

**OF PHONES AND PLANES: POLICY  
TRANSFER IN THE LIBERALIZATION  
OF EU PUBLIC SERVICES<sup>1</sup>**

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Comments are welcome on the paper!

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## Introduction

Our paper explores the utility of the concept of policy transfer for analysing the dynamics of the EU policy process. Specifically, the paper examines the liberalisation of two of the so-called utilities sectors: telecommunications and passenger air transport. Both sectors had traditionally been regarded through (western) Europe as public service activities. However, accompanying the creation of the single European market, both sectors moved incrementally to a liberalised set of regulatory arrangements in which the EU served as the key policy-making arena. Today, of course, consumers are presented with a range of service providers in both sectors: low-cost and full-service airlines offering intra-EU and domestic services;<sup>2</sup> and competing suppliers of a growing array of telecommunications services in fixed-line, data and mobile telephony as well as broadband/internet. The character of the two sectors has been revolutionised over the last two decades and the EU has played a pivotal role in both sets of developments.

We utilise the concept of policy transfer in this paper because it allows a single framework to be applied to the different stages of the policy process: from the formulation to the transposition stages. Adapting Dolowitz and Marsh, we understand policy transfer to mean the process by which ideas, policy, administrative arrangements or institutions in one political setting influence policy development in another political setting, mediated by the institutional system of the EU.<sup>3</sup> The three stages at which policy transfer may take place are as follows: during the negotiation of EU policy; in putting policy into practice at EU level; and (where applicable) in operationalising policy at the member state level. An institutionalist account is offered of these stages, identifying key variables that may constrain or facilitate policy transfer. Important exogenous components of the account in sectors such as these are globalization and technological change. Policy transfer, we argue, offers a more neutral terminology for identifying these forces when compared with the ubiquitous rival terminology of Europeanisation, which runs the risk of privileging the EU as the driver of domestic policy change when other forces may well be at work.

In the next section we set out our analytical framework. We then prepare the empirical analysis of the two sectors by offering a review of their (differing) characteristics. There then follow two sections which explore policy transfer at two separate stages of the policy process: the *construction* of the respective EU policy regime; and its subsequent *operationalisation*. In the case of the latter we focus particularly on operationalisation at EU level because a striking contrast between the two sectors is that air transport is essentially regulated at supranational level, whereas the telecommunications sector entails multi-tiered regulation and discretion on the part of the national regulatory authorities (NRAs). In both these sections of the paper we offer an institutionalist interpretation of change, while keeping in mind the sectoral dynamics deriving from international forces and technological advances.

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<sup>2</sup> This paper will not address the external dimension of the EU air transport policy, for example that covered by the Open Skies agreement, reached earlier in 2007 with the US Administration. Most passenger air transport between EU states and third countries has not yet been liberalised.

<sup>3</sup> David Dolowitz and David Marsh, 'Who learns what from whom; a review of the policy transfer literature', *Political Studies*, 44, 1996, p. 344

## Analytical Framework

Explanations of politico-economic policy change have long been preoccupied with the relationship between global markets and globalizing technologies as the key drivers of change, and the institutional environments in which change is realized. Indeed, many scholarly accounts of the EU's Single Market and, later, of its Lisbon agenda see (economic) globalization and (technological) modernization as prime factors. Yet the relationship between them and the institutional environments is contested. 'Globalisation theorists' see tendencies towards trans-national governance or convergent patterns of national policy as the more or less ineluctable outcome of socio-economic and technical change.<sup>4</sup> Institutionalists, on the other hand, ascribe explanatory primacy to institutional triggers for reform (e.g. court or competition rulings) and to the institutional environments (governance regimes, policy styles, state traditions, etc.) that shape the orientations of economic and political actors towards globalization.<sup>5</sup> This paper explores the complex relationship between globalization, institutions and EU policy transfer through analysis of liberalization and regulatory change in the telecommunications and airline sectors.

Policy transfer has been defined as a process by which ideas, policy, administrative arrangements or institutions in one political setting are reproduced in another jurisdiction.<sup>6</sup> In the present context an important role is that played by the EU in facilitating policy transfer. The policy transfer process and mechanisms can be placed at any point along a continuum from 'coercive' transfer to 'voluntary' transfer, with a considerable amount (probably most) occurring in between these poles. Voluntary transfer clearly involves 'policy learning' whereas coercive transfer occurs where a government is obliged, for instance by a supranational institution, such as the European Court of Justice (ECJ) or the EU competition authorities, to adopt a policy.<sup>7</sup>

In fact, the EU offers a number of governance patterns each with distinct institutional characteristics that can be expected to generate different transfer types.<sup>8</sup> The first can be identified as governance by negotiation, which reflects the traditional Community method of policy-making centred on negotiations within the Council of Ministers, with the Parliament also playing an increasingly important role. This pattern is conducive to a largely voluntary policy transfer process, which we might expect most likely to lead to a synthetic form of policy transfer, though qualified majority voting may introduce some elements of coercion, more conducive to emulation of a chosen model. The second is governance by hierarchy, which relates to those areas – like the single market and competition policy – where a considerable degree of direct power has been delegated to the supranational institutions, notably the European Court of Justice and the Commission. This pattern of governance clearly provides the greatest scope for coercive policy transfer and the strongest policy transfer outcome

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<sup>4</sup> Charles Kerr, John T. Dunlop, Frederick Harbison and Charles A. Myers, (1960), *Industrialism and Industrial Man*, Cambridge MA. Harvard University Press; Suzanne Berger and Ronald Dore, eds. (1996), *National Diversity and Global Capitalism*, Ithaca, NY. Cornell University Press; Susan Strange, (1996), 'The Limits of Politics', *Government and Opposition* 30;3, 291-311.

<sup>5</sup> Robert Boyer and Daniel Drache (eds), *States against Markets; The Limits of Globalization*, London and New York, Routledge, 1996.

<sup>6</sup> Dolowitz and Marsh, 'Who learns what from whom', p. 344.

<sup>7</sup> David Dolowitz and David Marsh, 'Who learns what from whom', pp. 344-5.

<sup>8</sup> See Simon Bulmer and Stephen Padgett, 'Policy Transfer in the European Union: an Institutional Perspective', *British Journal of Political Science*, 35(1), 2005, pp. 103-26.

(emulation: see below). Thirdly, governance by facilitation denotes those areas of EU policy where the traditional Community method is not deemed appropriate and where instead the EU seeks to facilitate, as with the Open Method of Coordination, a more voluntary policy transfer process among the member states. Facilitation, however, might be expected to produce the weakest forms of (or no) policy transfer.

Policy transfer can occur through policy emulation - involving some 'imitating action' - or through policy learning, involving 'a redefinition of one's interests on the basis of newly-acquired knowledge.'<sup>9</sup> Policy models are rarely transferred wholesale; more often they will be adapted to policy preferences in the borrower jurisdiction. Thus, our typology of transfer types follows Rose and Dolowitz/Marsh in categorizing transfer outcomes in relation to fidelity to the 'blueprint'.<sup>10</sup> Emulation or copying signifies high fidelity. Synthesis implies a hybrid of models, often adapting existing policy in the borrower jurisdiction. 'Influence' suggests a loose form of transfer in which the external exemplar impacts only weakly on the outcome. Abortive transfer is where policy transfer fails.

The principal dependent variable that interests us – the extent and quality of policy transfer within the EU– is explained in terms of three sets of independent variables, which for heuristic purposes it is useful to categorise as follows.<sup>11</sup> We accept first of all that a major independent variable driving European regulatory policy change in a convergent direction, towards liberalisation, might be exogenous, or 'environmental' in Scharpf's terms.<sup>12</sup> It is techno-economic change, which embraces such key elements as the development of technologies that render national regulatory boundaries porous; economic globalisation and the associated drive for inward investment and international competitiveness; and the international regulatory competition ('competitive de-regulation' or 'competitive emulation') that this engenders. The institutions of the EU, and their varying capacity for 'policy transfer' according to the particular EU governance regime (see above), are held to be a second, potentially very important, possible independent variable. The EU 'mediates' the impact of exogenous forces on the member states by seeking to achieve a harmonised European regulatory response to the challenges of techno-economic change, globalisation, and the pressure of international regulatory competition. The third set of variables, of course, is the member states' own policy preferences and national institutional profiles. This third variable applies firstly at the EU negotiation stage, where the member states seek to 'up-load' their own institutional models and/or policy preferences<sup>13</sup> into the EU policy model so as to minimise their adaptation costs

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<sup>9</sup> Jacint Jordana, David Levi-Faur and David Vogel, 'The Internationalization of Regulatory Reforms: the Interaction of policy learning and policy emulation in the diffusion of reforms', unpublished paper, presented at the workshop on *The Politics of Regulation*, 29-30 November 2002 at the Universitat Pompeu Fabra, Barcelona.

<sup>10</sup> Richard Rose, *Lesson drawing in public policy. A guide to learning across time and space*, (Chatham, NJ: Chatham House, 1993), p. 91; David Dolowitz and David Marsh, 'Learning from abroad', p. 13.

<sup>11</sup> See the analytical framework in Peter Humphreys and Seamus Simpson, *Globalisation, Convergence and European Telecommunications Regulation*, Cheltenham UK and Northampton, MA, USA: Edward Elgar, 2005, pp. 1-20.

<sup>12</sup> Fritz W. Scharpf, *Games Real Actors Play: Actor-Centered Institutionalism in Policy Research*, Boulder, Co: Westview Press, 1997, p. 44.

<sup>13</sup> These national preferences will naturally reflect all sorts of national political factors, most notably government policies (e.g. the 'will' to liberalize), and patterns of interest intermediation and state structure (affecting governments' 'capacity' to deliver policies). This is a very interesting line of

at the subsequent stage where they have to transpose policy and put it into practice. The national variable will also apply at this second ‘downloading’ stage, when the diversity of national policy preferences and national institutional features, such as regulatory structures and styles, among the EU member states may be reflected in variable patterns of domestic implementation: the ‘domestication’ of EU-agreed policies.<sup>14</sup>

In what follows we examine the relationship between the aforementioned sets of variables and in particular the question of *whether* and *how* market and technological variables might impact on the capacity of the EU institutions for policy transfer. In this connection, we contend that globalization and technological change, because they ‘privilege’ neo-liberal ideas, will strengthen the potential of EU institutions for using or threatening to use the ‘coercive’ instruments of liberalization at its disposal – namely, the legal powers of the ECJ and the direct competition powers of the Commission. Further, globalization and technological change will produce a convergence of actor interests, and a consequent orientation towards pragmatic problem-solving rather than political bargaining in EU negotiations<sup>15</sup>, thereby having a ‘facilitating’ effect on negotiated policy transfer in the EU.<sup>16</sup>

If exogenous factors such as globalization and globalizing technologies are very strong, clearly the EU institutions might be held strictly speaking to constitute an *intervening* rather than truly *independent* variable. However, it is possible that EU institutional variables may exert a veritable independent effect. The ‘conventional’ view that sees recent changes in EU governance (towards the ‘regulatory state’) as akin to a regional sub-category of globalization has been challenged.<sup>17</sup> Moreover, globalization pressure, it has been pointed out by many, may not predispose actors towards convergent policies. Instead, techno-economic change can produce diverse national responses; it does not necessarily lead at all to convergent national policies.<sup>18</sup> As Cerny has argued, the ‘competition state’ comes in many guises: the Anglo-Saxon neo-liberal competition state is merely the one that is often held (naturally by

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inquiry, but clearly we cannot pursue it further herein. See e.g. Edgar Grande and Volker Scheider, ‘Reformstrategien und staatliche Handlungskapazitäten: Eine vergleichende Analyse institutionellen Wandels in der Telekommunikation in Westeuropa, Politische Vierteljahresschrift, 32 (3) 1991, pp. 452-78. The complex relationship between national preferences, national institutional profiles and EU policy transfer is a key theme of Bulmer, Dolowitz, Humphreys and Padgett, *Policy Transfer*.

<sup>14</sup> To express this point in terms of the Europeanisation literature, the national diversity influences patterns of ‘uploading’ and ‘downloading’: see Tanja Börzel, ‘Pace-Setting, Foot-Dragging and Fence-Sitting: Member State Responses to Europeanization’, *Journal of Common Market Studies*, 40/2, 2002, pp. 193-214.

<sup>15</sup> Fritz W. Scharpf, ‘The joint decision trap: lessons from German Federalism and European integration’, *Public Administration* 66, (1988); Adrienne Héritier, *Policy-Making and Diversity in Europe: Escape from Deadlock*, (Cambridge: Cambridge University Press, 1999), pp. 19-20.

<sup>16</sup> Indeed, comparison of the telecommunications and electricity sectors does suggest that external variables (‘globalisation’, new technologies) were very important for explaining the different timing, pace and extent of the reforms of the governance of these sectors in Europe. See Peter Humphreys and Stephen Padgett, Globalization, the European Union, and Domestic Governance in Telecoms and Electricity, *Governance*, 19/3, July 2006, pp. 383-406. See also Bulmer, Dolowitz, Humphreys and Padgett, *Policy Transfer in European Union Governance*, 186-7.

<sup>17</sup> See, for instance, a paper by Nicolas Jabko, ‘The Political Origins of the Regulatory State’, prepared for the conference on “Theories of Regulation” organized by David Levi-Faur at the Pompeu Fabra University, Barcelona, November 29-30, 2002.

<sup>18</sup> See, e.g. Vivien Schmidt, (2002) *The Futures of European Capitalism* (Oxford: Oxford University Press).

economic liberals) to be most ‘congruent’ with globalization; strong features of the dirigiste or mercantilist competition state may endure in other countries, not least in continental Europe.<sup>19</sup> Equally, it is conceivable that the *independent* effect of action by EU institutions might be capable of counteracting this diversity of national responses to globalization.

### **Of phone and planes ...**

Air transport and telecommunications share a number of broad characteristics with other sectors that have been subject to liberalisation in the period since the single European market, including postal services and electricity. Specifically, they are ‘network sectors’ comprised of terminals, links and nodes.<sup>20</sup> The liberalisation challenge for these sectors has been to unbundle them and to introduce competition in service provision. How can we unpick these developments and identify the different stimuli arising from globalisation and technological change? The key forces for change have been technology, corporate dynamics, international policy trends and the role of international agencies.

Until the 1980s telecommunications was assumed to be a natural monopoly, normally supplied by part of the state: the PTTs (Post, Telegraph and Telecommunications). The state provided a public good (*service public*) and assured universal service to all citizens. Rapid **technological change** in the 1980s and 1990s completely changed the character of the telecommunications network. Terminal equipment was revolutionised by computerisation; multiple technologies emerged to provide competing networks (cable, satellite, microwave and mobile telephony – followed later by the internet); and the shift from mechanical to digital/packet switching at nodes expanded the capacity of the networks. The sector is no longer regarded as a natural monopoly and technology can easily bypass any effort to retain the integrity of a national telecommunications market. In turn this technological change has fuelled globalisation. Telecoms provision and price became important determinants of business location, thus unleashing regulatory competition in the sector.

The impact of technology on the air transport sector was rather different. It was already international in orientation. There were, of course, technological advances: jet aircraft, wide-bodied planes, fuel-efficient jet engines and the growth of smaller, regional airliners. However, these changes did not of themselves undermine the default situation in most European states, namely: a state-licensed/owned national flag-carrying airline; bilateral regulation by governments of market access (one airline per country); bilateral price-fixing and revenue-sharing between airlines; and state subsidies to cover any operating losses.<sup>21</sup> The key difference was that airspace was regarded as a matter of national sovereignty in a way that telephone infrastructure was

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<sup>19</sup> See Peter Humphreys and Seamus Simpson, ‘Globalization, the “Competition” State and the Rise of the “Regulatory” State in European Telecommunications’, *Journal of Common Market Studies*, 45 (3), 2007, forthcoming.

<sup>20</sup> Nicholas Argyris, ‘Regulatory Reform in the EU Utilities Sectors, with Particular Reference to Telecommunications’, paper at UACES annual conference, University of Surrey, 7 January 1997.

<sup>21</sup> For a more nuanced and detailed version of the *status quo ante*, see K. Armstrong and S. Bulmer, *The governance of the Single European Market*, Manchester, Manchester University Press, 1998, pp. 171-5.

not. Moreover, many of the technological advances relating to the terminals, links and nodes have post-dated liberalisation, responding to the congestion that has ensued from greater competition. Examples include introducing competition into ground-handling services and improving air traffic control systems and their inter-operability.

Changing **corporate dynamics** are a typical response to the availability of new technology. In telecommunications four discrete markets can be observed: for equipment; basic services; advanced services; and infrastructure. Equipment suppliers had traditionally had a very close relationship with ‘their’ national PTT. However, the high costs of the new technology encouraged industry consolidation, which took place on an international basis. The initial liberalisation by the EU of advanced services encouraged a surge of corporate alliances between key European telecommunications providers with other global corporations, such as AT&T, Sprint and MCI, as well as with each other. The objective here was to offer global telecommunications solutions to the corporate sector. But this ‘global player vocation’ led the telecommunications incumbents to relax their obstruction of the liberalisation of basic services (voice telephony) for consumers and of the infrastructure. Efforts by individual telecommunications providers – by incumbents and new entrants alike - have followed the market opportunities offered by new technologies and by the opening of national markets as EU liberalisation took hold.

Corporate behaviour in air transport has tended to follow regulatory rather than technological change, reflecting the distinctive significance of national sovereignty in shaping the sector. The bilateral regulation of market access on international routes determined the licensing of nationally owned carriers, and often nationalised ones at that. Only in the UK, with a long-standing multi-airline policy for domestic and international services that permitted the development of private-sector carriers (for example, British Caledonian) and in the Netherlands, where KLM was not wholly state-owned, were there corporate pressures to change the character of the sector. Sir Freddie Laker’s transatlantic ‘Skytrain’ service and domestic liberalisation under the Thatcher government represented new market opportunities but it was not until the wholesale changes in regulatory structure, brought about in the 1980s and 1990s by the EU, that corporate re-structuring developed apace. Flag-carriers used alliance strategies and mergers and acquisitions to develop (or defend) market-share. Privatisation became a parallel process, starting with British Airways in 1987. Financially weaker carriers, such as (initially) Air France, Alitalia and Olympic (of Greece), were dependent on state aid. The Belgian carrier SABENA went bankrupt in 2001. However, the growth of low-cost carriers (LCCs) with full EU liberalisation in the 1990s brought fast-growing new entrants, such as easyJet, Ryanair and Air Berlin, creating pressures on the previously discrete sub-sector of charter airlines. These carriers, traditionally associated with offering flights in conjunction with package holidays, found a new challenge from consumers booking their own vacations using a combination of LCCs and accommodation arranged over the internet.

In both sectors **international trends** in policy played a significant role in spreading ideas about policy development. Neo-liberal ideas have been prominent. They are important to both sectors but in air transport, given the absence of any specific technological trigger, play a proportionately more significant role. International trends can unleash regulatory competition, as suggested earlier in the paper, or even ‘herding’ whereby actors follow signals from the international system rather than

designing policy in response to 'local' circumstances. The basic ideas of air transport liberalisation can be traced back to the 1978 Airline Deregulation Act under the Carter Administration. This reform was confined to domestic transport in the United States (USA), however, and did not immediately lend itself to international air transport because of presumptions about the sovereignty of airspace. Significantly, some liberalisation was sought in bilateral regulation between the USA and the Netherlands, while the Thatcher government moved to de-regulate domestic air transport. These two European states were to be key players in the air transport policy transfer process. In telecommunications a number of regulatory and legal decisions taken under the Reagan presidency were decisive.<sup>22</sup> The transformation of the former US telecommunications monopoly operator AT&T into a data-processing business resulted in its emergence onto the world market, along with competing firms. The US Administration championed this development. The UK and Japan embarked on their own policy reforms, thus giving global liberalisation an irresistible stimulus and promoting the international exchange of policy ideas on sectoral regulation. Mostly hesitant at first, the continental European governments came to accept that – ultimately - full liberalization was vital for the competitiveness both of their national telecommunications sectors and, given the latter's strategic importance, of their economies at large.

Unsurprisingly, a range of **international actors and organisations** have played a role in both sectors, both at European and international levels.<sup>23</sup> Long-standing sectoral bodies such as the International Telecommunications Union and the International Civil Aviation Organization (comprising governments) and the International Air Transport Association (IATA, comprising major airlines) declined in importance as the liberalisation process gathered momentum. However, the Paris-based European Civil Aviation Conference (ECAC), the regional counterpart to the ICAO, and with a membership approximating that of the Council of Europe, proved to be an important agent in policy transfer. With the European Communities not having clearly established responsibility for air transport, ECAC proved to be an important body for discussing the ideas and experience of de-regulation in the USA. Under the influence of the British and Dutch governments, the key protagonists of liberalisation, ECAC produced the COMPAS Report, a possible blueprint for reform of bilateral air transport in Europe.<sup>24</sup> The report was controversial within ECAC; it was not official policy. In telecommunications a major development has been the sector's emergence as an issue in international trade negotiations. In 1986, as the momentum towards liberalisation gathered pace, the USA and the United Kingdom (UK) were able to place telecommunications services on the agenda of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). Global liberalisation of the sector subsequently played a key role in negotiations within the World Trade Organisation (WTO).

A key distinction between the sectors was the fact that telecommunications had always been seen as of special strategic economic importance (rather akin to the

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<sup>22</sup> Jeremy Tunstall, (1986) *Communications Deregulation: The Unleashing of America's Communications Industry*, Oxford: Blackwell.

<sup>23</sup> See Bulmer, Dolowitz, Humphreys and Padgett, *Policy Transfer in European Union Governance*, pp. 50-3.

<sup>24</sup> ECAC European Civil Aviation Conference (1982) 'Report on Competition in Intra-European Air Services', ECAC Doc. No. 25, Paris: ECAC.



defence sector). In telecommunications, much more so than air transport, a mercantilistic ‘competition state’ orientation was strongly evident as states typically pursued highly interventionist strategies to promote technological development in terminals, advanced services and networks for the sake of national economic competitiveness, increasingly so as telecommunications came to be perceived as the ‘nerve system’ of the global information society. The ways states did this varied according to their differing ‘competition state’ institutional architectures, state traditions, policy styles, resource endowments and strategic capacities.<sup>25</sup> Thus, states’ responses to the pressures of the international regulatory competition unleashed by US liberalisation varied considerably: the UK, for instance, embraced a distinctly neo-liberal approach, whilst mercantilist France by contrast continued to favour a stronger role for the state. Path dependence meant that this diversity of ‘competition state’ institutions and regulatory practices was likely to shape, and be reflected in, the emergent EU liberalization regime.<sup>26</sup> Above all, though, the perceived high strategic importance of telecommunications made it unlikely that the ‘competition states’ would cede control to a centralized European regulatory authority. In air transport national mercantilist strategies over the *airliner* manufacturing industry at national level, notably in France, the UK and, to a lesser extent, the Netherlands, had been superseded by the emergence of Airbus.<sup>27</sup> The liberalisation of air transport was not regarded as intimately linked to the fate of Airbus, however. Of course, national governments typically championed their own flagcarrying airline. Similarly they also supported the strategic development of a major airport within their boundaries (London Heathrow, Amsterdam Schipol and so on). But the more ‘physical’ nature of the sector (aircraft, airports) and the continued assumption of national sovereignty over airspace militated against the regulatory competition that has been evident in the telecommunications sector

### **Building the EU Regimes**

In examining policy transfer at this phase of the policy cycle we explore three hypotheses. The first is that qualified majority voting in the Council of Ministers – particularly if practised, but in any event if provided for – has the potential for enabling stronger forms of policy transfer (emulation or synthesis). By contrast, unanimity is likely to only permit a weaker form: influence or even abortive transfer. Our second hypothesis is related, namely that the processes and outcomes of policy transfer are dependent on the mode of negotiation employed. The key distinction here is between *bargaining* and *problem-solving* patterns of EU decision-making.<sup>28</sup> The

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<sup>25</sup> In Cerny’s words, the ‘competition state ...comes in myriad forms’. Philip Cerny, ‘Restructuring the Political Arena: Globalization and the Paradoxes of the Competition State’, in R.D. Germain (ed.) *Globalization and its Critics: Perspectives from Political Economy*, London: Macmillan, 2000, p. 130.

<sup>26</sup> See Peter Humphreys and Seamus Simpson, ‘Globalization, the “Competition” State and the Rise of the “Regulatory” State in European Telecommunications’, *Journal of Common Market Studies*, 45 (3), 2007, forthcoming.

<sup>27</sup> See Martin Staniland, *Government Birds. Air Transport and the State in Western Europe*, Lanham, MD: Rowman and Littlefield, 2003, pp. 138-66.

<sup>28</sup> On these patterns, see Fritz Scharpf, ‘The joint decision trap: lessons from German federalism and European integration’, *Public Administration*, 66/3 (1988): 239-78; Adrienne Héritier, ‘The accommodation of diversity in European policy-making and its outcomes: regulatory policy as a patchwork’, *Journal of European Public Policy*, 3/2 (1996): 149-67; O. Elgström, and C. Jönsson, ‘Negotiation in the European Union: bargaining or problem-solving?’ *Journal of European Public*

latter variant emphasises mutual gains and is likely to enable stronger transfer outcomes, whilst the former is more self-interested and conflictual and therefore likely to enable weaker forms of transfer. Thirdly, the use of pre-existing EU institutional powers under hierarchical governance, notably ECJ rulings or the Commission's use of its quasi-judicial powers can also serve to bring about coercive policy transfer.<sup>29</sup> These three hypotheses are utilised in order to shed light not only on the importance of EU institutions but also to judge their explanatory power alongside that of globalisation.

## Telecommunications

In telecommunications, EU liberalization occurred through a two-stage negotiation process. The first stage saw the incremental enactment during the 1990s of a series of Commission liberalization Directives, under EU competition law (Article 86). At first this apparent by-passing of the customary community method of negotiation in the Council and European Parliament (EP) was very controversial, but the European Court of Justice (ECJ) responded to the contention of some member states that the Commission's use of this competition article in this way exceeded its powers by ruling that its use of this 'coercive' instrument was in order. However, in reality, the Commission was very careful – not least because of the controversy over the liberalisation procedure – to move forward in consensus with the member states. Hence, from the so-called 'Open Network Provision (ONP) compromise' of 1990 onwards, the liberalization Directives were accompanied by a series of Council and Parliament regulatory harmonization Directives, which culminated in the '1998 regulatory package' of sector-specific telecommunications rules, negotiated in the customary manner. The second stage – essentially the negotiation of a new electronic communications regulatory framework, agreed in 2002 – did not prescribe any new liberalization, apart from a single very important EU regulation opening up the incumbent's dominance of the 'local loop' (the 'last mile' from the local exchange to the household), and essentially amounted to a streamlining of the 1998 regulatory package; it reduced the number of Directives and aimed at a reduction of the regulatory burden as markets were judged to become open and competitive.<sup>30</sup>

EU telecommunications liberalization therefore involved an important element of *harmonising re-regulation*. This meant the design of new EU-wide regulations and regulatory instruments to establish a level playing field for the promotion of competition and to prevent the former monopoly operators (the incumbents) from abusing the market dominance that they carried over from their former monopoly status to the disadvantage of new entrants. Inevitably, in the negotiation process the member states, whose liberalization and re-regulatory preferences varied according to their different competition state orientations and their various resource and strategic capacity endowments, had the opportunity to shape the EU regime to minimise the anticipated adaptation costs that they would incur, by 'up-loading' their preferences into the EU regime. Very broadly, the UK led a 'northern camp' of liberalization

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Policy 7/5 (2000): 684-704; also Bulmer, Dolowitz, Humphreys and Padgett, *Policy Transfer in EU Governance*, p. 21.

<sup>29</sup> For fuller elaboration, see Bulmer, Dolowitz, Humphreys and Padgett, *Policy Transfer in EU Governance*, p. 21-3.

<sup>30</sup> For a detailed account see Humphreys and Simpson, *Globalisation, Convergence and European Telecommunications Regulation*, pp. .

‘pace-setters’; France led a camp of liberalization ‘foot-draggers’, much more concerned about retaining state control of the sector; while Germany – largely due to complex domestic political constraints<sup>31</sup> – was a ‘fence-sitter’.<sup>32</sup> However, over time, an EU-wide consensus in favour of full telecommunications liberalisation emerged.

What were the impacts of – and the relationship between – our independent variables? Firstly, the effects of globalization (and globalizing technologies) were clearly a very important factor for achievement of the basic member state consensus over full liberalization. The global ambitions of incumbent operators in a number of ‘fence-sitting’ (Germany) or ‘foot-dragging’ (France, Spain) states was a major factor in shifting national positions towards full liberalization (and, indeed, also part-privatisation of the incumbents, which was not part of the EU package). Secondly, globalization clearly gave the EU institutions a strong normative mandate to push forward the liberalization agenda, manifest in the Commission’s use of Article 86 to issue the liberalization Directives under its own authority and also manifest in the European Court of Justice’s support for such a procedure. Given the emergent Member State consensus, the element of coercion should certainly not be overstated, yet the fact remains that the negotiation of the Council and EP regulatory harmonisation Directives did occur under the ‘shadow of coercion’. As one interviewee in the Commission (July 12, 2000) pointed out in connection with the crucially important ‘ONP compromise’: ‘The [Commission] directive liberalizing services was “self standing”, [having] all the basic elements which would make it possible to function, should the Council block the other Directives. So there was a strong political push for the Council and Parliament to agree the ONP directive’<sup>33</sup>. Thirdly, globalization affected the style of EU negotiation. After some early polarization between liberalization enthusiasts and laggards, the negotiations soon exhibited a problem-solving, rather than a hard bargaining, style. For the most part, disputes were resolved in COREPER working groups. Globalization therefore clearly had an important impact on the institutional dynamics of EU policy transfer. While clearly the EU’s policy transfer capacity was considerably strengthened by the Commission’s use of its hierarchical powers and by the problem-solving style of negotiation, with globalization playing a role, it is less clear that qualified majority voting was an important factor. The regulatory harmonisation Directives all provided for QMV. The shadow of the vote may have served to alter the negotiating calculus of some member states. However, the causal effect of QMV is hard to judge given the dynamics of globalization and other EU institutional effects that have been described.

Despite the broad consensus in favour of liberalization, in telecommunications the national preferences variable was reflected first of all in the timing of the

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<sup>31</sup> For detail on Germany’s ‘fence-sitting’, and its subsequent turn towards full liberalization, see Simon Bulmer, David Dolowitz, Peter Humphreys and Stephen Padgett, ‘Electricity and Telecommunications: Fit for the European Union’, in Kenneth Dyson and Klaus Goetz (eds), *Germany, Europe and the Politics of Constraint*, Oxford: Oxford University Press, pp. 251-69.

<sup>32</sup> See Tanja Börzel, ‘Pace-Setting, Foot-Dragging and Fence-Sitting: Member State Responses to Europeanization’, *Journal of Common Market Studies*, 40/2, 2002, pp. 193-214.

<sup>33</sup> The principal of Open Network Provision underpins the whole EU regulatory framework for the liberalized telecommunications sector. It establishes the principle of harmonised conditions of access to public networks and services according to standards of objectivity, transparency and non-discrimination. It was first enacted in the Framework Directive that accompanied the Commission’s advanced services directive; ONP was subsequently enacted for leased lines and then voice telephony services.

liberalization process. The need to respect differing Member State orientations explained the incrementalism of the EU liberalization process, which occurred over the period 1988-1998. An important result of this timing was that much of the EU liberalisation process occurred after the Maastricht Treaty had strengthened subsidiarity in the EU, thereby making it even less likely (than already suggested above) that the member states would cede control to a centralized EU regulatory agency for telecommunications. Secondly, the fact that the Commission liberalisation Directives were accompanied by Council and EP regulatory harmonisation Directives gave the opportunity to so-inclined countries (most notably France and Belgium) to mainstream *service public* provisions (for instance, the universal services directive) in the 1998 regulatory package. The UK model was clearly only 'influential'. The UK's own early liberalization steps gave credence to the Commission's proposals and the UK formed a special policy axis with the Commission. Above all, the UK's success in stimulating new services, transforming British Telecom into an international player and promoting the UK as an attractive business location, exerted a major demonstration effect on the 'foot draggers' and 'fence sitters', and strengthened the Commission's hand in pushing reform onwards. However, the EU model that emerged was inevitably a 'synthesis' of Member State influences, and – perhaps above all - it allowed considerable scope for national discretion at the transposition and regulatory implementation ('downloading') stage, as will be seen in the next section.

#### Air transport

The experience with air transport liberalisation exhibits parallels but also some important distinctive features. Early efforts at liberalization within the European Communities from the late-1970s were frustrated by the lack of clear supranational competence. A very limited piece of legislation – the Council Directive on Inter-Regional Air Services – was agreed in 1983; otherwise, powers remained with member governments. Discussion of more significant moves for liberalisation was confined to ECAC, where the British and Dutch delegations were influential on the COMPAS Report, which however did not represent official ECAC policy. The report was in turn influential on the Commission's Memorandum No. 2, published in 1984.<sup>34</sup> However, the pressures of globalisation were insufficient to drive the policy debate in the direction of liberalisation. In fact the key changes to the negotiating context came from four institutional developments.

First, in April 1986 the ECJ's *Nouvelles Frontières* judgement ruled that the existing regulatory arrangements underpinning air transport between the member states were in breach of European competition law.<sup>35</sup> In June the Commission's competition directorate-general charged ten airlines with infringements but used proceedings as a threat suspended over member governments and their airlines, should they not agree to liberalisation in the regular policy-making process. The timing of this action coincided with the second development, namely the dynamic new Delors Commission and its pro-active Competition Commissioner, Peter Sutherland. Thirdly, air transport liberalisation had been included, albeit in rather vague terms, in the Commission's White Paper on completing the internal market. The single market, of course, had a

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<sup>34</sup> CEC (1984) Towards the Development of a Community Air Transport Policy, COM (84) 72 final, Brussels.

<sup>35</sup> Joined cases 209-13/84, *Ministère Public v. Asjes and others* [1986] ECR 1425.

major dynamising impact on the EC in the late-1980s.<sup>36</sup> Finally, the Single European Act of 1986 included a treaty change that provided for QMV on air transport policy. These new institutional resources at supranational level were crucial to air transport liberalisation.

Up to that point the governments of the UK and the Netherlands, the protagonists of liberalisation, had been unable to make much headway beyond secure some sympathy from the European Commission. Instead they had turned their efforts to bilateral steps of varying degrees of liberalisation. The initial move in 1984-5 was to liberalisation with each other and then through more limited measures with other states, such as Ireland, Luxembourg, Belgium and Germany. The French and Italian governments remained wedded to the public service ethos and were hostile to EC-wide liberalisation. Germany and Denmark had special concerns that led them to caution: in the former case the country's division and Lufthansa's inability to fly to Berlin under its four-power status; in the latter the tri-national nature of its flag carrier, Scandinavian Airlines System, was problematic in view of the absence from the EC of Sweden and Norway. The general rule was that the flag carrier's policy was aligned with that of its respective government, so British Airways and the independent carrier British Midland along with the Dutch KLM were amongst the few corporate protagonists. Labour was hostile for fear of seeing a decline in working conditions such as had occurred following de-regulation in the USA.

The basic thrust of the Commission's Memorandum No. 2 was threefold: to replace existing multiple bilateral regulatory regimes with one supranational one; to reduce collusive behaviour between governments/airlines on access to the market, tariffs and revenue-sharing; and to apply European competition rules except in the case of certain negotiated exemptions. The achievement of these goals was blocked by member state resistance until the 1986 *Nouvelles Frontières* ruling which, together with the Competition Commissioner's threatened legal action, forced the foot-dragging majority of states into problem-solving mode, for the *status quo ante* could no longer be defended. Thus it was the impact of the ECJ ruling that facilitated the first, December 1987, package of measures by providing a strong normative mandate for liberalisation. QMV was not really a factor at this stage because the SEA only came into effect shortly before agreement.

The first package, like its successors, liberalised fares, access to the market as well as adjusting the competition rules applicable in the sector. Succeeding packages were agreed in 1990 and 1992 but it was not until 1997 that full liberalisation was operational. The negotiation of the second and third packages was not easy and various concessions or time-limited derogations were agreed in order to secure agreement. These concessions were made in a problem-solving context, designed to buy off potential opponents and build up a significant majority support, if not complete consensus. By the third package the foot-draggers had been reduced in numbers to southern states, such as Portugal and Greece. Following unification Germany became a cautious protagonist, while Ireland proved to be a 'swing state', having come to see the benefits of Anglo-Irish bilateral liberalisation (which had given rise to the creation of Ryanair). The threat of a decision by QMV was more important than its actual usage.

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<sup>36</sup> Armstrong and Bulmer, *The governance of the Single European Market*.

By 1997 the whole basis of air transport liberalisation had been transformed and paved the way for the emergence of LCCs across the EU, the establishment of new routes, the growth of new airport hubs served by LCCs (such as Frankfurt Hahn, Berlin Schönefeld London Stansted and Girona). This development was remarkable, given the original protagonists represented a minority position within the EC. In view of the international nature of the reforms they were more radical than the domestic ones in the USA.<sup>37</sup> In terms of policy transfer the UK – specifically encouraged by the free-market Secretary of State for Transport, Nicholas Ridley, in the second Thatcher government – and the Netherlands had exported the ideas of liberalisation to ECAC. The COMPAS report was a valuable blueprint for the Transport Directorate General of the Commission. With the coercive power of the *Nouvelles Frontières* ruling suspended above the Council of Transport Ministers, there was an important transfer of policy ideas to the EC. By the time of the final package, measures had gone beyond those in the COMPAS Report. The EC’s institutional resources, specifically its ECJ rulings and the threat by the Commission to use its competition powers were decisive in creating the problem-solving climate in the Council. Indeed, the strongest element of policy transfer was arguably the exporting of competition rules (through ECJ rulings) to a sector that had been presumed exempt from them. Globalisation had a background effect but nothing more specific than that, as is evidenced in tortuous efforts to establish liberalised *external* agreements. It was not until 2007 that an Open Skies agreement was secured with the USA. As for national variables, the need to take into account differing circumstances was handled through phased introduction of liberalisation and time-restricted derogations in certain cases. The dynamics are therefore different from those in telecommunications. Another important distinction, as will be seen in the next section, is that the air transport legislation was by means of Regulations, thus eliminating member states authorities’ discretion. In consequence, EU authorities assumed *exclusive* regulatory competences for overseeing the operation of the single aviation market: another stark contrast with telecommunications.

## Regulating the EU Regimes

In exploring the character of the ensuing regulatory regimes for telecommunications and air transport we focus on the factors that have promoted the practice on the ground (or air!) of the agreed regulatory regimes. We may identify two ideal-type regulatory regimes. One is based on governance by hierarchy, where the supranational authorities have strongly enshrined powers. In ideal-type format such regulatory regimes are supported by dense rules, sanctions (or incentives) on the part the supranational institutions, judicial powers, legislative instruments and a supportive set of political norms. Our hypothesis is that regulatory regimes of this type bring about strong policy transfer effects (emulation or synthesis). A second type of regulatory regime relies upon facilitated governance. In this case we find the EU playing a facilitating role, deploying soft or flexible rules to persuade member states to reassess their policy practices. Although much less densely institutionalised than under hierarchy, there can be significant variation depending on the terms of reference for

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<sup>37</sup> As a result of a further ECJ judgement in 1989 the European legislation also applied to domestic air transport in the member states. See *Ahmed Saeed Flugreisen und Silver Line Reisebüro v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*: case 66/86 [1989] ECR 803.

the regime, the density of networks, the different patterns of operation (benchmarking, peer review etc.). Policy transfer effectively occurs by diffusion between member state authorities. We hypothesise that transfer under such conditions will be more limited (influence or abortive). These are two ideal types of regime. In what follows air transport corresponds most closely to a hierarchical regime. Telecommunications, by contrast, exhibits a mixed pattern.

### Telecommunications

The EU regulatory regime for telecommunications that emerged from the 1998 package, only slightly modified by the streamlined 2002 package, is a mixture of EU-hierarchy and national discretion. Because of the member states' persistent refusal to countenance the establishment of a European regulatory agency for telecommunications - despite some support for the latter from within the Commission<sup>38</sup> and strong support from the European Parliament, transnational telecommunications users and new entrants - regulatory responsibility resides primarily with National Regulatory Authorities (NRAs) acting under national law but in conformity with EU legislation. While the telecommunications regulatory regime is still strongly defined and institutionalized (in comparison with electricity for instance), the EU Directives nonetheless allowed considerable scope for 'domestication' in their transposition into national law by the member states and in their implementation by the national regulators, principally the NRAs. Moreover, while the Commission clearly has powers to initiate legal action against the member states' non-compliance with EU-agreed principles and practices, it has tended to rely more on its 'softer' powers of persuasion. It has preferred to 'name and shame' poor performers through regular implementation reports (12 to date), to draft benchmarks, conduct inquiries into particular markets, to issue reports on particular regulatory issues, and generally encourage wherever possible mutual policy learning among the national regulators.

What is the significance of these characteristics of the EU regulatory regime for EU policy transfer in telecommunications? In fact, the way that the new regulatory institutions (notably the NRAs) have been configured and the spirit in which the new regulatory principles and instruments have been operationalized by the member states has been crucially important for the functioning (as distinct from the merely formal legal establishment on 1<sup>st</sup> January 1998) of the internal market in telecommunications and, in turn, for the Commission's avowed goal of the creation of globally competitive pan-European telecommunications players and a competitive European information society. When sufficient discretion is left to the member states, a nominally pro-competitive regulatory regime can plainly have a 'Janus-face'. Regulatory activity might either be deployed in the spirit of the neo-liberal 'competition state' to promote new economic activity and investment through diligent market opening, or alternatively it could be deployed in more mercantilistic fashion, to give national champions (usually the incumbents) a regulatory subsidy.<sup>39</sup>

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<sup>38</sup> It was a recommendation of the 1994 Bangemann report.

<sup>39</sup> See Humphreys and Simpson, 'Globalization, the "Competition" State and the Rise of the "Regulatory" State', forthcoming.

Examination of the domestic regimes in the telecommunications sector suggests considerable evidence of the latter.<sup>40</sup>

The regulatory harmonisation Directives established a set of principles and minimum requirements that the member states were obliged to implement, but the means of implementation was a matter that allowed considerable discretion to the member states. Thus, the 1990 ONP Directive specified only the need for regulation that was independent of the operators and sufficiently resourced; it did not attempt to harmonize the NRAs' institutional form or manner of operation. In fact, NRAs varied very considerably in terms of resources and therefore their regulatory capacities. They also differed considerably in terms of their independence, both politically and where states retained a stake in the incumbent also vis-à-vis these operators. Until recently licences were granted at the national level, the NRAs deciding whether individual licences were required or whether general authorizations would suffice. Although a 1997 Licensing Directive sought to restrict the use of individual licences and encourage market entry, in practice licensing regimes could vary considerably on a light-onerous scale in terms of the regulatory burden that they placed on new entrants. While the ONP (1990, 1992, 1995) and Interconnection Directives (1997) prescribed cost-orientation and transparency, the fact that it was left to the NRAs – not the Commission – actually to conduct audits of the operators' practice opened up scope for considerable variation here. Moreover, in order to ensure universal service, namely a minimum level of service at an affordable price for all users,<sup>41</sup> Member states were allowed discretion to impose special national requirements on operators.

The decentralized character of regulation-in-practice quickly revealed some regulatory shortfalls.<sup>42</sup> The main persistent problems have been: 1) Inconsistency in the conditions – light or onerous - that member states have attached to authorisations (licences). Despite a provision in the 2002 regulatory package mandating the granting of (light) general authorisations, inconsistency persists with regard to key areas of discretion that have been left to the member states, notably regarding the use of scarce radio spectrum. This has hampered the introduction of pan-European services. 2) There have been repeated complaints (from new entrants) about the lack of transparent procedures for the setting of interconnection tariffs, with suggestions of a regulatory bias towards the incumbents in some cases. 3) The inadequacy of mechanisms of dispute resolution and the suspension of regulatory decisions by some national courts during appeals. 4) The aforementioned variety in the quality of regulation and the weakness of some national regulators in terms of resources, expertise and/or independence. 5) A lack of consistency regarding remedies to competition problems that have been adopted in the different member states. It is highly significant that this was a key area of regulatory activity where the attempts of

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<sup>40</sup> For detail see Bulmer, Dolowitz, Humphreys and Padgett, *Policy Transfer in EU Governance*, pp. 136-78.

<sup>41</sup> This included the provision of the public fixed telephone network, supporting voice telephony, fax and voice band data transmission via modems (enabling basic Internet access); the provision of fixed public telephone service; the provision of operator assistance and directory services; the provision of public pay phones; and the provision of services under special terms and special facilities for customers with disabilities and special social needs

<sup>42</sup> For a powerful critique of this decentralized regulatory regime, see Giandomenico Majone 'The Credibility Crisis of Community Regulation', *Journal of Common Market Studies*, 38/2: 283. He goes so far as to cite telecommunications as an example of this 'credibility crisis'. This is not a position shared here, though the critique does point to real regulatory shortfalls.



the 2002 regulatory package to tighten up harmonisation failed to give the Commission a veto over NRA decisions (and which it is worth noting again currently features on the Commission's reform agenda). Moreover, a questionnaire survey of the NRAs revealed significant differences among them regarding their attitudes to the promotion of competition in telecommunications. For example, the Belgian regulator did not even believe that determining the effectiveness of competition was its responsibility. Above all, 'there were clear differences in perceptions of the extent to which competition had developed in telecommunications, the need for more competition and even of the desirability of the competition that had developed'.<sup>43</sup>

In sum, the experience of this two-tier, 'decentralised' governance regime in telecommunications, reveals that the transfer of supranational rules to the domestic level represents at best synthesis but more typically influence and some examples of abortive transfer (in instances of very weak or non-compliance by member states). The impact of national institutional profiles is important at this stage of the policy transfer process. Consequently, transfer is much weaker than in the hierarchical governance that characterises the air transport policy regime, to which attention is now turned.

#### Air transport

The distinctive characteristic of air transport regulation is the delegation of the key regulatory powers to the directorate general for transport (DG VII, then DG TREN). The use of Regulations pre-empted the need for domestic transposition of legislation: an important point at which national institutional patterns can undermine the fidelity of policy transfer to the member states. Thus in the limited areas where member state authorities are in fact empowered to take decisions, any misinterpretation – deliberate or otherwise – may be over-ruled directly by the Commission. Resort to the Court only occurs should the member state authority appeal against the Commission's action. It should also be underlined that the Commission's writ extends to regulating domestic as well as inter-state air travel. At the same time, the scope of the Commission to regulate some aspects of corporate behaviour in the sector – typically that of an anti-competitive nature – was reinforced. The Commission's authority on competition policy is also characteristically hierarchical in nature.

It is possible to identify three key consequences of the air transport regulatory regime. One concerns the direct operation of the legislation and tests of the Commission's resolve to uphold the agreed rules. Secondly, the European Commission had to tighten up its rules on state aid to ensure that some states – typically the laggards – did not try to subvert liberalisation through bailing out their flag carrier by underwriting its losses and thus undermining the notion of a level playing-field. A final aspect concerns the need to extend the scope of the regime, as related issues such as ground-handling or access to take-off and landing slots came into focus.

The Commission experienced some early tests of resolve on applying the rules, and they continue to this day. These tests have typically originated from laggard states. Thus, in 1993 the French authorities refused to allow TAT (a French airline which

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<sup>43</sup> See T. Dassler and D. Parker, 'Harmony or Disharmony in the Regulation and Promotion of Competition in EU Telecommunications. A Survey of the Regulatory Offices', *Utilities Policy*, 12, 2004, pp. 9-28.

was 49.9 per cent owned by British Airways, BA) and British airlines to fly from Paris-Orly to London Heathrow on the grounds of congestion at the former. Air France, however, had timetabled services for the route from March 1994. TAT appealed to the Commission and the decision of the French authorities was overruled. This and similar decisions quickly established that member state authorities had limited scope to exploit regulatory provisions unfairly. French authorities have also been challenged in regard to the allocation of 'slots' at Orly.<sup>44</sup> Another area of dispute has concerned national authorities' allegedly arbitrary declaration of routes as subject to Public Service Obligation (PSO): whereby airlines go through a tendering process rather than being able to compete on the route. For example, in 2006 Ryanair experienced a PSO declaration that ended its provision of services from the Italian mainland to Sardinia. A Commission investigation ruled in 2007, albeit after lengthy investigation, that the Italian authorities had breached the terms of EU legislation.

The success of the Commission in regulating state aids to airlines (under Articles 87 and 88 of the EC Treaty) has been rather more contested. Such subsidies are likely to favour incumbents – some still subject to partial or full state ownership – rather than private new entrants. Unusually control over state aids is in the hands of DG TREN (formerly DG VII) rather than DG Competition, as is the case generally. Would this location of authority result in industry-friendly rulings? The regulation of state aids was only really activated from the 1990s.<sup>45</sup> The proclivities of governments to give such aid is exacerbated by the cyclical nature of the industry and its susceptibility to adverse international conditions (such as the first Gulf War and '9/11', both of which led to a sudden drop in patronage).<sup>46</sup> Efforts to introduce a 'one time, last time' policy on state aid were not entirely successful, as Olympic and Alitalia came back for approval of a second round of assistance. The latter's 2005 aid from the Italian government was permitted as 'rescue aid', while the former was found to be illegal and to be repaid to the Greek government (which has still not occurred). A further important ruling on state aid went against Belgian authorities at Charleroi airport, a hub for the LCC and new entrant, Ryanair. The Commission ruled that payments made in connection with opening new services represented unfair state aid.<sup>47</sup> What is clear is that the Commission has become stricter over time in the application of the state aid rules.

The Commission has taken steps to extend the air transport regime through a number of measures. It has opened up ground-handling at airports to try to ensure there are competing providers and that an incumbent airline cannot use ownership of such

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<sup>44</sup> See Bulmer, Dolowitz, Humphreys and Padgett, *Policy Transfer*, p. 100.

<sup>45</sup> The Commission's policy statement is in CEC, *Report by the Commission to the Council and the European Parliament on the evaluation of aid schemes established in favour of Community air carriers*, SEC(92) 431 final, Brussels: CEC, 19 March 1992.

<sup>46</sup> In the latter case it was a major factor contributing to the bankruptcy of Belgium's SABENA as well as Swissair.

<sup>47</sup> These aids included payments made for each new service, preferential ground-handling charges and a 'marketing contribution' of €4 per passenger. See CEC 'Commission Decision of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi', at: [http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l\\_137/l\\_13720040430en00010062.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_137/l_13720040430en00010062.pdf), (accessed 1 May 2007).

facilities unfairly.<sup>48</sup> Progress has been slower on the pricing for airport services as well as on take-off and landing slots, where member states (and their airport authorities) have retained the whip hand.<sup>49</sup> A review of the third package was launched in 2003 and in July 2006 the Commission presented a proposed Regulation to tidy up some of the areas of ambiguity relating to the existing regime.<sup>50</sup> Over the period since liberalisation began the Commission's competition directorate general has made extensive rulings on a range of issues: mergers and acquisitions, price-fixing and airline alliances being notable amongst them.<sup>51</sup>

The experience in air transport supports the argument that hierarchical governance arrangements enable strong policy transfer outcomes, imposing the principles and rules of liberal markets on member state authorities. The outcome was not full fidelity of policy transfer, as several challenges to the rules by the French, Italian and Greek authorities reveal. Clearly, the concept of '*service public*' and a neo-mercantilist approach to 'national champions' were a factor. The main area where liberalization came under challenge was in connection with state aids. This was a different type of policy transfer, since there was no new legislation on this issue. Rather, it was more a matter of ensuring the state-aid regime was consistent with the philosophy of liberalization, with the European Commission issuing occasional policy communications. Hence it is not possible to see the mixed (but improving) performance on state aids as deficient policy transfer, since until 1992 there was no major policy pronouncement on state aids to airlines to *transfer*. The airlines involved in state aid investigations by the Commission show some correlation with the states which were reluctant liberalizers: France, Italy, Greece, Portugal and Spain. The decline in occurrences of state aid suggests that national authorities and the airlines have learnt the new rules of the game, albeit imperfectly in Greece.

Thus, when comparing the two sectors, there is little doubt that the mixed regime in telecommunications offers significant scope for the 'domestication' of EU-agreed principles and practices. By contrast, the hierarchical EU governance of air transport, leaves no doubt that hierarchy 'packs the stronger policy transfer punch'.<sup>52</sup>

## Conclusion

In reviewing the evidence presented in this paper we make four broad conclusions.

First, the two sectors revealed strikingly different dynamics. Whilst both sectors experienced technological change and a wave of deregulatory ideas originating in the

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<sup>48</sup> See Susanne Schmidt, 'A constrained Commission: informal practices of agenda-setting in the Council', in G. Schneider and M. Aspinwall (eds.), *The rules of integration: institutional approaches to the study of Europe*, Manchester: Manchester University Press, 2001, p. 135-8.

<sup>49</sup> See Bulmer, Dolowitz, Humphreys and Padgett, *Policy Transfer in EU Governance*, p. 107. For other new areas of intervention, see p. 109.

<sup>50</sup> Proposal for a Regulation of the European Parliament and of the Council on common rules for the operation of air transport services in the Community (recast), COM(2006) 396 final, Brussels, 18 July 2006: [http://ec.europa.eu/transport/air\\_portal/competition/doc/acte\\_en.pdf](http://ec.europa.eu/transport/air_portal/competition/doc/acte_en.pdf), accessed 1 May 2007.

<sup>51</sup> See Bulmer, Dolowitz, Humphreys and Padgett, *Policy Transfer in EU Governance*, p. 104-6.

<sup>52</sup> Bulmer, Dolowitz, Humphreys and Padgett, *Policy Transfer in European Union Governance*, p. 185.

USA, their impact in the European context was distinct. In telecommunications the emergence of competing networks and the inability to maintain borders meant that the point at which the continued benefits of maintaining a protected regime were soon outweighed by the costs of resisting liberalisation. The centrality of an efficient telecommunications system for the economy's well-being as well as for inward investment was key in introducing the dynamics of the competition state into the sector. For air transport, by contrast, borders and sovereignty were much more visible, thus enabling conservative member states to resist change. The costs of resisting liberalisation were much slower to show through. Regulatory competition was much less in evidence.

Secondly, and following on from this point, the Commission's usage of its hierarchical powers (Article 86) was working with the grain of the sectoral dynamics in telecommunications. Similarly, policy-making in the Council soon moved into a problem-solving mode, as member governments sought constructive ways to manage liberalisation. The character of the regime, with its scope for national discretion, created promoted policy transfer based on synthesis. The provision for, and use of, QMV only had supporting value. In air transport, by contrast, the EU's institutional resources served as an independent variable. The critical *Nouvelles Frontières* ruling changed the default position away from an inertia that reflected the wishes of a majority of conservative governments. Instead, the default became the need to find regulatory certainty to avoid damaging competition rulings. Under these circumstances the ideas that were contained in the COMPAS Report, and which had influenced the Commission's Memorandum No. 2, took on an influential position. As with telecommunications, but for different reasons, member governments adopted a problem-solving mode. In this case national preferences were met through time-restricted derogations and a phased legislative process. The provision for QMV simply strengthened the dynamics that had developed prior to the Single European Act's implementation. There was a much greater sense of emulation in the transfer of policy from ECAC and Memorandum No. 2, albeit mediated by lengthy transition periods.

Thirdly, the operationalisation of the regulatory regimes highlights the different potentials for policy transfer of hierarchic and facilitated governance. The telecommunications regime was characterised by a hybrid pattern, whereby NRAs' discretion mediated policy transfer from the EU level to the member states. National policy orientations, for instance towards the balance between market and *service public*, or the support to be given to national champions, varied. Some member states have appeared reluctant to give real regulatory power to the NRAs, and some national champions appear to have been favoured. National institutional profiles (regulatory policy styles, legal traditions, etc.) influenced in particular the character of the NRAs themselves. The Commission certainly had powers to enforce formal compliance, but its veto powers over NRA decisions were limited and, significantly, they did not extend to NRAs' remedies for competition shortfalls. While a significant amount of policy learning was quite densely institutionalised both within the EU telecommunications comitology and between the NRAs themselves in the Independent Regulators Group, the fact remains that the EU regulatory regime allowed for considerable 'domestication'. In air transport, by contrast, there was considerable fidelity in translating EU rules down to the member states. The latter

lacked discretion and where they tried to interpret rules differently from the Commission, the latter sought to overrule discriminatory behaviour.

Fourthly, the prime explanation for the weaker policy transfer capacity of the EU institutions in the case of telecommunications, despite the fact that EU institutions' policy transfer capacity was plainly reinforced by globalization and new technologies, would seem to be best explained by the very strong competition state responses of EU member states to these very same exogenous pressures. The member states refused to relinquish control of telecommunications to the EU, in the manner of air transport.

Air transport and telecommunications are crucial to the functioning of the modern economy. In each sector major changes have taken place over the last three decades. Our conclusion is that policy transfer can offer important insights into the dynamics of the policy process. In particular, when coupled with a robust methodology of process-tracing and elite interviewing, it can distinguish between the three competing sets of variables at play: external factors such as globalisation; the institutional resources of the EU itself; and the diversity of actor preferences and institutional profiles at national level.