrict access to the public telecommunications network or public telecommunication services. These requirements are: Secure network operations, maintenance of network integrity and, in justified cases, interoperability of services and data protection. Council Directive 90/387/EEC of June 28, 1990, art. 2, para. 6, on The Establishment of the Internal Market for Telecommunication Services Through the Implementation of Open Network Provision, 24.7.1990 O.J. (L 192) 1.
140. European standards for telecommunication equipment and services are approved by ETSI and called European Telecommunications Standard (NET) [Norme Européene de Telecommunications]. Commission of the EC, DG XIII, Telecommunications, Information Industries and Innovation, Standardization—Fact Sheet 5, at 2 (1990). NETs are given mandatory force, according to the legal procedure established in Council Directive
which also confers access to that market after independent certification. National standards which conflict with the European ones must be withdrawn. In order to ensure that the standards are applied in practice, steps are being taken to ensure that national legislation requires reference to IT standards in national technical regulations, in public procurement requirements, and in standards applying to the connection of equipment to the public telecommunications networks in the Member States.

Different testing and approval procedures existed in all Member States. A single testing and approval procedure replaced those when Directive 91/263/EEC\(^{141}\) took effect on November 6, 1992. This means that tests carried out under harmonized standards and certified in one Member State are valid throughout the Community. Such certified equipment can then be placed on the market and connected to a public network in any of the Member States without the requirement of repeated testing or further approval formalities in the country of destination. This aspect of the Internal Market is often underestimated. It will generate huge economies of scale by allowing manufacturers to produce uniform products for sale across the EC, while costs of administrative nuisance and uncertainty will decrease.

d. Assessment and Conclusion

In a material sense, non-Community telecommunication equipment does not receive Community treatment due to the lack of intra-Community trade in this equipment. To the extent that equipment from non-EEC origin is in the process of being placed in the same position as equipment originating in one of the Member States, this approach formally favors Community and non-Community products alike. However, it will materially and significantly alter the position of non-Community equipment, enabling its manufacturers to make full use of the Internal Market of 343 million consumers. Thus, rather than disfavoring non-Community telecommunication equipment, the 1992 Program will improve the current position of these products and place them in a position equal to that of equipment originating in the Community. Thus, it allows non-Community manufacturers to compete on an equal basis with their EC competitors. Some authorities have even suggested that U.S. competitors will be at a considerable advantage.\(^ {142}\) They already have a vast manufacturing infrastructure from their large domestic base, something that the EC is only beginning to work towards.

Non-Community telecommunication equipment will receive national and Community treatment in post-1992 Europe and will therefore not be disfavored compared to telecommunication equipment originating in one of the Member States. For U.S.
telecommunication equipment, the 1992 Program cannot lead to more restricted access to the Community, and U.S. telecommunication equipment cannot be disfavored in intra-Community trade. Thus, there is no Fortress Europe regarding the sale of U.S. telecommunication equipment.

3. Transatlantic Trade in Telecommunication Services

Enormous amounts of services are presently provided through telecommunications. Although it is not possible to measure the volume of these voice and data flows exactly, it will without question increase exponentially with the computerization and automation of society. Naturally, telecommunication service providers are eager to profit from this trend. For the purposes of this Article, the market for telecommunication services can be split into two different geographical markets: a market for transatlantic telecommunication services and the intra-Community market for these services. This discussion will address the former, and therefore, the main issue is whether the Community's 1992 Program leads to decreased access to the EC for U.S. telecommunication services and service providers.

a. Transatlantic Telecommunication Services

Transatlantic telecommunication services are provided jointly by neighboring carriers, which forward transit traffic to its final destinations. The carriers are reimbursed for the services they provide, and they reimburse other carriers for the services provided to them. This has lead some countries to decrease their international rates, in order to attract extra transit revenue. It is clear that it would be particularly profitable to deliver door-to-door, or rather terminal-to-terminal service, which would eliminate having to pay other carriers. However, as the discussion below shows, the telecommunication services sector is not at present covered by the GATT rules, and therefore, no obligations to grant access exist. Changing the way the system currently operates is a matter which requires negotiation.

b. Services in the GATT

Negotiations are presently continuing in the GATT Uruguay Round. One of the main topics in those negotiations is services. Some commentators have tried to argue that trade in services is already covered by the GATT. For example, they point to article IV of the GATT, which contains special provisions relating to cinematographic films. Another argument is that the Agreement often cites "products," which could include services. Moreover, article III of the GATT mentions specifically "distribution" and "transportation," which are both services. However, the opinion of the majority of authorities and Contracting Parties is that the GATT's reference to distribution and transportation merely recognizes the fact that these services make the trade in goods possible, and it rejects the idea that services would be covered by the current Agreement.

143. COLLENTEUR, supra note 80, at 27.
144. Id.
Because the focus in trade negotiations gradually shifted away from tariff barriers towards non-tariff barriers, services were discussed increasingly during the seven negotiation rounds preceding the Uruguay Round. The U.S., confronted with an enormous trade deficit, pushed hard to include services in the current round of trade negotiations. The hope is that exporting the vast supply of U.S. services will help balance the trade deficit. Thus, when the Uruguay Round started on September 20, 1986 with the Declaration of Punta del Este, the ministers of the Contracting Parties, in a separate second part of the declaration called Negotiations on Trade in Services, announced their intention to come to a multilateral system of principles and rules for trade in services. The aim was to expand trade by improving transparency and liberalization of services, but the negotiations have yet to result in any concrete services agreements.

c. U.S. Concerns

The fact that the negotiations have not resulted in any concrete agreements does not mean that there was no trade in telecommunication services between the U.S. and the EC; all basic telephone calls are telephone services, and U.S. exports of value-added telephone services to the EC were an estimated $170 million in 1989. The U.S. is concerned, however, that discrimination against U.S. suppliers could restrict those exports to the current level while demand is rising. Specifically, there are three U.S. concerns relative to access to the EC telecommunication services market. In the order which this Article will examine them, they are: (1) diminishing rights of establishment; (2) standards; and (3) restriction of U.S. telecommunications services.

i. Diminishing Rights of Establishment

The U.S. is concerned that U.S. companies will not receive national treatment within the EC, and that they will be treated less favorably than EC firms. Although this is a matter which will be discussed below, it now bears noting that U.S. government trade reports link the U.S. fear of being disfavored with fears of diminishing rights of establishment, without which national treatment has little practical significance. Rights of establishment concern access to the EC market and as such are discussed here.

Apart from possible future GATT rights relating to access and establishment, there are two sources for rights of establishment for U.S. companies. The first source is the Treaties of Friendship, Commerce and Navigation. The U.S. has bilaterally concluded these

146. Id. at 1627.
148. See infra notes 171-210 and accompanying text (discussing intra-Community trade in telecommunication services).
149. The United States has concluded Treaties of Friendship, Commerce and Navigation with Belgium, 14 U.S.T.S. 1284 (1961); Denmark, 12 U.S.T.S. 908 (1951); France, 11 U.S.T.S. 2938 (1959) (Convention on Establishment); Germany, 7 U.S.T.S. 1839 (1954); Greece, 5 U.S.T.S. 1829 (1951); Ireland, 1 U.S.T.S. 785 (1950); Italy, 12 U.S.T.S. 131 (1948, with supplemental agreement in 1951); Luxembourg, 14 U.S.T.S. 251 (1962); the Netherlands, 8 U.S.T.S. 2043 (1956), 285 U.N.T.S. 231, 231-33; (“Verdrag van vriendschap, handel en scheepvaart tussen het Koninkrijk der Nederlanden en de Verenigde Staten van Amerika,” concluded at The
treaties with at least nine EC Member States. Although some of these treaties are rather old and therefore not quite as extensive and detailed as more recent ones, most include some form of right of establishment clause and can be invoked before the International Court of Justice, thus giving the U.S. a concrete opportunity to effectuate the rights contained in them.

The second source for rights of establishment is the Code of Liberalization of Capital Movements (CLCM) of the Organization for Economic Cooperation and Development (OECD). The CLCM includes a right of establishment for foreign investors from other OECD member countries. The Code commits OECD member countries to the goal of progressive liberalization. Although the OECD does allow an EC Member State to grant more favorable treatment to other EC Member States, it does not permit them to discriminate additionally against non-EC countries. Admittedly, the OECD Code is not very strong. Although it is legally binding, it lacks enforcement or formal dispute settlement mechanisms. Yet, the OECD has proven to be a successful forum for dispute settlements.

As shall be seen below, third country undertakings, that is, political non-Community companies, can benefit from the intra-EC right of establishment and from the right to provide cross-border services in the EC once they are established within one Member State, which makes them real Community companies. It is within the discretion of each Member State to permit the first leap towards its territory. This opportunity has received wide use, and, as far as the U.S. is concerned, it can be based on the strong rights in the Treaties of Friendship, as well as the weaker rights in the OECD Code of Liberalization of Capital Movements. It is therefore not clear why the U.S. is suddenly anxious that access to the EC telecommunications market will be restricted.

### ii. Standards

The effectiveness of opening up telecommunications in Europe, especially providing access for value-added services, is almost entirely determined by compatibility standards.

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150. See supra note 149 (citing treaties with various countries).
151. Act OECD/C(61)96, adopted by the OECD Council on December 12, 1961, as last amended by act OECD/C(73)12(Final), adopted on February 27, 1973 [hereinafter “CLCM”].
152. All EEC Member States, as well as the U.S., are OECD member countries. P. KOOMANS, INTERNATIONAL PRIVILÉGES IN VOELVLUCHT 143 (1989); MALCOLM N. SHAW, INTERNATIONAL LAW 607 (2d ed. 1986).
153. CLCM, art. 2(a) Annex A. Annex A has last been amended by act OECD/C(70)126(Final), adopted by the OECD Council on September 17, 1970.
154. Id. art. 1.
155. This is the “Customs Union exception.” Id. art. 10.
156. This has proven to be true, at least as far as the U.S.-EC relationship, for example, in the discussions relating to the EC’s Second Banking Directive.
157. See infra notes 171-210 and accompanying text.
158. EEC TREATY, supra note 5, art. 52 j° 58.
159. Id. art. 59 j° 58.
This Article already addressed the standard-setting process. This process is no different for telecommunication services, that is, ONP standards, than it is for telecommunication equipment, that is, NETs. Non-European experts are allowed to observe plenary and technical meetings of ETSI. As previously discussed, U.S. concerns about being excluded from the EC standard setting process are not justified.

Nevertheless, there remains a need to discuss international standards. Because of different standards, different technologies, and different qualities of the national networks, it does not always make sense to mutually recognize current standards and certification. Europe-wide programs are designed to ensure compatible standards for the new Integrated Systems Digital Network (ISDN), the Digital European Cordless Telecommunications program (DECT), and the Pan-European Digital Mobile Cellular Communications System (GSM) systems. The realization of these programs will exponentially increase possibilities for value-added services. In order to maximize profit from these new systems, it is imperative for non-European service providers to ensure that international standards be set in the ISO and IEC. These standards will then most likely be used as standards for the new systems.

iii. Restriction of U.S. Telecommunication Services

This Article previously noted, that the U.S. fears that telecommunication services exports will be restricted to the current level, despite rising demand for these services. This currently is a legitimate concern, although it has no relation to the 1992 Program. Although the EC is currently facilitating the leasing of international telephone lines, further opening of access to the EC for transatlantic U.S. value-added services will have to be negotiated bilaterally or multilaterally, preferably within the current GATT negotiating round. In order to argue that the EC is protectionistic in this regard, it is crucial to realize that protectionism which has occurred to date should not be confused with the 1992 Program, and is misplaced in discussions on the reality of the Fortress Europe accusation.

Access to providing voice telephony service from the U.S. to the EC through EC telecommunications administrations is not controlled by EC regulations. Providing direct access to the consumer, however, generally requires the physical presence of the service provider in the geographical area concerned, and it will therefore be discussed below. To be complete, it should be mentioned that the U.S. was closely following the EC proposals.

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160. See supra notes 73-103 and accompanying text (discussing intra-Community trade in telecommunication equipment).

161. See supra note 53 and accompanying text (discussing introduction of the ISDN).

162. See Appendix I.

163. See id.

164. See supra notes 147-68 and accompanying text.


166. See infra notes 171-210 and accompanying text (discussing intra-Community trade in telecommunication services).
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on government procurement of telecommunications services. However, the U.S. indicated already that it did not expect a 50 percent content rule in those proposals. That expectation has come true. Council Directive 92/50/EEC of June 18, 1992, relating to the coordination of procedures for the award of public service contracts, does not mention a minimum content requirement.

d. Assessment and Conclusion

Can the Community’s 1992 Program lead to a decrease in access to the EC for U.S. telecommunication services and service providers? Although no agreements have yet been reached in the GATT negotiations, trade already exists in basic and value-added telephone services. Only one U.S. concern, the standardization process, is a result of the 1992 Program. However, this process is not a discriminatory or access-reducing move on the part of the EC, but rather an applaudable drive towards greater uniformity, which will increase access to the EC’s telecommunications market as a whole for telecommunication service providers worldwide. The fact that the EC determines its own standards in the absence of international ones is a sign of failing international willpower to come to international standards and it should not prevent the EC from integrating the national markets of the Member States. Meanwhile, the concern of decreasing rights of establishment seems to be unwarranted.

As will be discussed below, access to providing voice telephony service will predictably remain restricted, although the current GATT negotiating round will ideally lead to further worldwide opening of enhanced or value-added telecommunication services markets. This, however, depends on bilateral or multilateral trade concessions in the negotiations, the outcome of which cannot be predicted. Still, it is a positive sign that both the U.S. and the EC are in favor of opening the telecommunication services markets. The European Commission rightfully considers “easy two-way access of European service providers and users to the global market [to be] necessary.”

Whatever the outcome of present negotiations, they have little to do with the Fortress Europe accusation. Rather, they stem from practices that have existed since the beginning of modern telecommunications in Europe. The 1992 Program cannot be said to have any negative impact on access to the EC’s telecommunication services market, and its harmonization process will facilitate access to the value-added telecommunications market. Therefore, the Fortress Europe accusation must be considered invalid in the context of transatlantic trade in telecommunication services.

168. This is also called a “discrimination clause” in the U.S.
169. See infra notes 171-210 and accompanying text (discussing intra-Community trade in telecommunication services).
170. Green Paper, supra note 9, pt. 3 at 47.
4. **Intra-Community Trade in Telecommunication Services**

This final analytical section focuses on “U.S. companies.” These are companies which are established and formed in an EC Member State, thus making them real Community companies, but which at the same time have a political link to the U.S. A rumor persists in the U.S. that political non-Community companies from the U.S. are disfavored in the EC. The discussion above, which included the definition of political non-Community company, promised to show that this fear is a misconception without legal or factual basis. Doing so is the first goal of this present discussion. The second issue that will be addressed is the extent of possibilities for real Community companies to provide services in the European telecommunication services market.

a. **Community Treatment of U.S. Companies**

Political non-Community companies satisfy the EEC Treaty requirement that they have their registered office, central administration, or principal place of business within the Community. The General Programmes additionally require that such companies show a real and continuous link with the economy of one of the Member States if they have only a registered office within the Community but intend to set up agencies, branches, or subsidiaries in a second Member State. The U.S. government sees the parentage of U.S. companies as the link to the U.S. which may cause them to be disfavored, compared to companies based in the EC. However, the General Programmes state explicitly that the required link “shall not be of nationality, whether of the members of the company or firm, or of the persons holding managerial or supervisory posts therein, or of the holders of the capital.” Neither the EEC Treaty or the General Programmes, or any other legislative EC provision, is concerned with the political nature of companies. Political non-Community companies fulfill the EEC Treaty’s geographical requirements and the geographical requirements of the General Programmes, so they are Community companies. They can make full use of the freedom to provide services and the freedom of establishment. Thus, U.S. companies are Community companies and receive national treatment. They cannot be disfavored because of a political link with a non-Member State, such as the U.S.

b. **The Extent of Opportunities and Freedom to Provide Telecommunication Services in the EC**

As will be discussed below, the European telecommunications sector is organized quite differently than the U.S. telecommunications sector. However, both sectors share

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171. See supra notes 19-25 and accompanying text (discussing EC and non-EC companies).
172. EEC TREATY, supra note 5, art. 58.
173. See supra note 19 and accompanying text (discussing Title I of the General Programmes).
174. Title I of the General Programmes, supra note 19.
175. EEC TREATY, supra note 5, art. 58(1).
176. See infra notes 243-60 and accompanying text (comparing the EC and U.S. telecommunications sectors).
common characteristics, one of which is that they started out with an essentially monopolistic position in providing telecommunication services.177 The European Commission’s Green Paper on telecommunications and the ensuing Council and Commission directives will continue to lead to an increase in possibilities for private undertakings to provide telecommunication services between and in Member States.

The EEC Treaty describes the freedom to provide services as follows: “Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.”178 Although articles 52 and 59 of the EEC Treaty are directly effective, and article 59 of the EEC Treaty has horizontal direct effect, meaning that the article can be invoked not only against a Member State but also against private persons, the articles relating to services do not contain absolute prohibitions of discrimination; exceptions are allowed.180

The exceptions permitting discrimination are those connected with the exercise of official authority, even if the authority is only occasionally exercised, and those connected with public policy, public security, or public health. Thus, a provider of a service may have to comply with specific requirements relating to, for example, organization, competence, professional ethics, supervision, and responsibility in order to provide the service. This is so, provided that first, these rules apply to everyone established in the territory of the Member State in which the service is provided, and second, to the extent to which such requirements are necessary to ensure that the provider of the service does not escape the net of these rules by establishment in another Member State.181 It is clear that the Member States do not enjoy a completely free hand in determining the scope of these exceptions.182 Like all exceptions, they must be interpreted restrictively.183 The requirement of necessity is an objective requirement.184 The European Court of Justice has made it clear that a ground of public interest, also expressed as the “general good,” can only be invoked “in so

177. The monopolists were AT&T in the U.S. and the national PTTs in Europe. See supra notes 35-47 and accompanying text (discussing the EC telecommunication sector and infra notes 211-242 and accompanying text (discussing the U.S. telecommunication sector).

178. Companies are treated the same as natural persons. See, e.g., EEC TREATY, supra note 5, art. 58(1).

179. “Services shall be considered to be ‘services’ within the meaning of the Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.” Id. art. 60(1).

180. EEC TREATY, supra note 5, art. 60(3).


183. EEC TREATY, supra note 5, arts. 55, 56 j’66.

184. Van Binsbergen, supra note 181, at 1309-10.

185. Reyners, supra note 181, at 654, Consideration 43; Case 41/74, Van Duyn, 1974 E.C.R. 1337, 1350-51, Consideration 18.


far as that interest is not safeguarded by the provisions to which the provider of the service is subject in the Member State of his establishment.\textsuperscript{188}

c. Telecommunication Services

The European Commission is of the opinion that:

None of [the] telecommunication services are connected with the exercise of official authority involving the right to use undue powers compared with the ordinary law, privileges of public power or a power of coercion over the public. The supply of telecommunication services cannot in itself threaten public policy and cannot affect public health.\textsuperscript{189}

The Commission has therefore determined that "member States shall withdraw all special or exclusive rights for the supply of telecommunication services other than voice telephony and shall take the measures necessary to ensure that any operator is entitled to supply such telecommunications services."\textsuperscript{190} The Council specified at the same time that "open network provision conditions . . . must guarantee equality of access and must be non-discriminatory, in accordance with Community law."\textsuperscript{191} Regarding packet or circuit switched data services, Member States could, until December 31, 1992, prohibit economic operators from offering leased line capacity for simple resale to the public.\textsuperscript{192} This period may be extended until January 1, 1996 for some Member States, in which the network for the provision of the packet or circuit switched data services is not yet sufficiently developed. Finally, Member States can include conditions regarding public-service requirements which constitute objective, non-discriminatory, and transparent trade regulations regarding the conditions of permanence, availability, and quality of the service.\textsuperscript{193}

Although Member States must ensure that operators be able to obtain leased lines for purposes other than the simple resale of capacity for voice telephony and packet or circuit switched data services, Member States need not renounce their special or exclusive rights for the provision and exploitation of public telecommunications networks.\textsuperscript{194} Doing so would deprive the special voice telephony and data services provisions of all effect. The European Commission has invoked article 90(2) of the EEC Treaty to exclude voice telephony and the resale of capacity for packet or circuit switched data services, for the time being, from competition. The article allows derogation from the application of articles 59


\textsuperscript{190} Id. art. 2, par. 1.


\textsuperscript{193} Id. Consideration 10.

and 86 of the EEC Treaty when their application would obstruct the performance, in law or in fact, of the particular task assigned to the telecommunications administrations. That task consists in the provision and exploitation of a universal network, that is, one having general geographical coverage which is provided to any service provider or user upon request within a reasonable period of time.\(^{195}\) Investments of ECU 500 to 1000 billion in universal networks are expected over the next decade.\(^ {196}\) Because the majority of these investments will be made by the telecommunications administrations, it is necessary to secure their financial stability. However, opening voice telephony to competition could threaten this financial stability. Additionally, competitive service providers could make leased lines available for resale with limited or no added value. They would be able to take advantage of the market by operating only the most profitable routes. Although increasing telecommunication equipment and services trade are prominent goals of the Green Paper on telecommunications, its first aim is the development of a strong telecommunications infrastructure and efficient telecommunication services. This justifies the position the EC takes with regard to voice telephony. A final reason for shielding voice telephony from competition is that whether provided from the present telephone network or forming part of the ISDN service, it is currently also the most important means of notifying emergency services responsible for public safety.\(^ {197}\)

The current exclusion of the voice telephony market from competition means only that Member States are not presently required to open that market. However, they may do so at any moment they wish, following the lead of the U.K. Meanwhile, the Commission can monitor the use which the telecommunications administrations make of their position.\(^ {198}\) Sir Leon Brittan announced on July 5, 1991, that the Commission will investigate telephone rates in the Community in a full and formal investigation, based on Directive 90/388/EEC\(^ {199}\) and articles 85 and 86 of the EEC Treaty. Furthermore, the European Commission's Directorate B of Directorate-General IV is currently concentrating its monitoring activities explicitly on telecommunications.\(^ {200}\)

d. **ONP Standards**

The Council has determined in its directive of June 28, 1990,\(^ {201}\) that ONP standards as developed shall carry with them the presumption that service providers which comply with those standards fulfill the relevant essential requirements. Thus, when they want to provide cross-border services or establish agencies, branches, or subsidiaries, they will be able to do so without having to fulfill additional national requirements. This will greatly facilitate the provision of these telecommunication services.

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196. *See supra* notes 9-14 and accompanying text.
198. EEC TREATY, *supra* note 5, art. 90(3).
199. *See supra* note 189.
200. Mr. D. Pantz, Directorate A, DG IV of the European Commission. Mr. Pantz's remark was provided by Ms. C. Csizmadia, who interviewed him in Brussels on August 14, 1991.
e. Competition

The future liberalization of all telecommunication services in the EC brings with it the risk of concentration of some of the national PTTs. While it will be difficult for new carriers to obtain a meaningful market share, it will become almost impossible if too many concentrations are allowed. Council Regulation 4064/89/EEC recently provided the European Commission with a legal instrument to control concentrations with a Community dimension. To fall within the scope of the regulation, a concentration must satisfy certain quantitative criteria. This regulation may prevent the establishment of one or several large telecommunications providers with monopolistic tendencies, thereby improving chances for new carriers. U.S. investment opportunities in the EC telecommunications sector may thus be safeguarded by the regulation. The Commission's guidelines on the applications of EEC competition rules in the telecommunications sector make clear that the full application of the competition rules forms a major part of the Community's overall approach to telecommunications.

f. Interested Parties

There will certainly be interested parties if the legal possibility of providing and exploiting networks arises. Some possible service providers can already be named. For example, both the Dutch and the English railway companies have expressed their interest, and several electricity companies have negotiated cooperation contracts with the Dutch PTT Telecom. The electricity companies and the railways already have networks at their disposal which could easily be made available to third parties. Large international competitors of the Community's telecommunications administrations will also be interested. In September 1989, for instance, AT&T bought Istel Ltd., one of Britain's leading electronic messaging companies. Moreover, a representative of AT&T's Market Regulation Affairs Department has remarked that "of course AT&T would want to take over PTT Telecom, if it would be for sale." However, AT&T's interest in operating next to and in direct competition with PTT Telecom is not clear, which comes as no surprise, given the amount of telecommunication equipment AT&T sells to PTT Telecom each year.

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202. Some concentrations have taken place already. A selected list of mergers and joint ventures which took place between 1984 and 1987 has been included in Appendix II.


204. These criteria are a minimum combined worldwide turnover of ECU 5 billion and ECU 250 million in individual Community turnover. Regulation 4064/89, art. 1 (2(a) and (b)).


207. DE VOLKSKRANT, supra note 206, at 3.

208. Interview with Mr. Rudolf J. de Ruiter, on July 22, 1991, at AT&T's Dutch headquarters in Hilversum.

209. Id. The reason given was the need to safeguard AT&T's strategy.
Companies which are formed in accordance with the law of a Member State and established there are treated as natural persons who are nationals of Member States. Generally, only the geographical aspect (the "real" aspect) of companies is important, not the political aspect: U.S. companies established in the EC are Community companies and cannot be disfavored compared to EC companies.

The development of a strong telecommunications market and efficient telecommunication services currently precludes voice telephony and packet and circuit switched data services from being liberalized. However, smaller sectors, such as value-added services, are now exposed to competition, and the Commission monitors the telecommunications sector closely. The Commission has made it clear that the lack of competition is a temporary revenue protection measure necessary for the development of the telecommunication services sector. Once sufficiently developed, however, these services are to be exposed to competition: data services from December 31, 1992, or January 1, 1996, depending on the Member State, and voice telephony at a later date. Community-wide ONP standards will assure provision of cross-border telecommunication services and easier establishment in second Member States. Meanwhile, the Commission's authority over large mergers and acquisitions will guarantee competition and prevent the establishment of monopolies.

As will be discussed below, development and liberalization take time. Nonetheless, the Commission will likely continue to force Member States and telecommunications organizations to grant access to the national telecommunication services markets, in order to truly develop a Community telecommunication services market. The 1992 Program and the ensuing Green Paper on telecommunications have effectively led to limited but continuous liberalization of the telecommunication services sector, for EC and U.S. companies alike. Although voice telephony and data services are currently not as exposed to competition as value-added services, this is not a protectionist change resulting from the 1992 Program but merely a condition being temporarily maintained in order to permit development of the voice and data telecommunication services networks. In time, more and more telecommunication services will be liberalized, thereby opening the European Community telecommunication services market. Thus, the Fortress Europe accusation by U.S. firms does not have validity in intra-Community trade in telecommunication services.

V. THE UNITED STATES TELECOMMUNICATIONS SECTOR

The degree of liberalization of a nation's own market influences its citizens' perception of other countries' markets. This Article describes the U.S. telecommunications sector to determine its degree of liberalization. A short historical overview of the sector's development is necessary in order to fully understand current regulation of telecommunication equipment and services in the U.S. The U.S. telecommunications sector has a background which is very different from the nationally-oriented EC telecommunications sector described above.

210. See infra notes 211-42 and accompanying text (discussing the U.S. telecommunication sector).
211. See supra notes 35-47 and accompanying text (discussing the EC telecommunication sector).
The first and most important difference between the U.S. and the EC is that the U.S. is among the few countries in the world with a privately owned telecommunications system. Although some other countries are now privatizing the sector, most countries originally started out with a public system. The second important difference in the U.S. is that long-distance service providers are oriented to multiple states, each with their own legislation and supervisory bodies.

A. The Rise and Fall of AT&T as a Monopolist: Competition in Telecommunication Services

AT&T's early power derived from its patents on the basic technology of transmitting voice signals over copper wires. When the patents expired in the 1890's, other companies started to provide local telephone services, but they were unable to provide interexchange, or long-distance, service. AT&T had pioneered the development of long-distance technology and used its patents to control that sector of telecommunications. Independent local companies found it difficult to compete or to resist AT&T's offers to acquire them. At the time, all telephone sets, private branch exchanges (PBXs), and other standard equipment used by residences or businesses were owned and leased by the telephone companies. They, in turn, were obliged to buy from AT&T's Western Electric manufacturing subsidiary. Thus, by the late 1930's, AT&T controlled almost the entire long-distance market, 80 percent of the local exchange market, and a very large share of the market for switching and terminal equipment. Furthermore, AT&T's Bell Laboratories were supported by revenues from the Bell operating companies' license agreements.

AT&T's position as the largest private company in the world was first threatened in 1949, when the Justice Department filed a Section 2 Sherman Act antitrust suit against AT&T. This suit focused on AT&T's alleged monopolization of telephone equipment through its exclusive purchases from Western Electric. The case was settled in 1956 by a consent decree which permitted AT&T to keep Western Electric, but prohibited it from entering any markets other than regulated telecommunications. In 1959, the Federal Communications Commission (FCC) decided to allow large private users to build their own microwave systems. To obtain a license, a user had to demonstrate the absence of common-carrier alternatives. According to Crandall, this was the beginning of the end of AT&T's monopoly over long-distance services. Companies started to ask for the right

212. PBXs are customer owned switches, very similar to a telephone company's switch. They may be connected directly to a long-distance carrier or to other PBXs, thereby bypassing a local carrier's circuits. The modern, digital form of these switches are often referred to as Private Automatic Branch Exchanges (PABX).

213. Id. at 17-18.


215. CRANDALL, supra note 212, at 19.


217. CRANDALL, supra note 212, at 19.
to build microwave networks to sell services to smaller firms that could not afford to build
their own systems.

In 1969, Microwave Communications, Inc. (MCI) was authorized to build a common-
carrier network for private-line services.\textsuperscript{218} This authority was extended in 1971 to
specialized common carriers who were expected to concentrate primarily on offering data
services to smaller companies. However, when MCI found that it was possible to do so, it
started to promote an Execunet service that allowed private-line customers to obtain switched
long-distance service. Although the FCC apparently thought that its authorizations were
limited to private-line service, it never explicitly barred MCI from switched services.\textsuperscript{219}
Therefore, the FCC lost every court ruling when it subsequently tried to block the Execunet
service. After that, new specialized carriers gained de facto acceptance. However, the new
long-distance companies, especially MCI, had difficulty trying to compete with AT&T as
they were simultaneously customers of AT&T for local circuits.

This difficulty finally led the Justice Department to file another antitrust suit in 1974.
The complaint charged that AT&T had abused its power as a bottleneck monopolist in
procuring equipment, excluding competition from the terminal equipment market, and
denying access to long-distance competitors.\textsuperscript{220} Eventually, the Justice Department and
AT&T settled the case out of court. The settlement required AT&T to divest itself of all
operating companies, but AT&T could retain Western Electric\textsuperscript{221} and its Long Lines
divisions. Bell Laboratories also remained with AT&T, although part of its personnel was
transferred to a new research organization for the divested Bell Operating Companies
(BOCs), to be called Bellcore. Finally, AT&T was permitted to enter other fields of
electronics, including computers. The newly independent BOCs could only provide local
services, and were prohibited from engaging in competitive telecommunications activities,
such as manufacturing equipment or providing information services. This was to prevent the
reassembly of a new vertical monopoly. However, the BOCs were allowed to keep their
Yellow Pages and to sell Customer Premises Equipment (CPE). Congress has recently
relaxed the restrictions on the BOCs, allowing them to provide gateway circuits for videotex
systems and voice storage services.\textsuperscript{222} The U.S. District Court for the District of
Columbia, reviewed, approved and finally entered the settlement agreement as a
modification of the 1956 decree.\textsuperscript{223} Therefore, it is often referred to as the Modified Final
Judgment, or simply the MFJ.\textsuperscript{224} The Bell telephone system thus ceased to exist on
January 1, 1984.

\textsuperscript{218} In re Microwave Communications, 18 FCC 2d 953 (1969).
\textsuperscript{219} CRANDALL, supra note 212, at 20 n.12.
\textsuperscript{220} Id. at 36 n.46.
\textsuperscript{221} Western Electric was renamed AT&T Technologies. Id. at 76 n.2.
\textsuperscript{223} See supra note 214 and accompanying text.
\textsuperscript{224} Modification of Final Judgment, United States v. American Telephone & Telegraph, 552 F. Supp.
B. Competition in Telecommunication Equipment

As late as the 1960s, attaching foreign equipment\footnote{225} to a telephone line in the U.S. violated the contracts which customers had with their local operating companies. Until the 1940s, the FCC did not oppose this practice at all. The FCC's decision\footnote{226} to allow the use of recording devices, subject to a protective connection arrangement, was the first exception to these tariffs.\footnote{227} More exceptions followed, and despite AT&T's protests, a certification policy was established in 1975 for all equipment, including that supplied by telecommunications companies.\footnote{228} However, AT&T delayed the program's implementation, by challenging it in the appellate courts. With the appellate court's decision in 1977,\footnote{229} AT&T finally lost the ability to use state regulation to restrict the interconnection of non-Western Electric equipment. Equipment can now be used on the regulated networks, as long as it can be shown to be unharmful to the network and can be connected through standard plugs or jacks.\footnote{230}

C. Current Regulation

FCC action has made possible the unlimited resale and shared use of domestic services.\footnote{231} Until 1976, domestic resale and shared use were permitted, on a limited basis, by the underlying carriers. In 1976, the FCC found tariff prohibitions on domestic resale and shared use of private line services unjust, unreasonable, and unlawful. Four years later, the Commission extended its policy of requiring resale and shared use to message telecommunications services (MTS) and wide-area telephone services (WATS).

Since 1984,\footnote{232} little progress toward deregulation has been made. Only terminal equipment is now fully deregulated. Since the 1983 AT&T antitrust decree, all common carrier services remain under federal and state regulation, as well as under judicial regulation. Although the formal jurisdiction of the regulatory bodies is well delineated geographically, the intangible nature of telephone service and the common costs of services crossing these boundaries cause many problems.

At the interstate level, AT&T remains a regulated, dominant carrier whose tariffs must be approved by the FCC. Other competitive carriers are not subject to rate regulation,

\footnote{225} "Foreign equipment" here means equipment not supplied by the local operating company.
\footnote{226} In re Use of Recording Devices, 11 FCC 1033 (1947).
\footnote{227} CRANDALL, supra note 212, at 88.
\footnote{228} In re Proposals for New or Revised Classes, 56 FCC 2d 593 (1975).
\footnote{230} CRANDALL, supra note 212, at 89.
\footnote{231} A reseller is an entity which subscribes to communications services and facilities of another communications entity and then re-offers it to the public on a profit-making basis. Shared use is defined as a non-profit arrangement in which several users collectively use communications services obtained from an underlying carrier or resale carrier, and each sharer pays on a pro rata portion of the costs. U.S. GOVERNMENT, U.S. NATIONAL STUDY ON TRADE IN SERVICES: A SUBMISSION BY THE UNITED STATES GOVERNMENT TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE 17 (1984).
\footnote{232} The old Bell telephone system ceased to exist on January 1, 1984. See supra notes 212-224 and accompanying text.
Although they have to report their revenues to the FCC. For enhanced or value-added services, FCC rules require that AT&T and the regional BOCs provide open network architecture or comparably efficient interconnection to ensure that competitive service vendors have access to bottleneck facility services.\(^{233}\) At the state level, most intrastate toll and local exchange service remains tightly regulated. Some states have liberalized entry into these markets, but only Nebraska has totally deregulated intrastate telecommunications.\(^{234}\)

**D. Subsidization**

Although the FCC did not regulate individual AT&T rates for most of the period between 1934 and 1960, AT&T implicitly had to maintain switched long-distance rates that were geographically uniform, regardless of the traffic density on the route. The average rates had to be just and reasonable, but individual rates did not have to reflect costs. Over time, at least five types of rate distortions developed in this regulated sector: (1) long-distance rates were held artificially high to mitigate increases in local rates; (2) long-distance rates were based on distance, not on call density; (3) local rates were usually lower for high-cost rural areas than for lower-cost urban areas; (4) business users were charged more for access and local exchange service than residential users in the same exchange; and (5) local service was generally offered on a flat-rate basis, so heavy users paid no more for local service than users who placed less of a burden on traffic sensitive facilities.\(^{235}\)

Until World War II, the cost of local loops was borne fully by local exchange companies. This pricing principle was challenged in *Smith v. Illinois Bell Telephone*,\(^{236}\) in which the U.S. Supreme Court ruled that Illinois Bell could not assign all of the local loop costs to local service.\(^{237}\) Responding in part to this Court decision, a joint board of federal and state regulators decided in 1943 to allocate local plant costs between local and interstate jurisdictions in proportion to the minutes of use in each category. The formula used in allocating the local loop costs, the subscriber plant factor (SPF), was changed three times; in 1950, in 1965, and in 1969.\(^{238}\) Each change raised the interstate share of local costs.\(^{239}\)

By 1981, the interstate share of usage had risen to eight percent, but regulators were allocated twenty-seven percent of non-traffic-sensitive costs to interstate calls.\(^{240}\) Because it was inefficient to allow non-traffic-sensitive costs to be recovered from long-distance calls, the FCC proposed to phase out this cost recovery system and replace it with fixed monthly subscriber-line charges (SLCs). Due to strong political opposition, this plan has not been

\[^{233}\] Third Computer Inquiry, 104 FCC 2d 958 (1986). The Computer III Decision was overturned by the U.S. Court of Appeals for the Ninth Circuit in June 1990, 905 F.2d 1217 (9th Cir. 1990), and the FCC is reconsidering its decision. CRANDALL, supra note 212, at 159 n.18.
\[^{234}\] CRANDALL, supra note 212, at 41.
\[^{235}\] Id. at 24-29.
\[^{236}\] Smith v. Illinois Bell Telephone, 282 U.S. 133 (1930).
\[^{237}\] Id. at 151
\[^{238}\] See CRANDALL, supra note 212, at 25.
\[^{239}\] Id.
\[^{240}\] Id. at 23-25.
fully implemented, but SLCs are currently $3.50 per month. Moreover, the FCC has frozen the SPF and will reduce it to twenty-five percent within eight years.241

E. Current Telecommunications Consumer Options

The U.S. telephone industry has undergone a major organizational and regulatory transformation in the past decade. Consumers may now purchase equipment from scores of different companies, and long-distance service may be acquired from AT&T or from several competitive carriers.242 Although local service in most states is still governed by monopolies, much of what was once local service may now be obtained through PBXs, local area networks on the customer's premises, and even large private, unregulated fiberoptic networks. In fact, users may build their own customized private networks and choose where, if at all, to connect to the regulated network. The cost of fiber optics will probably lead to a renewed market concentration in long-distance services,243 but cellular systems may, on the other hand, become a meaningful alternative for local access. In the long run, this will most likely lead to a relaxation of the line-of-business restrictions placed on the BOCs.244

VI. COMPARISON OF THE EC AND U.S. TELECOMMUNICATIONS SECTORS AND CONCLUDING ASSESSMENT

This discussion consists of two distinct parts. The first part compares the EC and U.S. telecommunications sectors. The two telecommunications sectors have some characteristics which are totally different. However, they also share some striking similarities which must be considered in discussions of Fortress Europe. The second part is the final assessment of this Article, concluding that the accusation and fear of Fortress Europe are unfounded.

A. Comparison of the EC and U.S. Telecommunications Sectors

1. Public versus Private

As discussed above,245 the first and foremost difference between the EC and the U.S. telecommunications sectors is that the U.S. is among the few countries in the world with a privately owned telecommunications system. Although the U.K. has partially privatized British Telecom,246 it started out with a public telecommunications administration, as did the other EC Member States. The fact that the U.S. system was privately owned has spurred

241. When voice telephony will be liberalized in the EC, regulators can thus look forward to similar problems as the FCC has faced in the U.S.: deciding on models and means of measuring costs and distributing them evenly over local and long-distance service providers. See supra notes 62-72, 171 and accompanying text.
242. See CRANDALL, supra note 212, at 10-11.
243. Id. at 4.
244. See id. at 162.
245. See supra notes 35-47, 211-42 and accompanying text (discussing the EC and U.S. telecommunication sectors).
246. The U.K. government now holds 49 percent of its shares.
competition somewhat earlier than in the EC. However, intervention on the federal level was necessary in the U.S. to make the competition possible. This is quite like the action the European Commission is currently taking at the Community level in the EC.

2. Telecommunication Equipment

The manufacture of telecommunication equipment has not been explicitly regulated in the EC nor in the U.S. The monopoly position of sole distributor of telecommunication equipment, for the national PTTs in Europe and the local operating companies in the U.S., was made possible by prohibiting interconnection of foreign terminal equipment to the telephone network. In the EC, transmission and switching equipment was bought from a small number of national suppliers which specialized in each national market's network technology, while AT&T bought most network equipment from its own manufacturing subsidiary, Western Electric.

In the late 1970s, AT&T had to allow non-Western Electric equipment to be interconnected due to the FCC's 1975 certification program and to court rulings. The European Commission's Directive 88/301/EEC had the same effect in the EC in the late 1980s.

3. Telecommunication Services

Several differences can be found in the organization of the EC and U.S. telecommunication services sectors. One company provides local and long-distance services within the state in most Member States of the EC. Although Denmark, France, Italy, and Portugal have several operators, their services are delineated according to geographical and functional lines. All are publicly owned. The only exception is the U.K., where a duopoly exists between British Telecom, which is 49 percent publicly owned, and Mercury, which is privately owned. Other firms will soon be able to run new telecommunications networks, according to the U.K. trade secretary.

The national telecommunications administrations or the foreign telecommunication service provider jointly provide long-distance service between Member States and to non-Community countries. Although voice telephony services are still excluded from competition in the EC, Member States have to withdraw all special and exclusive rights for other telecommunication services. Resale of leased line capacity for data services is permitted as of January 1, 1993 or January 1, 1996, depending on the Member State. The European Commission is developing a Community market of high quality telecommunication equipment and services, and it therefore encourages the national telecommunications administrations to invest in the networks.

247. Here, "foreign" terminal equipment refers to equipment which is not supplied by the telecommunications administration or local operating company.
248. See supra note 228 and accompanying text.
249. See supra note 229 and accompanying text.
250. See supra note 135.
252. See supra notes 171-210 and accompanying text (discussing intra-Community trade in telecommunication services).
Since the 1984 divestiture of AT&T and the MFJ,\textsuperscript{253} a strict distinction between local and long-distance service is necessary in the U.S. These services have to be provided by different companies to prevent the reassembly of a new vertical monopoly. Numerous local operating companies exist,\textsuperscript{254} many of which formed part of the pre-1984 Bell System. In order to avoid abuse of their bottleneck position, the operating companies must provide open network architecture and access to their customers for the long-distance carriers. Furthermore, they cannot engage in competitive telecommunications activities.\textsuperscript{255} The long-distance carriers, on the other hand, cannot engage in local service. Every customer can choose which long-distance company they want to use, and some even have a choice of local service providers.\textsuperscript{256}

Although the international market is among the more rapidly growing markets for U.S. interexchange carriers, it still produces only five percent of their revenues. Because other companies have found it difficult to obtain connections to foreign PTTs, AT&T still dominates the international market. Nonetheless, MCI and US Sprint have increased their international operations rapidly since 1987.\textsuperscript{257}

4. Subsidization

The main objective of European PTTs has been general telephone coverage: placing the telephone within reach of every consumer. Apart from the monopoly regime, it has resulted in heavily subsidizing rentals and connections through usage related call charges, and subsidizing local rates with long-distance tariffs.

An intricate system of cross-subsidization has been set up in the U.S. by the FCC. Strictly speaking, it can be argued that for the cost-shifting from local to long-distance to represent a subsidy, the price of interstate service would have to be above the stand-alone costs of providing this service, including the costs of providing local connections for interexchange calls alone. However, what happens in the U.S. is exactly what happens in Europe. When voice telephony is liberalized in the EC, regulators can anticipate problems similar to those which the FCC has faced in the U.S.; deciding on the models and the means of measuring costs and distributing them evenly over local and long-distance service providers.

5. Regulation

The European PTTs are regulated by the national laws of the Member States. Tariff changes and the organization of the telecommunication services sector are subject to government approval. Equipment has to fulfill certain essential EC requirements, but when it is approved in one Member State,\textsuperscript{258} the “CE” sign can be affixed and the equipment is assumed to fulfill essential requirements in all Member States. Other Member States cannot

\begin{itemize}
  \item \textsuperscript{253} See supra note 224 and accompanying text.
  \item \textsuperscript{254} See CRANDALL, supra note 212, at 25.
  \item \textsuperscript{255} See supra notes 211-42 and accompanying text (discussing the U.S. telecommunication sector).
  \item \textsuperscript{256} Id.
  \item \textsuperscript{257} CRANDALL, supra note 212, at 50-51.
  \item \textsuperscript{258} See supra notes 143-70 and accompanying text (providing details on testing in non-Community countries).
\end{itemize}
demand re-testing. The European Commission monitors telecommunications tariffs and can undertake action if it decides that prices are too high or that tariffs otherwise conflict with Community competition rules.\textsuperscript{249} All U.S. common carrier services are under state and federal (FCC) regulation, while the U.S. District Court for the District of Columbia administers the 1982 MFJ.\textsuperscript{250} Although there are competitive suppliers of virtually every service and equipment, two major problems plague the combination of regulation and liberal market entry policies. First, regulators are likely to be forced into the role of cartel managers, particularly if one or more carriers find themselves unable to compete. New entrants or even incumbents may use the regulatory process to prevent their rivals from cutting rates by claiming that such rates are predatory. Second, regulators may tighten barriers to entry in other markets to preserve some politically motivated cross subsidy.\textsuperscript{261} It has been demonstrated above that these subsidies mainly serve less traffic dense routes, both in the U.S. and in Europe. Regulators find themselves beholden to the pressure of incumbent carriers, especially when they require these carriers to offer various nonremunerative services.\textsuperscript{262}

6. Future Regulation in the EC

Competition, not regulated monopoly, is likely to be the best market structure to encourage technical progress. However, the rise in local rates in the U.S. during the early 1980s affected the willingness of low-income households to subscribe to telephone service. Moreover, the reduction of cross-subsidization will lead to higher telephone bills for lower income households, while higher-income households, which typically consume more long-distance service and more other services that are telephone intensive, such as travel and financial services, will see their telephone bills decrease.\textsuperscript{263} This is contrary to current Community aims of general telephone coverage, especially in the less favored peripheral regions of the Community. When the Community common telecommunications market is realized, and basic telecommunication services are exposed to competition, the Community will face many of the regulatory problems the FCC has coped with over the past twenty-five years.

B. Concluding Assessment

The aim of this Article was to determine whether the fear and accusation of Fortress Europe was realistic in the telecommunications sector. This in turn raised two central questions: first, can and will access to the EC telecommunication equipment and services markets be restricted for U.S. telecommunication equipment and services as a result of the

\textsuperscript{259}  EEC TREATY, supra note 5, art. 86.
\textsuperscript{260}  See supra note 224 and accompanying text.
\textsuperscript{261}  CRANDALL, supra note 212, at 155.
\textsuperscript{262}  Id. at 163; see infra Appendix I(8).
\textsuperscript{263}  CRANDALL, supra note 212 (finding $15 to $16 increases per year for low-income households versus $15 decreases for higher-income households).
1992 Program; and, second, can and will non-Community U.S. telecommunication equipment and service providers be discriminated against within the Community as a result of the 1992 Program?

The 1992 Program should not be confused with protectionism which has occurred prior to 1992. Nonetheless, many of the U.S. concerns mentioned previously, such as the elimination of import duties and government procurement, involve protectionism which existed prior to the 1992 Program. Some concerns are legitimate and must be taken seriously. All concerns are currently the subject of bilateral or multilateral negotiations. Other concerns may also be justified, but so can the EC positions, for example, on the standardization process and the temporary exclusion of voice telephony from competition. Still other concerns involve situations which have no connection with the 1992 Program and should therefore not be included in discussions on the reality of the Fortress Europe allegations.

Fortress Europe is an external dimension of internal EC measures. The European Commission’s 1985 White Paper on the Internal Market led to the 1987 Green Paper on telecommunications, which has two goals. The first is to develop a strong telecommunications infrastructure and efficient telecommunication services. This goal has already led to enormous investments. Although partially privately funded, most of the investments were made by the national telecommunications administrations. Those administrations will fund the majority of future investments as well. The second goal is to increase competition in the telecommunications sector, as long as this does not harm the first goal. This second goal has already led to the liberalization of the sale of telecommunication equipment, as well as to the liberalization of value-added services. After January 1, 1993 or January 1, 1996, it will lead to competition in the packet or circuit switched data services sector as well.

The Commission presently considers liberalization of voice telephony to conflict with the first goal because it would seriously threaten the financial stability of the telecommunications providers. This is a legitimate concern. The Commission’s second concern, that voice telephony is the most important means of accessing emergency services charged with public safety, should not be overlooked, either. Accessing those services mainly depends on the local network, and the separation which exists between local and long-distance service in the U.S. does not exist in Europe. It is therefore not possible to protect only the local service providers in the EC, as it is in the U.S. Unless the EC telecommunications administrations were to be split up, liberalization of the voice telephony market would result in complete liberalization of this sector in the Community.

The exclusion of voice telephony from competition may be justified not only in a Community context, but also in a larger, international framework. A model treaty on the international trade in services includes an article on service monopolies. It states that “domestic measures, which constitute a government owned monopoly or a government sanctioned private monopoly, are regarded as inappropriate, unless the Party demonstrates

the necessity of such measures..."265 Although the final GATT text will undoubtedly be quite different from the model, it may well contain a similar provision. If it does, the EC's restriction on voice telephony could be justified on non-economic grounds: the development of the telecommunications networks and services, as well as public safety.

The Commission has made it clear that in the pursuit of competition in the telecommunications sector, liberalization and harmonization must go hand in hand.266 Harmonization and standardization will yield large profits for equipment manufacturers and service providers alike. This aspect of the future Internal Market is often underestimated.

This Article challenges U.S. accusations regarding the EC standard-setting process and explains the advantages of the harmonization process. It argues that the fact that the EC already determines its own standards, in the absence of international ones, is a sign of failing international willpower to come to international standards, and that it should not prevent the EC from integrating the national markets of the Member States. The only justified concern seems to be that tests have to be performed by notified bodies in the Member States, or in other countries, under supervision of Community-notified bodies. This is not protectionistic because recognition has not been regulated before. It is logical that a standard-setting country would want the opportunity to supervise the testing. However, negotiations on recognizing tests performed by third country testing laboratories are currently underway between the U.S. Trade Representative and the European Commission.

The goal of increased competition has resulted in the government procurement directive,267 which still contains a non-mandatory 50 percent content rule for telecommunication equipment.268 As soon as the multilateral reciprocity negotiations regarding the GATT Government Procurement Code result in expansion of that Code to include the excluded sectors, U.S. equipment can no longer be discriminated against at the national and Community level. Conclusion of a bilateral U.S.-EC agreement may even lead to full application of the procurement directive to products originating in the U.S. This means that bodies at all levels of government will be obliged to consider offers containing U.S. equipment on the same footing as offers containing Community equipment. These bilateral negotiations take place in the context of government procurement in general, which exceeds the scope of this Article.

Neither explicit nor implicit, VERs' quantitative restrictions apply to the importation of telecommunication equipment in the Community. Although import duties exist, they are not a result of the 1992 Program and should not be included in discussions on the reality of Fortress Europe. Telecommunication equipment originating in the U.S. already receives national treatment in the individual Member States and formal Community treatment in intra-Community trade. As a result of the liberalization actions following the Green Paper and the ensuing regulations, trade in telecommunication equipment will increase, which will result in material Community treatment as well. The government procurement directive will cause U.S. telecommunication equipment to be considered on the state, provincial, and local levels.

265. COLLENTEUR, supra note 80, at 59.
268. Its services counterpart does not contain such a clause. See supra notes 171-210 and accompanying text.
The U.S. fear that political non-Community U.S. companies will be discriminated against is unjustified. It has been clearly established that the political aspect of a company is not important, as long as the requirements of article 58 of the EEC Treaty and the requirements of the General Programmes\textsuperscript{269} are fulfilled. These favored companies can provide the liberalized telecommunication services and establish agencies, branches, and subsidiaries in second Member States.\textsuperscript{270} Establishment in the first Member State can be based on the bilateral Treaties of Friendship, the multilateral OECD Code on Liberalization of Capital Movements, and perhaps shortly on a GATT Agreement on Trade in Services.

The U.S. concern that the volume of transatlantic telecommunication services will not increase may be justified until a multilateral agreement is concluded in the GATT Uruguay Round. However, increased U.S. investments in the EC can be expected even if no agreement can be reached. Whether that can be called forced investment remains to be seen. As costs for international telecommunications connections become more dependent on volume, it is likely that more services will be performed locally, regardless of telecommunications access provisions.\textsuperscript{271}

Import quotas, reciprocity requirements, local content standards, minimum direct investment standards, market segment insulation policies, and domestic company definitions, it is feared, will result in preferential treatment for EC firms. However, this Article establishes several important facts. First, neither import quotas nor VERs exist for telecommunication equipment. Second, reciprocity is a principle of international law upon which the GATT system is based, and as such, reciprocity requirements might return in the GATT Uruguay Round negotiations with regard to access for telecommunication services and in the negotiations on government procurement. Reciprocity is not typically a protectionist device but rather a bargaining tool to obtain similar rights for one's own companies as are accorded to companies of other countries. Third, application of current local content standards concern only telecommunication equipment and is not mandatory. The standards are being negotiated bilaterally and multilaterally. Fourth, market segment insulation policies are prohibited by articles 85, 86, and 90 of the EEC Treaty and are the opposite of the goal of the 1992 Program. Finally, domestic company definitions are strictly geographic, do not contain political elements, and allow U.S. companies to provide intra-Community telecommunication services and the right to set up agencies, branches, and subsidiaries, like any other Community company. EC firms cannot receive preferential treatment, nor can U.S. firms be disfavored.

VI. CONCLUSION

The Community is working hard to liberalize as many telecommunication services as possible without losing sight of the goal of development of the sector. If EC policy towards the telecommunication services sector is perceived as protectionist by the U.S., it is because

\textsuperscript{269} See supra note 175 and accompanying text.

\textsuperscript{270} Only after the Member States have made an arrangement for the problems of company law involved in the framework of article 220 of the EEC Treaty can companies entail a right to transfer their registered office. Case 81/87, The Queen v. H.M Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC, 1988 E.C.R. 5483, 5512 Considerations 21-25.

\textsuperscript{271} There will always be a larger volume of services within the Community than between the Community and the U.S., as is true in the U.S. Therefore, costs will always be lower within the EC.
of the differences in organization of the EC and U.S. telecommunication services sectors. In terms of competition, the EC telecommunication services sector is currently in the position that the U.S. occupied thirty years ago. The U.S. experience teaches that liberalization of the telecommunication services sector does not happen overnight and deserves the full attention of the regulating authorities. No measures have been found which are aimed against non-Member States, with the exception of article 29 of the government procurement directive. However, telecommunications is a special sector, as is clear from the fact that it is specifically excluded from the GATT Government Procurement Code. This issue will ideally be resolved in the current bilateral and multilateral negotiations.

Therefore, the central questions of this Article can be answered as follows. First, access to the EC telecommunication equipment and services markets cannot be restricted as a result of the 1992 Program. However, internal EC measures will increase EC and world trade. Second, telecommunication equipment originating in the U.S. receives national and Community treatment and is not discriminated against in intra-Community trade. Third, political U.S. telecommunication service providers cannot be discriminated against in the EC as a result of the 1992 Program because they are Community service providers. Therefore, the accusations of a Fortress Europe are not well founded.

APPENDIX I

Actions Taken to Date Relating to Telecommunications

(1) The Commission enacted a directive\(^{273}\) to open up the market for telecommunications terminal equipment to competition, based on article 90(3) of the EEC Treaty. The legal basis of the directive was challenged in the Telecommunications case,\(^{274}\) but the Commission won most of the battle.

(2) The Commission issued a directive\(^{275}\) to open up the market for telecommunications services to competition, again based on article 90(3) of the EEC Treaty. This directive, too, is being challenged,\(^{276}\) but not only on legal grounds. Several Member States do not agree with the extent of the liberalization plans of the Commission.

(3) The Council issued Directive 90/531/EEC\(^{277}\) on the procurement procedures of entities operating in the water, energy, transport, and telecommunications sectors.\(^{278}\)

(a) The Council issued Directive 92/13/EEC\(^{279}\) coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement of procedures of entities operating in the water, energy, transport and telecommunications sectors.

(b) The Council issued Directive 92/50/EEC\(^{280}\) relating to the coordination of procedures for the award of public service contracts

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276. By Belgium (action brought Sept. 14, 1990) and Italy (action brought Sept. 20, 1990), cases C-281/90 and C-289/90 respectively 31.10.1990 O.J. (C 274) 20.
277. 29.10.1990 O.J. (L 297) 1.
278. The “excluded sectors” are given this name because they are excluded from the application of the “normal” public procurement directives 77/62, relative to the award of public supply contracts, and 71/305, relative to the award of public works contracts.
The Council issued a directive covering the harmonization of legal and administrative provisions in the Member States for Open Network Provision (ONP). Its aim is to guarantee open and efficient access to and use of the public network and public telecommunications services.

(a) The Council issued Directive 92/44/EEC on the application of open network provisions to leased lines.

(b) The Council issued Recommendation 92/382/EEC on the harmonization provision of a minimum set of packet-switched data services (PSDS) in accordance with Open Network Provision (ONP) principles.

(c) The Council issued Recommendation 92/383/EEC on the provision of harmonized intergrated services digital network (ISDN) access arrangements and a minimum set of ISDN offerings inaccordance with OPN principles.

On December 22, 1986, the Council issued Recommendation 86/659/EEC on the coordinated introduction of the Integrated Services Digital Network (ISDN) in the Community, as well as Decision 87/95/EEC on standardization in the field of information technology and telecommunications.

The Council issued a directive on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity.

The Commission issued guidelines on the application of competition rules in the telecommunications sector, aimed at clarifying the application of these rules by the Commission. The guidelines essentially concern the application of articles 85 and 86 of the EEC Treaty.

The Council issued a recommendation\(^{289}\) and a directive\(^{290}\) pertaining to the introduction of a pan-European digital mobile cellular communications system (GSM-system) in the Community, and the Commission intends to publish a green paper on the future development of mobile communications.\(^{291}\) According to the Council, access to cellular digital mobile communications should be unrestricted.\(^{292}\)

The Commission proposed\(^{293}\) a Council recommendation on the coordinated introduction of digital European cordless telecommunications (DECT) in the Community.

The Commission published a Green Paper on Satellite communications,\(^{294}\) the contents of which have been welcomed by the EC Committee of the American Chamber of Commerce in Belgium.\(^{295}\) This new green paper expands the principles already developed in the Green Paper on telecommunications, taking into account the specificity of satellite communications.

The Council, in its resolution of 30 June 1988\(^{296}\), made it clear that telecommunications administrations will have to move towards a greater cost orientation for tariffs.\(^{297}\) The Commission should have conducted a review of progress achieved on this objective by January 1, 1992, and it will monitor tariffs closely.

The proposal of the Green Paper for the creation of a European Telecommunications Standards Institute (ETSI) resulted in a major reform of the standards setting process in the sector. ETSI was founded in April 1988 in Sophia-Antipolis near Nice, France.

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293. 27.7.1990 O.J. (C 187) 1; COM(90)139 final, 12.6.1990.
297. According to Information Market, costs may vary between Member States by 426 percent or more for identical calls. Neither distance nor GNP per head of population seem to play a role in international traffic. INFORMATION MARKET, Feb.-Apr. 1991, at 7.
APPENDIX II
SELECTED LIST OF MERGERS AND JOINT VENTURES
WHICH TOOK PLACE IN THE
EC TELECOMMUNICATIONS SECTOR
BETWEEN 1984 AND 1987

A. Telecommunication Equipment

1. Alcatel, the French equipment group, acquired the European activities of ITT;

2. The Swedish producers Ericsson won the take over of the French equipment group CGCT, together with MATRA;

3. In Italy, the telecommunication manufacturers Italtel and Telettra attempted to form Telit; they collaborated with GTE, now Siemens, in ITALCOM;

4. An agreement was concluded between GEC and Plessey to merge their telecom business in a 50/50 joint venture;

5. ITT sold its stake in STC to Northern Telecom of Canada;

6. CGE, Siemens, Italtel, and Plessey have cooperative links;

7. Philips has a joint venture with AT&T for transmission;

8. Siemens has a 50/50 joint venture with the American GTE regarding switching, transmission, R&D, and manufacturing, which affects STE's European markets;

9. British Telecom acquired a majority interest in the Canadian PABX manufacturer Mitel;

10. Plessey acquired Stromberg-Carlson of the U.S.; and

11. NTT, NEC, Fujitsu, Hitachi, and Oki collaborate on a project.

B. Computers

1. IBM bought Rolm, a leading U.S. manufacturer of office communications systems;

2. In the U.K., STC purchased the computer maker ICL;

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3. Ericsson formed links with Honeywell; and

4. ATT and Olivetti link up.
APPENDIX III

TELEPHONE PENETRATION IN THE EC, PER MEMBER STATE, AND IN THE U.S.

<table>
<thead>
<tr>
<th>Country</th>
<th>Rank</th>
<th>Telephone connections (x 1,000)</th>
<th>Telephone connections per 100 inhabitants</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>7¹</td>
<td>3,257</td>
<td>33.0</td>
</tr>
<tr>
<td>Denmark</td>
<td>1</td>
<td>2,683</td>
<td>52.4</td>
</tr>
<tr>
<td>France</td>
<td>4</td>
<td>23,911</td>
<td>42.2</td>
</tr>
<tr>
<td>Fed. Rep. Germany</td>
<td>3</td>
<td>26,399</td>
<td>43.2</td>
</tr>
<tr>
<td>Greece</td>
<td>7¹</td>
<td>3,292</td>
<td>33.0</td>
</tr>
<tr>
<td>Ireland</td>
<td>10</td>
<td>751</td>
<td>21.2</td>
</tr>
<tr>
<td>Italy</td>
<td>8</td>
<td>18,253</td>
<td>31.9</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>2</td>
<td>162</td>
<td>45.3</td>
</tr>
<tr>
<td>Netherlands</td>
<td>5</td>
<td>6,029</td>
<td>41.3</td>
</tr>
<tr>
<td>Portugal</td>
<td>11</td>
<td>1,512</td>
<td>14.8</td>
</tr>
<tr>
<td>Spain</td>
<td>9</td>
<td>9,801</td>
<td>25.2</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>6</td>
<td>21,654</td>
<td>38.3</td>
</tr>
<tr>
<td>European Community</td>
<td></td>
<td>117,704</td>
<td>35.8</td>
</tr>
<tr>
<td>United States</td>
<td></td>
<td>112,202</td>
<td>50.8²</td>
</tr>
</tbody>
</table>

Sources: INTERNATIONAL TELECOMMUNICATIONS UNION, YEARBOOK OF COMMON CARRIER STATISTICS (1988) and CEC studies, cited in UNGERER, supra note 9, at 30; U.S. Telecommunications Association; U.S. Census Bureau. The reference year is 1986.

¹ Shared rank. ² Estimate.