No Innocents Here: Using Litigation to Fight against the Costs of Universal Service in France

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Abstract:

Liberalization of utility sectors may bring the benefits of competition to customers, but it also creates risks of manipulation of the new system by powerful industrial actors. Litigation is one tool available to undermine or delay effective regulation. In 2001 the European Court of Justice declared the French system of funding universal service in telecommunications un treaty, and ordered France to redesign it. The commission and observers understood the case as a triumph of open market over France’s narrow protection of the "national champion" French Télécom. An alternative interpretation that fits the data better describes the story as successful use of litigation by powerful industry actors to reduce burdens put on them as part of the liberalization system and delay implementation of rules that worked to their detriment. The paper addresses the tension between the agency accountability and the potential abuse of accountability mechanisms by regulated industry.

1 Associate Professor, UC Hastings College of the Law. I am grateful to Bruce Carruthers, David Coolidge, Aaron Rappaport, and François Varloot for very useful comments to previous versions of this project and to Frederic Carteron and Shelley Kennedy for invaluable research assistance and input.
Introduction

A major difference between United States and European practice and outlook is found in the relationship of regulation to competition. In the United States, opening a utility market to competition is described as “deregulation.” In Europe, however, opening a market to competition is seen as requiring careful regulation after monopoly rights and duties are cancelled, to prevent abuses from powerful corporate actors and protect valuable interests⁵. When I carelessly referred to the liberalization of the telecommunications market as “deregulation,” a Swedish interviewee corrected me: “No. Before, we had an unregulated monopoly. Now, we have regulated competition.”³ One reason for this difference in perspective can be attributed to a difference in starting points. The United States had traditionally provided utilities by means of licensed monopolies, which while heavily regulated were still privately held companies, while most countries in Europe provided utilities through nationalized industries administered directly by the state in some way. Thus, the U.S. already had a vast array of regulation in play, some of which was eliminated in order to permit competition. Another factor is that several countries in Europe distrust the market to deliver certain kinds of goods and thus

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³V incent Wright, Public Administration, Regulation, Deregulation and Reregulation, in Managing Public Organizations: Lessons from Contemporary European Experience, 244, 252-253 (Kjell A. Kooiman and Eliassen, Jan eds., 1993) (Describing the European context and showing that the result of reforms to liberalize sectors was reregulation, not just deregulation); Steven K. Vogel, Freer Markets, More Rules 16-18 (1996) (demonstrating that privatization led to deregulation, focusing on cases from Britain and Japan); Giandomenico Majone Cross-National Sources of Regulatory Policymaking in Europe and the United States, 11 J. of Pub. Pol'y 79, 85 (1991). This description is somewhat simplistic; careful observers of regulation across both Europe and the United States emphasize the connection between state withdrawal from delivery and public services and a growth in regulation. See the articles in the edited book Marc K. Landy, et al., Creating Competitive Markets: The Politics of Regulatory Reform (2007). Nonetheless, I believe it captures differences in the basic approaches.

⁵Interview with member of the Swedish Telecommunications Agency, PTS, in Stockholm, Sweden (Sept. 7, 2004). Some of the information included in this article has not appeared in publication before and is based on original empirical research conducted through open ended interviews with actors in Sweden, France and England in 2004. The interviews were conducted under guarantees of anonymity, as required to get the approval of the Institutional Review Board at UC Berkeley working under federal regulations to protect human subjects. For that reason, the names of the interviewees, and on occasion (when it’s too revealing) the specific location of the interview, will not be reported, though the date of the interview and the institutional affiliation of the interviewees will be reported.
see a need for careful regulation. Those involved in regulating the newly competitive
sectors correctly recognize that the greatest danger to successful liberalization is the
previous state monopoly (the “incumbent”), both because of its size and power and
because it has every incentive not to cooperate with the liberalization in normal
circumstances.4 Although in specific cases operators may have interests that would lead
them to support the move to liberalization,5 they are less likely to support the new
obligations placed on them following liberalization: they will naturally want to maximize
the advantages accruing to them from liberalizing while minimizing the restrictions
placed on their use of their market power. To balance this power advantage of the
previous incumbents, European Union institutions regulating utilities sectors tend to
focus on enforcing competition.6 This approach comfortably fits the emphasis in the EU

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5 For example, Thatcher convincingly argued that telecommunications operators in Europe supported liberalization and achieving freedom from the government as a way to reduce political control over them and political intervention in their actions and to get better access to capital. See MARK THATCHER, THE NATIONAL POLITICS OF EUROPEAN REGULATION: INSTITUTIONAL REFORM IN TELECOMMUNICATIONS, IN UTILITIES REFORM IN EUROPE, 11, 13 (David Coen & Mark Thatcher eds., 2001); MARK THATCHER, WINNERS AND LOSERS IN EUROPEANISATION: REFORMING THE NATIONAL REGULATION OF TELECOMMUNICATIONS, 27 WEST EUROPEAN POLITICS, 284 (2004). For electricity, several authors showed that EDF, France’s incumbent electricity operator supported, even though reluctantly, some liberalization since it would allow it to expand to other markets and it believed it is in a good position to withstand competition. IAN BARTLE, WHEN INSTITUTIONS NO LONGER MATTER: REFORM OF TELECOMMUNICATIONS AND ELECTRICITY IN GERMANY, FRANCE AND BRITAIN, 22 J. PUB. POL’Y, 1, 16 (2002); RAINER EISING POLICY LEARNING IN EMBEDDED NEGOTIATIONS: EXPLAINING EU ELECTRICITY LIBERALIZATION 56 INTERNATIONAL ORGANIZATIONS 85, 97-99; NICOLAS JABKO & RAINER EISING, MOVING TARGETS: NATIONAL INTERESTS AND ELECTRICITY LIBERALIZATION IN THE EUROPEAN UNION, 34 COMPARATIVE POLITICAL STUDIES, 742, 745-747 (2001). This willingness to support initial liberalization, however, does not undermine the point made here: the operators may have an interest in some liberalization, but they also have an interest in preserving their own market power as much as possible within the liberalized market.

treaties on ensuring free movement of goods and services and preventing protectionism of large national firms against competition. 7

However, the incumbent operator is not the only powerful economic actor in European member states. Some of the new entrants are also powerful corporations. The natural image of new entrant in communications for many laypeople is the small communications start up, which can be described in contrast to the huge, impersonal multi nationals or huge incumbents that initially dominate the market. There are certainly companies like that. 8 But many of the operators entering European communications market are “new entrants” to a specific country, but as describe in part 1.b, in no other way resemble a small start up. These sophisticated, powerful economic actors naturally want to maximize the benefits from liberalization. One avenue for them is to use the European Institutions to promote the aspects of liberalization they prefer – for example, access to the incumbent network – and at the same time use them to avoid the counterweights put in place to prevent harm from liberalization and avoid obligations put in place to protect valuable interests. That is not to say that these actors do not need protection against the incumbent, with its inherent advantages, just to caution that they should not be automatically seen as the “under dog”, a David needing help against a Goliath. That is not a criticism of these new entrants; part of the philosophy behind liberalization is that the entry of new competitors would bring to the sector the benefits of free market competition. Sophisticated competitors, out to maximize their benefits, can

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8 Does this need a reference? Seems pretty obvious to me. But I can add references to the British descriptions of the operators in their market, which includes some really small fragments, and to some start up sites.
probably balance the weight of the incumbent better than only small new companies, and thus contribute to competition. But the designers of the system and its regulators need to be aware that this is a battle of giants, and design the system to prevent abuses from either side.

This paper demonstrates that this concern is not only theoretical, by telling the story of how French operators attempted to avoid their universal service obligations through European and then French litigation. In 2001, the European Court of Justice (ECJ) found the French system of funding universal service in telecommunications to be in violation of EU law. Subsequent funding decisions were repeatedly attacked by operators in the French administrative courts, especially the Conseil d'État, for a number of reasons.

The decision and its aftermath can be seen—as the ECJ clearly saw it—as another attempt by France to put obstacles in the path of new entrants. Under this view, France does not share the ideology of free competition and unregulated markets and is anxious to protect its national champion, France Télécom, from competition through all means fair or foul. However, the battle around funding universal service can also be seen in another light—as a carefully thought out attack by sophisticated competitors on a regulatory scheme protecting a value they had no wish to pay for, universal service. A similar strategy—litigating to fight regulation—was adopted in the United States by industry actors unhappy with regulation aimed at them or burdens put on them. This paper

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suggests that that approach better fits existing data, and will be useful for understanding
the behavior of the operators after the ECJ decision, when they brought repeated cases
against universal service decisions by the French regulator.

Three general lessons emerge from this different reading of the battle around
French Universal Service Funding. First, it supports the warning mentioned above, that
the incumbent may not be the only actor with an incentive to combat or subvert the post-
liberalization regulatory framework, and that regulators and courts should be wary of
abuses of the system by new entrants too. Second, there is a real tension between the need
to provide private actors a forum in which to defend themselves against excessive
regulation and to protect their rights and the need to prevent use of the court system to
cause delays and torpedo regulation. Ways to resolve that tension need to be considered.
Finally, France’s universal service experience emphasizes the importance of designing
regulatory systems to prevent potential problems (or create procedural safeguards in the
right places)—an issue considered in other contexts. In this specific context, the
French experience casts doubts on the desirability of using an operator-supported fund to

Is the 1996 Act a Beginning or an End? available at:
visited April 22, 2010 (copy available with author). But see: Michael J. Legg, Verizon Communications,
Inc. v. FCC - Telecommunications Access Pricing and Regulator Accountability through Administrative
danger is from the regulators and judicial review is necessary. More generally, on the negative role of
courts in making it harder to regulate, see: Thomas O. McGarity, The Courts and the Ossification of
Rulemaking: A Response to Professor Seidenfeld, 75 Tex. L. Rev. 525, 539-556 (1996-1997).
Mandates, 59 Stan. L. Rev. 673, 712-713, 745-746 (2006) (why agencies are not always designed for
success); Robert F. Durant, Agency Evolution, New Institutionalism, and ‘Hybrid’ Policy Domains:
Lessons from the ‘Greening’ of the U.S. Military, 34 Policy Studies J. 469, 469-471 (2006); David E.
Lewis, Presidents and the Politics of Agency Design: Political Insulation in the United States
Structure, in Can the Government Govern, 267, 268-269 (Chubb and Peterson ed., 1989); B. Dan
Wood & John Bohite, Political Transaction Costs and the Politics of Administrative Design, 66 J. of
Politics 176, 178-182 (2004); Amy Zegart, Flawed by Design: The Evolution of the CIA, JCS, and
NSC 49-52 (1999).
finance aspects of public service operators may not share. Operators are more apt to act strategically to block a large annual assessment than they are to object to the addition of a small monthly charge to customers’ bills.

Part I describes the French market post liberalization, and the framework put in place by France to fund universal service. Part II describes the version of the story reflected in the ECJ decision. Part III suggests the alternative version and describes the data supporting it. Part IV discusses the implications of the story. I then conclude with some general observations.

Part I: Funding Universal Service in France

I.a: The Framework for Funding Universal Service

European Union law required all member states to open their telecommunications market to competition as of 1998. From then on, the invisible hand of the market should rule the sector, rather than the former state monopolies. However, alongside the impetus for reform, concerns were raised about the effect such reform might have on values important to the people of the member states, such as universal service. Universal service in this context refers to providing access to telecommunications in ways a “pure” free market would not (and see below for the details of the French concept).

13 GERADIN, supra note 4; JOHANNES M. BAUER, Regulation and state ownership: conflicts and complementarities in eu telecommunications 76 ANNALS OF PUBLIC AND COOPERATIVE ECONOMICS 151, (2005); PIERRE LAROCHE, Telecommunications, in THE LIBERALIZATION OF STATE MONOPOLIES IN THE EUROPEAN UNION AND BEYOND, 15 (Damien Geradin ed., 2000); WOLF SAUTER, Universal Service Obligations and the Emergence of Citizens' Rights in European Telecommunications Liberalization, in PUBLIC SERVICES AND CITIZENSHIP IN EUROPEAN LAW, 117, 134-136 (Mark Freedland & Silvana Sciarra eds., 1998).
An important literature addresses whether there should be a right to basic services like telecommunications and electricity. ¹⁵ However, in relation to telecommunications in Europe in general and France in particular the question is fairly well settled by law, and the argument is about implementation. Article 16 EC of the Treaty of Amsterdam said that:

“....given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfill their missions.”¹⁶

In the telecommunications context the European Union has officially enacted that access (though not free access) to telecommunications is an important and basic right. The Universal Service Directive states that liberalization goes hand in hand with securing the delivery of universal service. ¹⁷ Section 14 then goes on to say:

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¹⁶ For a more detailed description of the development of Universal Service in EU law and especially in relation to network services, see: Stéphane Rodrigues, La régulation communautaire des services publics de réseaux. Vers une théorie générale de la concurrence régulée ?, 44 FLUX 80, (2001).


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“The importance of access to and use of the public telephone network at a fixed location is such that it should be available to anyone reasonably requesting it.”

The details, however, are left to the member states, and can vary substantially. Similarly, the decision whether to compensate the operators providing universal service for their costs has been left to the member states—within certain constraints aimed at assuring that the funding mechanism will not give the incumbent an unfair advantage. A number of European states have chosen to potentially compensate their universal service providers (USO) and therefore evaluate USO costs. However, once the ratio between cost and compensation is evaluated, only two of them, France and Italy, use a direct fund.

France was especially concerned about the effect of liberalization process on public service. Public service is an important value in France. In addition, the previous economic tradition in France emphasized other values besides competition and free markets, including large national champions which were held in high regard, and which served the nation, sometimes even when that was contrary to their narrow economic interests.

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18 Ibid, p. 53.
Under these circumstances, it was easy for France to adopt a universal service program including geographic balancing and relatively generous provision for vulnerable customers. It also seemed obvious to members of the French government that fairness required compensating France Télécom for the burden placed on it by its universal service obligations. Since universal service is an important public value, and the state wishes to provide it for the community, the cost should be shared among all users.

Accordingly, sections R. 20-31 to R. 20-34 of the Posts and Telecommunications Code established a funding mechanism for universal service. And here France made its first crucial policy choice. Rather than fund universal service through adding a set amount to customers’ telecommunications bill (as it did in electricity, for example), or through adding a supplementary interconnection charge (as was done in telecommunications in Belgium), the government created a universal service fund, to which all operators were required to contribute (later passing the costs on to their customers). This raised complex implementation issues. The most basic task entrusted to the regulator, ART, was to calculate what universal service cost—not an easy task.
calculation. However, beyond the problem of calculating the cost, important questions about distributing the burden remain. Which operators will contribute? How will their share be calculated? There are several ways to do this, and any choice would be controversial, since there will inevitably be winners and losers.

Under the European directive, Universal Service costs are determined by calculating the costs of providing it minus the costs that the operator would incur anyway, i.e., comparing the costs to the operator in a situation where they have to provide universal service with a hypothetical situation in which they would not have to provide it. However, that still leaves a lot to be determined. The costs assessed for universal service in France can be grouped under five headings:

1. Rebalancing France Télécom’s tariffs until 2000, as a temporary measure.
2. The costs of geographic balancing—i.e., assuring that all customers, regardless of where they live, pay the same maximum price for fixed access and fixed voice telecommunications service, so that rural customers and customers living in remote locations (where the costs of providing services are higher) will not pay substantially higher sums than those in urban areas.
4. The costs of providing public payphones even where it is not profitable.
5. The costs of publishing an annual free paper directory and running a vocal directory service at a reasonable price.

While the calculation of the costs for items 2 through 5 was done in a fairly straightforward (although quite lengthy) way using measured data, for item 1 France used
a very complicated formula which required both estimated and measured data. France Télécom collected the measurable data with some accuracy, but the basis for the estimation was challenged successfully by the European Commission before the ECJ.\footnote{28}

The calculation of all five components is complex, lengthy and requires masses of data, supplied annually by the universal service supplier, France Télécom (most of the data is subject to audits annually conducted by the regulator, ART). The entire process is work intensive and requires a high level of expertise.

France initially decided to include all licensed operators, including mobile operators, but not Internet Service Providers (ISPs), as contributors. The requirement that mobile operators share in paying for the costs for 1997 only was struck down by the ECJ's decision, but those operators were not absolved from contributing the costs of universal service in subsequent years. France calculated the burden on each operator according to the volume (in terms of minutes) of use of the network; it later decided to charge each operator by revenue, seeing revenue as a more equitable measure. France Télécom was also a contributor, and in fact paid the major share (under either system).

In addition, during the first few years, France used several transitional arrangements. For example, instead of calculating some of the components of the formula for the first two years, where the numbers were not being collected yet, it used flat rate estimates based on numbers used by other European countries.

\textbf{I.b: Who is required to pay Universal Service?}\footnote{29}

\footnote{28} The rebalancing tariff, the first component, is calculated using the following formula: \( C = 12 \times (P_e - P) \times N \) where \( P_e \) is the estimated monthly subscription charge after rebalancing; \( P \) is the actual subscription charge at the time and \( N \) is the number of customers without special contracts. This information is taken from the ECJ decision, Case C-146/00 \textit{Commission v. France} [2001] ECR I-9767, paragraph 14.

\footnote{29} This discussion is largely based on the data connected for my dissertation, DORIT REISS, Regulatory ACCOUNTABILITY: TELECOMMUNICATIONS AND ELECTRICITY IN THE UNITED KINGDOM, FRANCE AND SWEDEN (2007) (Doctoral Dissertation, University of California, Berkeley), for chapter 3, and specifically,
As explained above, the costs of universal service are mostly spread between France’s fixed and mobile operators. Who are these operators?

The main provider of universal service is the French incumbent, France Télécom, currently only partly owned by government (45.3%), but strongly influenced by it in more than one way. The head of the firm was usually a figure with substantial political connections (a former president of France Télécom, Thierry Breton, had then become the Minister for industrial affairs and is known to be a friend of Rafarrin, the former Prime Minister\(^{30}\), and his successors – both the chairman of the board and the CEO - are also well connected\(^{31}\)). In addition, many agency members have worked, in the past, for France Télécoms, as have many members of other companies or of other actors who work in the telecommunications field. However, France Télécom did not just receive funding for universal service, it also paid into the fund, both as “France Télécom” and for its mobile operator, Orange, and since it was – by any criteria – still the largest operator, it paid the largest share. This was described to me, by a member of France Télécom, as “we take the money out of our right pocket to pay into our left pocket”.\(^{32}\)

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30 In the words of one Frenchman in an informal conversation, ‘ils se tutoient’, or they address each other using the familiar ‘tu’ address.
31 From the biography of Didier Lombard, appointed CEO and then chairman of the board of directors of France Télécom after Breton: From 1988 to 1990, he was the Scientific and Technical Director at the Ministry of Research and Technology. From 1991 to 1998, he was General Manager of Industrial Strategy at the Ministry in charge of Economy, Finance and Industry. He is Officier de la Légion d'honneur and Commandeur dans l'Ordre National du Mérite. See France Télécom’s english site: http://www.orange.com/en_EN/group/governance/board-directors/index.jsp (last visited March 25, 2010); in February 2010, Stephane Richard was appointed as CEO; he graduated from the prestigieuse Ecole Nationale d’Administration, served in many high positions in industry and in many high level public service posts, including Chief of Staff for the French Minister for the Economy, Industry and Employment (2007-2009). His biography can be found on Orange’s site, at http://www.orange.com/en_EN/group/management/members/Stephane_Richard.jsp (last visited March ).
32 Interview with member of France Télécom, the French telecommunications incumbent, in Paris, France (December 22, 2004); my translation from the French.
In addition to France Télécom, France had three substantial mobile operators, Orange, which is a part of the France Télécom group, SFR (Société Française De Radiotéléphone) and Bouygues Télécoms.

In 2008, SFR merged with the fixed operator Neuf Cegetel, and therefore now also owns a fixed network:

“With 19.7 million mobile customers and 3.9 million high-speed Internet customers, the new SFR – created from the merger between SFR and Neuf Cegetel* – is the leading alternative mobile and fixed-line operator in Europe, offering solutions tailored to the needs of individuals, companies and operators.”

SFR is a large company with years of experience and substantial sophistication. It is also owned by large companies. SFR is mostly held by the Vivendi group (56%)\(^{34}\), with a large minority block of shares belonging to Vodafone (44%).\(^{35}\) Vivendi is a large multi national company, self described as “a world leader in communications and entertainment”.\(^ {36}\) Vodafone is self described as the “world’s leading mobile telecommunications company.”\(^ {37}\)

SFR is clearly not a small startup without business savvy or ability to defend itself.

The other mobile operator, Bouygues Telecoms, belongs to the Bouygues group, a powerful economic conglomerate with subsidiaries in the construction area and


\(^{34}\) This information is taken from the group Vivendi’s website, at [http://www.vivendi.com/vivendi/SFR,952](http://www.vivendi.com/vivendi/SFR,952), last visited on March 10, 2010.

\(^{35}\) This information is taken from Vodafone’s own site, where it lists its holding in other telecommunications company. Available at: [http://www.vodafone.com/start/investor_relations/structure_and_management/subsidiaries.html](http://www.vodafone.com/start/investor_relations/structure_and_management/subsidiaries.html), last visited on March 10, 2010.


communications area in France and worldwide.\textsuperscript{38} Once again, it is by no means a start up or a company without business experience.

The fixed operators in France include, among others, Belgacom, Belgium’s incumbent, BT France – a subsidiary of the British incumbent – and other large firms.\textsuperscript{39} There are, of course, small start ups as well, but many of the cases, as a glance at the list in Appendix II demonstrates, were brought by large and sophisticated operators.

\textbf{Part II: The ECJ Decision story—French Resistance}

To read the ECJ’s decision and the very few relevant scholarly references to the decision,\textsuperscript{40} universal service is the story of French resistance to the European Union’s desire to create real competition in the market. France, when creating its system for funding universal service, has in design and implementation skewed the funding system to benefit France Télécom at the expense of new operators. However, the commission refused to let France get away with this. The most dramatic battle began in 2000, when, after repeated communications with France did not lead to corrective action the European Commission filed a complaint with the European Court of Justice against the French universal service funding system.

On December 6, 2001 the ECJ justified the commission’s misgivings and ruled against France,\textsuperscript{41} finding that its system for funding universal service violated the European directives.\textsuperscript{42} The findings can be grouped under four headings. First, inflating

\textsuperscript{39} See Arcep’s list of operators, \url{http://www.arcep.fr/index.php?id=9320}, last visited March 10, 2010.
\textsuperscript{40} COLIN D. LONG, GLOBAL TELECOMMUNICATIONS LAW AND PRACTICE (2004). RENAUDIN, 36-37. MICHEL BERNE, Telecommunications Universal Service in France, 10 INFO 121, 125-126.
\textsuperscript{41} Case C-146/00 Commission v. France [2001] ECR I-9767 (hereinafter case 146/00).
\textsuperscript{42} A detailed description of the claims and the ECJ decision is attached here as Appendix I.
the costs of universal service, thereby benefiting France Télécom at the expense of new entrants. For example, ECJ criticized France’s inclusion of “red list” costs—the list of customers whose name will not appear in the directory, non-listed customers—as part of the calculation. Conversely, France did not calculate the “intangible benefits” that France Télécom will receive from being the universal service provider. France was also charged with “estimating up” in several cases—i.e., evaluating costs beyond what was the rate in other countries. Second, the commission strongly criticized several methodological “shortcuts” used by France to calculate the costs of the first years. France chose not to calculate some of the components in its formula, instead using estimates based on the practices in other countries as shortcuts. For example, it set the net cost of non-profitable subscribers at 1% of total turnover; and the geographical component at 3% of turnover. It also calculated the initial cost of a non-profitable household as if all households were non-profitable, claiming it is unable to identify those that were profitable before the balancing of the tariffs. The claim against the method was that the French calculations lacked transparency, both because some of the components of the formula were estimated based on comparisons with other countries without explanation of the specific numbers arrived at, and because French government did not submit information it was required to provide under the law. Finally, the commission and France disagreed on the interpretation of several provisions of the directive. For example, the commission – and the court – interpreted the directive as requiring, if not complete

43 Britain, for example, did consider their incumbent’s – British Telecoms, now BT – in their analysis of universal service costs. This led the British regulator, at the time, Oftel, the Office of Telecommunications, to conclude that the benefits cancel out the costs and BT does not deserve to be reimbursed. REISS, Agency Accountability Strategies After Liberalization: Universal Service in the United Kingdom, France, and Sweden.
rebalancing of tariffs by 2000, at least a detailed timetable. The French Government did not interpret the directive to require such a timetable.

Finding against the French system, the ECJ, under this version of the story, bravely forced the rogue state to correct its problematic practices. Indeed, ART’s reevaluation after the ECJ’s decision showed substantial reductions in the assessed amount of costs of universal service and the amount operators had to pay to the fund. The amount for 1998 went down from 4,374 million francs before the ECJ’s decision to 1,806 million francs after it; the amounts for 1999 went down from 1,646 million francs before to 725 million francs after the decision.44

However, even with the ECJ’s brave interference, the French system was not completely fixed, and constant vigilance was required. Luckily, the operators competing with France Télécom took the burden on themselves. Accordingly, when the French regulator continued to be recalcitrant, the association of French operators—AFORST—filed another complaint with the commission.45 Similarly, operators brought several suits in the French courts against France, demanding that the system be corrected.

This version of the story can be supported by other examples of tensions between the commission and France over France’s protection of national champions, and scholarship showing the French tendency to strongly support such champions.46 It can

45 RENAUDIN, 36.
also be supported by focusing on ideological differences in values between France and the commission.\footnote{47} Universal service is important to the French. The commission, on the other hand, has been promoting and supporting liberalization for years. It values open competition and the market. The definition of universal service in the EU directive surrounds it with many caveats. The commission that enforces it does not encourage it. The ECJ, as part of the EU institutions and as an institution enforcing treaties that place great weight on open competition, may be more sympathetic to the operators’ view than to the French desire to assure generous compensation of the universal service provider.\footnote{48}

However, this is not the only possible story.

\textbf{Part III: An Alternative Story: New Entrants v. Universal Service Funding}

A very different story could be told about the struggle around universal service funding. While the two stories do not directly contradict each other, the second story suggests different cautions, many of which figure prominently in the United States regulation of the sector.

Under the second story, when transposing the universal service system into domestic law, the French government created a mechanism to properly fund universal service. That mechanism will allow the level of services the French government wanted to secure and assure that France Télécom will not bear the costs of universal service on


\footnote{48} I am grateful to Frederic Carteron who, though his analysis was different than the one above (and one I hope he publishes separately), raised the point of differing values.
its own. If France Télécom is to operate as any other firm competing in the market, forcing it to fund alone the non-profitable services government thinks should be provided puts it at a disadvantage compared to its competitors. Rather, costs should be shared in a way that puts all market players in the same situation, as part of the cost of doing business in France. Accordingly, the mechanism required other operators to contribute to a universal service fund that will cover the costs. ART will calculate the costs according to criteria detailed by the legislature. They will be apportioned among operators according to an objective formula based on the advantages they get from the system. While France Télécom, the monopoly that receives the highest advantages, will bear the bulk of the costs, other operators will bear a proportion of the costs according to their profits. France designed the system according to its best understanding of what was allowed under European Union law, although it did place a value on compensating France Télécom for real costs it incurs in providing what is, in effect, a social service.\(^49\)

The competing operators are for-profit companies that do not share the French government’s commitment to universal service. Even if they may be sympathetic to universal service in principle, they naturally want to minimize their share, or not pay it. Faced with large annual bills for universal service, they have a strong incentive to mobilize and fight to undermine the funding system. Initially, they took the fight to Europe. After the ECJ had its say and the French regulator fixed the system accordingly, they had to find a different way to avoid the costs. They started challenging every

\(^{49}\) This is the understanding of the system reflected in my interviews with members of ART as well as with France Télécom. Interviews with member of the French Telecommunications Agency, ART, in Paris, France (December 9, 2004). Interview with member of France Télécom, the French telecommunications incumbent, in Paris, France (December 22, 2004); my translation from the French.
decision of the French regulator in the courts—whether or not such a challenge had merit and realistic chances of success.

Accordingly, this view sees the ECJ decision story in a different way. The source of the EU action is, in this view, a result from the operators’ objection to paying for universal service. Specifically, it stemmed from complaints lodged by two associations of operators, l’Association Française des Opérateurs Privés en Télécommunications (l’AFOPT) and l’Association des Opérateurs de Services de Télécommunications (l’AOST). Accordingly, the motivation of the process is not in the commission’s efforts to force France to toe the line, but in the operators’ unhappiness with having to pay.

This view also emphasizes another direct consequence of the ECJ decision. Aside from lower universal service costs assessed against the operators, the decision added substantial costs and upheavals to a system that was not easy to implement to start with. The ECJ decision sent the Ministry and the ART back to the drawing board, to redesign the funding mechanism according to the ECJ’s requirements and to redo the work done for the first years, 1997-1999 at the least. A year and a half later, in April 2002, the ART suggested modifications. The modifications deviated from ECJ’s decision in a few details, where ART saw the ECJ’s decision as being based on a misunderstanding of the situation. For Example, ART explains in its decision that while the ECJ criticized its calculation of the element Pe in its formula for—among other things—not including detailed breakdown, that detailed breakdown was actually included. However, for the

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most part the ART put in place substantial changes in the system, cooperating with the ECJ decision. Following ART’s work, on July 11 2002 the minister enacted a regulation (“arrêt”\(^52\)) setting the sums for 1998-1999 as well as for 2002 according to ART’s recommendation. Shortly after that the ART sent out individual decisions setting each operator’s contribution for 2002. Somewhat later it also sent out the individual decisions regarding 1998-1999.

At this point the operators started combating the requirement that they share in paying the cost for universal service using the domestic courts. In the years following the ECJ decision many cases were brought against the regulator. Some had merit. But many were brought without any attempt to appeal to the minister, ignoring a basic procedural requirement embedded in the French Code of Administrative Justice.

The first case decided was brought by the company Tiscali, objecting to the assessment of over three million Euros for its universal service contribution in 2002. Tiscali emphasized its financial difficulties and the fact that the law was not yet changed in accordance with the ECJ’s decision.

The court made two important rulings.\(^53\) As a general matter it stated that funding universal service was an important policy objective for which the minister was responsible. Since the matter could be urgent, the minister had, in principle, the right to enact temporary decrees setting amounts to be paid even before the law was changed in accordance with the ECJ decision. However, the court ruled that such decisions must be made in a transparent way. The arrêt in this case was not published, nor were the

\(^{52}\) The French system, where the executive enjoys substantial powers to legislate as well as to create rules, has more than one kind of rule/regulation. An arrêt is a relatively low-level – i.e., specific, and subject to other types of regulations - implementation decree.

\(^{53}\) [S.A. Tiscali Télécom, Conseil d'État [CE][Highest Administrative Court], Sect 2 and 1, June 18, 2003, 250608](#)
operators notified about it before receiving their apportionment—therefore it was void. While the court acknowledged that the operator had a case in this instance, it made it clear that the operator's main contention, that no costs can be placed on operators until a new decree is passed, was wrong. The Minister and ART can require Operators to contribute to the universal service fund before the law is amended according to the ECJ decision, as long as the process is transparent and the ruling observed.

The Tiscali case was the opening shot, followed by many other cases. In 2005 alone, the Conseil d'État decided 15 cases regarding ART’s decisions about universal service for the years until 2002. In an interview with a member of ART he said that almost every decision of the regulator was attacked in the courts. Every decision setting the rules used to calculate the costs for the past year and the final calculation and compensations balances for that year were systematically attacked each year in 2002-2006 by at least one operator, often more.

Out of the 15 cases decided in 2005, in 10.5 of the complaints against ART’s price determinations were rejected by the court for not requiring “reclamation” from the minister – in more familiar American parlance, for non-exhaustion of administrative remedies.

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54 A decree is a higher level general regulation.
55 Interview with member of the French Telecommunications Agency, ART, in Paris, France (December 9, 2004).
56 Interview with member of the French Telecommunications Agency, ART, in Paris, France (December 9, 2004). A complete list of cases, with a (very) short description of each, is attached as Appendix II.
57 For several of these the complaint against the decree was acknowledged as justified under Tiscali, but the ART’s decision could not be addressed because the company in question did not address the minister before hand. Therefore, only part of the complaint was rejected for non-exhaustion. See, e.g., Societe 9 Telecom, Conseil d’Etat [CE][Highest Administrative Court], Sect. 2, Apr. 1, 2005, 250609; S.A. Bouygues Telecom, Conseil d’Etat [CE][Highest Administrative Court], Sect. 2, Apr. 1, 2005, 250572; S.A. Bouygues Telecom, Conseil d’Etat [CE][Highest Administrative Court], Sect. 2 and 7, Dec. 5, 2005, Rec. Lebon, table of content 257683.
Article R. 772-2 of the Code of Administrative Justice states, in the relevant parts:

“Article R772-2

Les requêtes mentionnées au deuxième alinéa de l'article précédent doivent être précédées d'une réclamation adressée à la personne morale qui a établi la taxe. … »

« Article 772-2

The demands (requests) mentioned in the second paragraph of the previous article must be preceded by an appeal (reclamation) to the actor establishing the tax ».

In other words, the law clearly requires an application to the minister against the assessment made against the operator. In spite of this clear requirements, the cases were filed without any attempt by the companies to address their concerns to the regulator or minister before hand. As described above, the companies are sophisticated large actor, including French branches of other European incumbents, such as Teleitalia, the Italian incumbent, and telecommunications companies belonging to large, sophisticated French business conglomerates, such as Bouygues Telecoms and SFR. They are well acquainted with French law, or at least, can hire lawyers who are. It is unlikely the lawyers missed the non-exhaustion requirement described above.

The impression is of cases being brought to the Conseil d'État even if operators know the case will be rejected. The question is, why.

One explanation is that the operators, rightly or wrongly, expect the minister to automatically side with the regulator, and do not want to waste time on a futile appeal.

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58 The principle that before taking an administrative agency to court an actor must exhaust – make use of – the procedures to challenge the decision offered by the agency is a long standing one in American administrative law. See add cases and articles.
59 Code de Justice Administrative, R. 772-2. The text was copied from www.legifrance.com, the French Government’s legislative portal.
60 Demands related to taxes and other impositions that fall under the administrative jurisdiction. See Code de Justice Administrative, R. 772-1.
61 Second paragraph of the article dropped. The translation is my own.
This may be true, but they must know that not approaching the minister will harm their chances at appeal. Another explanation is needed.

In a system where decisions need to be made every year and where the decisions require a high level of expertise and intensive labor, recurring appeals can be very disruptive. The Conseil d'État did not overrule any of the cases on substantive grounds; but it annulled several of the decisions that were made before the passage of the 2003 decree on procedural grounds. And it did so in decisions that came down in 2005, after the decree was in place. That means the companies could hope to delay the process and/or recoup some of the costs. The courts could be used to delay and weaken the implementation of the universal service funding mechanism.

**Part IV: Discussion**

The first question is which version of the story is more convincing. The first story fits views of the French economy as based on support of national champions and opposition to the liberalization process. It can fit with previous tensions between France and the European Commission on liberalization. And it is supported by the dramatic decrease in costs of universal service charged to the operators compared to the costs before the ECJ decision.

However, the second version seems more convincing.

The realities of universal service are such that the benefits to France Télécom from increasing the funding are not very great. France Télécom pays the largest share of universal service costs. The legal framework allows other operators to provide certain

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parts of the universal service too. In particular, companies can offer social tariffs—
reduced tariffs to individual groups—and be reimbursed for their loss from the universal
service funds. At least one company took advantage of that option, for a time.63
Therefore, increasing universal service funding is not a dramatic help for France
Télécom. The French government’s interest in inflating them to support the incumbent is
not as great as it might appear at first blush.64

But the more important evidence supporting the second story are65 the continuing
and recurrent appeals to the courts. The heavy use of the domestic courts after the ECJ
decision—especially bringing cases doomed to failure—suggests reluctance to pay the
contribution whatever the amount. Even winning regularly, the need to constantly defend
its behavior in court adds to the agency’s burden and may lead it to be very cautious in its
decision-making.66

Judicial review of administrative agencies seeks to prevent abuses and offer a
counter to agency professional biases.67 However, as acknowledged by scholars, judicial
review carries its own risks.68 One of those risks, though not the only one, is the ability of

63 The company Kertel provided social tariffs between 2000-2002. See two of ART’s opinions: Autorité de
Kertel de proposer tarifs sociaux ; Autorité de régulation des télécommunications (2002) *(recommending
that Kertel be allowed to provide social tariffs). Décision 02-308, April 23 2002 relatif au retrait pour
l’année 2002 de la société Kertel de la prestation de « tarifs sociaux » *(recommending that Kertel be
allowed to stop providing social tariffs). Both can be found on the agency’s site, at www.arcep.fr.
64 Though it is a help, and could make it harder for a new competitor to successfully compete if they do
indeed pass on their costs to the consumer through higher prices.
65 David – check me on this. I was very conflicted on whether to use “are” or “is” here. Microsoft Word
Grammar thinks it should be “is”, but it’s not a very good grammar checker, is it?
66 On negative consequences of heavy litigation on agency behavior see: EUGENE BARDACH & ROBERT A.
KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 101-118
(1982);ROBERT KAGAN & LEE AXELRAD, REGULATORY ENCOUNTERS: MULTINATIONAL CORPORATIONS
AND AMERICAN ADVERSARIAL LEGALISM, 389-400 (2000).
67 MARTIN SHAPIRO, Judicial Delegation Doctrines: the US, Britain, and France, 25 WEST EUROPEAN
POLITICS, 173 (2002).
68 TOM BURKE, On the Rights Track: the Americans with Disabilities Act, in COMPARATIVE
DISADVANTAGES? SOCIAL REGULATIONS AND AMERICAN ADVERSARIAL LEGALISM, 242, 244 (Pietro
Nivola ed., 1997);CHRISTOPHER F. JR. EDLEY, ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF
regulatees to use courts to delay and undermine regulation they are unhappy with. The idea that courts can be used to delay implementation of regulation is not new. However, dealing with the problem presents a constant challenge, and few real solutions have been suggested. The problem is that the companies involved have a legitimate interest to defend. They need a way to protect their rights and prevent abuses by the regulators, as well as solve disputes with them—and the courts are an acknowledged mechanism to handle these kinds of issues. In the French case especially, companies had good reasons to worry about the regulator being subservient to France Télécom, since there were close ties between many members of the regulators and France Télécom—specifically, many members of the regulator were trained in the École Nationale Supérieure des Télécommunications (now Telecom Paris Tech), previously funded by France Télécom, or worked for the company before being members of the regulator. Therefore, a mechanism for defending their rights is justifiably important to these companies.

On the other hand, the companies also have good reasons not to accept the system of funding universal service. From the point of view of the new entrants, avoiding costs they do not have to bear is part of their “job”—they are corporations judged by the amount of money they make for their shareholders, and fighting to establish themselves in a new market. Even if they agree with the idea of universal service in principle, there is

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71 Interview with member of France Télécom, the French telecommunications incumbent, in Paris, France (December 22, 2004); my translation from the French. That is not to say the regulator does work for France Télécom's interests – but it could look that way.

27 of 43

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no reason for them to want to pay for it if they can avoid or minimize costs—a classic free rider situation. And as sophisticated strategic actors they know how to use to their advantage all the mechanisms in place, including the courts.

The problem, then, is how to balance the new entrants' legitimate interest in protecting their rights while minimizing their ability to abuse the system.

One alternative is to use judicial review doctrines to balance those interests. Especially in the case of the Conseil d'État. The Conseillers d'État have been trained as civil servants and specialize in handling administrative cases. Furthermore, some members of the Conseil fill important roles in the public service. They can be trusted to understand the realities of administration and create appropriate doctrines.

The problem with this solution is not the inability of the Conseil d'État to handle the cases before it, but the way the court is used in this area. It is litigation itself, not how cases are decided, that diverts resources to handling cases, and has the potential to cause delay and uncertainty.

Another solution is to impose substantial costs. Access to the Conseil d'État is in fact limited by the risk of the loser having to pay costs, including lawyers’ fees. In some of the cases below, though not in many, costs have already been awarded to the government; however, those costs were clearly not enough to deter—they are not very high. One way to reduce problematic lawsuits is for the Conseil d'État to use its powers to award higher levels of costs—“punitive” costs—where appropriate. The concern is that such a power may deter suits that should be brought—i.e., have too much of a chilling

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72 L. NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW, 63 (5th ed. 1998); YVES ROBINEAU & DIDIER TRUCHET, LE CONSEIL D'ÉTAT (1994).
74 Generally true for many civil law countries. See UGO A. MATTEI, et al., SCHLESINGER'S COMPARATIVE LAW: CASES-TEXTS-MATERIALS 691-692 (Foundation Press 10th ed. 2009).
effect. The judges’ expertise may justify entrusting them with such power. On the other hand, since the Conseil d’État does have very close ties to the administration, on the face of it concerns may be raised about it using that power to protect the government. However, the Conseil d’État enjoys a high level of respect and is seen as independent, certainly not as being hand in glove with the government, it can safely use its powers to impose costs without much risk of provoking undue criticism.

Yet another possible way around the problem is to design the regulatory system to reduce incentives to use the courts as a delay tactic.

The French experience can act as a deterrent to other countries—European or not—who want to fund universal service. Since no sane regulator wants to spend substantial amounts of time in the courts, and since in addition to the complexity of setting the initial contribution amounts the French system led to a very high level of litigation, others may hesitate to follow their lead. In fact, no European country besides France and Italy adopted a direct funding mechanism. France’s difficulties with its universal funding mechanism support funding the universal service through some means other than a special fund. One way would be a direct addition to customers’ bills—in which case the costs would be directly passed on to consumers, as is done by the French electric utilities; transaction costs might be reduced in this case. Another is adding additional charges through one of the other funding schemes, such as interconnection prices. A fund, where the operators are directly charged large concentrated sums once a year, makes them feel the loss much more. Since

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75 ROGER PERROT, INSTITUTIONS JUDICIAIRES 35 (11th ed. 2004); JEAN VINCENT & SERGE GUINCHARD, INSTITUTIONS JUDICIAIRES: ORGANISATION, JURIDICTIONS, GENS DE JUSTICE 82-84 (5th ed. 1999).
76 Though some of them provide some funding to universal service indirectly through their interconnection tariffs – see: KIESSLING & BLONDEEL.
it is a direct cost and is strongly felt the operators are likely to mobilize to fight it. As has been observed by scholars, a burden on a concrete, concentrated group is much more likely to generate resistance than a burden on a diffuse group.\textsuperscript{77}

Conclusion

It may be tempting to see the French experience as a case of an anti-market state trying to impose costs on new entrants in favor of its former state monopoly. That it is not the only way in which the struggle around the costs of universal service can be seen. Surprisingly—or unsurprisingly—the French experience in these cases mirrors developments in the United States where sophisticated companies used courts to limit regulation. However, the European institutions, accustomed to viewing the French system as a "dirigist" institution willing to bend and avoid the law to support its national champions, were not sensitive to the other side of the equation, new entrants’ struggle to avoid handling of cases like the one brought to the commission.

In addition, in this case the opening of the market directly led to an increase in litigation, mirroring Kagan’s predictions for Europe.\textsuperscript{78} Litigation around universal service is now a fact of life for the ART. Both it and the government should consider how to minimize the problems it creates while safeguarding the legitimate interests of the companies involved.


Ian Bartle, When Institutions No Longer Matter: Reform of Telecommunications and Electricity in Germany, France and Britain, 22 Journal of Public Policy, (2002).


AMY ZEGART, Flawed by Design: The Evolution of the CIA, JCS, and NSC (Stanford University Press. 1999).


PIERRE LAROCHE, Telecommunications, in The Liberalization of State Monopolies in the European Union and Beyond, (Damien Geradin ed., 2000).

WOLF SAUTER, Universal Service Obligations and the Emergence of Citizens' Rights in European Telecommunications Liberalization, in Public Services and Citizenship in European Law, (Mark Freedland & Silvana Sciarra eds., 1998).


ÉLIE COHEN & ET AL, Service Public, Secteur Public (La Documentation Française. 1997).

DENOIX R. DE SAINT MARC, Le Service Public (La Documentation Francaise. 1996).

ELODIE RENAUDIN, L'évolution du service universel dans le secteur des télécommunications (2004 Université de Nanterre La Défense).


KJELL A. ELIASSEN & MARIT SJØVAAG, European Telecommunications Liberalisation (Routledge 1999).


MARTIN SHAPIRO, Who Guards the Guardians?: Judicial Control of Administration. (University of Georgia Press. 1988’).


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### Appendix I: ECJ’s Decision—Commission’s complaints, France’s Responses, and the ECJ’s Conclusions

#### First Complaint

<table>
<thead>
<tr>
<th>Commission’s claims</th>
<th>France responses</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Requirement to contribute to universal service in 1997 has no basis in community law since FT was still a monopoly. Costs can only be refunded if there is an unfair burden; that is not the case with a monopoly.</td>
<td>Article 4c does not require not charging for 1997. There is no express link between abolishing the monopoly and funding universal service.</td>
<td>Since in 1997 France Télécom had a monopoly on voice telephony there was no unfair burden if it had to bear the full cost of the universal service obligations.</td>
</tr>
</tbody>
</table>

#### Second Complaint

<table>
<thead>
<tr>
<th>Commission’s claims</th>
<th>France responses</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>France did not rebalance its tariffs before 1/1/1998 and did not send a detailed time line. It did put in the law that the balancing will be complete before 31/12/2000 but did not send a detailed timetable.</td>
<td>Disagree that there needs to be a timetable—a final date is enough under the directive, and they have that.</td>
<td>The law requires that rebalancing must be achieved, and the subscription tariff must be equal to it—both based on costs. Undercutting the balancing tariff is unjustified. Balancing was not achieved, even if the difference was small, and French Government should submit the timeline.</td>
</tr>
</tbody>
</table>

#### Third Complaint: method of calculating next costs

<table>
<thead>
<tr>
<th>Commission’s claims</th>
<th>France responses</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Profitable household subscriptions were included: profitable—if cost less than revenues. Need to determine this selectively. In reality, all subscribers in France were included as part of the calculation.</td>
<td>Ok to provide services to customers which can be provided at a loss or condition beyond normal commercial standard, not focusing on profitable/non profitable.</td>
<td>Annex III to directive sets the description of costs which may be included—only those directly from universal service provision. Provider must not be burdened but equally may not get financial benefit from it. Only costs from non-profitable activities are relevant. The French legislation does not limit costs included sufficiently.</td>
</tr>
</tbody>
</table>
Calculation not transparent: there is no objective criteria: Unclear how Pe was determined. Based on practices in other countries, but there is no real basis—first, in the countries of reference the detailed billing of customers is part of the basic subscription and that’s optional for FT. this leads to an artificial increase in Pe. And Pe included costs from maintaining the red list, which P did not.

The 65 frank price stemmed from a comparison between countries which lead to a margin of 55-75. So the value is sufficiently transparent. Impossible before balancing to identify the subscribers served in accordance with normal commercial standards.

Bench marking is generally ok to set prices, but must be done carefully. The commission is right that the range in the Champsaur report is very broad. So—more specifics are necessary. And only costs related to universal service can be included.

**Fourth complaint: using flat rate rather than calculation for certain components**

<table>
<thead>
<tr>
<th>Commission’s claims</th>
<th>France responses</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Net cost for non-profitable subscribers artificially set at 1% of turnover. This is higher than estimates in other countries, and higher than that used in France in 1999-2000.</td>
<td>The Champsaur report shows there was no reliable way to calculate costs in 1998, so suggested a margin that led to 1%. Unclear it’s possible to calculate 1997 costs—ART does not have data. Only reliable method, though imprecise. Little significant for cost to providers—their position was minor in these years.</td>
<td>The directive requires a precise calculation of net cost, and states how the costs are to be calculated. It therefore does not permit a flat-rate calculation. The 1997-1998 system is therefore flawed.</td>
</tr>
<tr>
<td>Geographical component was calculated as 3% of turnover. Unclear how amount arrived at, although elements are mentioned.</td>
<td>3% stemmed from an international comparison—a pragmatic approach. A complex calculation would only lead to a very marginal change. 1999 methodology can be used to 1997-8, but it’s really difficult. And allowing the precedent of choosing another methodology will lead to uncertainty for traders.</td>
<td></td>
</tr>
<tr>
<td>Hardship tariffs: calculations imprecise. Change of system does not</td>
<td>In 1999 a new system was introduced, with reduction for minimum wage earners</td>
<td></td>
</tr>
</tbody>
</table>
fix the infringement. and disabled veterans. In special cases the state assumed specific debts.

**Fifth Complaint: other components of universal service drawn to increase costs**

<table>
<thead>
<tr>
<th>Commission’s claims</th>
<th>France responses</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Calculation of net cost of non-profitable zones: does not include proceeds from inclusion in red list and comfort services. No intent to remedy the pre 1999 situation. Publication of directory separate from red list.</td>
<td>Costs and proceeds of comfort services only taken into account since 1999; red list cannot be separated from the publication of an annual directory. It’s not a separate cost components.</td>
<td>French Government concedes it did not comply with directive, he rejects their claim about the red list—it’s separate from the directory.</td>
</tr>
<tr>
<td>In 1998 the calculation is based on traditional data, not on best practice.</td>
<td>As much as possible account was taken of the commission’s recommendations relating to the application of Annex III. Application of the methodology of 1999 to 1998 is really hard.</td>
<td></td>
</tr>
<tr>
<td>No account of intangible benefits to FT.</td>
<td>Agreed—cannot estimate it retroactively.</td>
<td></td>
</tr>
</tbody>
</table>

**Sixth Complaint**

<table>
<thead>
<tr>
<th>Commission’s claims</th>
<th>France responses</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>No reporting of the contributions of parties to universal service costs.</td>
<td>Agreed.</td>
<td>Complaint founded.</td>
</tr>
</tbody>
</table>
## Appendix II: Cases brought by Competitors against the ART’s Universal Service Determinations

<table>
<thead>
<tr>
<th>Case #, date</th>
<th>Party bringing case</th>
<th>Legal Issue</th>
<th>Parties’ Request</th>
<th>Court’s Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. 250813, November 8, 2002</td>
<td>La Société Tiscali Télécom</td>
<td>Delay of payment according to art’s decision</td>
<td>That art’s decision requiring Tiscali to pay in two installments 3 670 000 Euro for its universal service contribution for 2002 be suspended</td>
<td>Grave doubt about legality of the decision &amp; grave damage from no suspension lead to decision being suspended.</td>
</tr>
<tr>
<td>2. 250608, June 18 2003</td>
<td>La Société Tiscali Télécom</td>
<td>Can the minister temporarily set universal service contribution without a new system put in place?</td>
<td>Annulment of the decree of the minister setting universal service for 2002 and costs</td>
<td>Yes, minister could create a temporary system, but the mode of evaluation of costs and the rules of the system should be published. They were not. Decision overturned for lack of transparency. Costs awarded to Tiscali.</td>
</tr>
<tr>
<td>3. 250643, April 1 2005, Conseil D’État</td>
<td>Société Cegetel</td>
<td>Objects to the mode of calculating the contribution</td>
<td>1. Decree already declared invalid in</td>
<td></td>
</tr>
</tbody>
</table>

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79 In ascending order of date. All cases here were brought before the Conseil d’état.
<table>
<thead>
<tr>
<th>Case Number</th>
<th>Date</th>
<th>Party</th>
<th>Issue</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>250644</td>
<td>April 1 2005, Conseil D'État</td>
<td>Société Française De Radiotéléphone (SFR)</td>
<td>Objects to the mode of calculating the contribution and the mathematic approach</td>
<td>3. Decree already declared invalid in Tiscali’s case, claim moot.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>250645</td>
<td>April 1 2005, Conseil D'État</td>
<td>Société Réunionnaise Du Radiotelephone</td>
<td>Objects to mode of calculating contribution and the mathematic approach</td>
<td>5. Decree already declared invalid in Tiscali’s case, claim moot.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>250609</td>
<td>April 1 2005, Conseil D'État</td>
<td>Société 9 Telecom</td>
<td>Objects to the mode of calculating the contribution</td>
<td>Denied for non-exhaustion— the company did not address a first</td>
</tr>
</tbody>
</table>

39 of 43
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<table>
<thead>
<tr>
<th>Case Number</th>
<th>Date</th>
<th>Societal Body</th>
<th>Objects to the mode of calculating the contribution and the mathematic approach</th>
<th>Decision</th>
<th>Reason for Denial</th>
</tr>
</thead>
<tbody>
<tr>
<td>7. 250610, April 1 2005, Conseil D'État</td>
<td>Société Belgacom Telecom France</td>
<td>Objects to the mode of calculating the contribution and the mathematic approach</td>
<td>Annulling art’s decision informing the plaintiff of the sums it needs to pay in 2002</td>
<td>Denied for non-exhaustion</td>
<td></td>
</tr>
<tr>
<td>8. 250611, April 1 2005, Conseil D'État</td>
<td>Société Kaptech</td>
<td>Objects to the mode of calculating the contribution and the mathematic approach</td>
<td>Annulling art’s decision informing the plaintiff of the sums it needs to pay in 2002</td>
<td>Denied for non-exhaustion</td>
<td></td>
</tr>
<tr>
<td>9. 250612, April 1 2005, Conseil D'État</td>
<td>Société Ventelo France</td>
<td>Objects to the mode of calculating the contribution and the mathematic approach</td>
<td>Annulling art’s decision informing the plaintiff of the sums it needs to pay in 2002</td>
<td>Denied for non-exhaustion</td>
<td></td>
</tr>
<tr>
<td>10. 250614, April 1 2005, Conseil D'État</td>
<td>Société Louis Dreyfus Communication</td>
<td>Objects to the mode of calculating the contribution and the mathematic approach</td>
<td>Annulling art’s decision informing the plaintiff of the sums it needs to pay in 2002</td>
<td>Denied for non-exhaustion</td>
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<tr>
<td>11. 250572, April 1 2005, Conseil D'État</td>
<td>S.A. Bouygues Telecom</td>
<td>Objects to the mode of calculating the contribution and the mathematic approach</td>
<td>Annulling art’s decision informing the plaintiff of the sums it needs</td>
<td>Denied for non-exhaustion</td>
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<tr>
<td>Date</td>
<td>Case Details</td>
<td>Mathematically Approach</td>
<td>To Pay In 2002</td>
<td>Notes</td>
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<tr>
<td>12. 251239</td>
<td>, April 11 2005, Conseil d'État</td>
<td>Changing the regulation of financing the universal service to bring it into conformity with EU law—current modification insufficient</td>
<td>Annulling the minister’s decree (&quot;arrêt&quot;) and art’s subsequent specific decisions about the universal service contributions for 2000</td>
<td>At the relevant date, the law was not corrected according to ECJ decision and there was no urgency to demand money that has been spent 18 months before; therefore, the minister did not have the authority for the decree. Decree is annulled. However, as to art’s decision, denied for non-exhaustion.</td>
<td></td>
</tr>
<tr>
<td>13. 252125</td>
<td>, April 11, 2005, Conseil D'État</td>
<td>Jurisdiction over demand to reimburse sums</td>
<td>That the minister’s decision, refusing to reimburse it for its contributions in 1997-2001 be overturned and that the state reimburse it.</td>
<td>Denied for non-jurisdiction—should be brought to the tribunal administratif de Versailles</td>
<td></td>
</tr>
<tr>
<td>14. 250516</td>
<td>, May 30, 2005, Conseil D'État</td>
<td>Attacking the method of calculation for not fitting into the eu</td>
<td>To force the minister to repeal the 1997 decree</td>
<td>Mooted because decree was already repealed before decision.</td>
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<td></td>
<td>Télécommunications (AFORS)</td>
<td>framework and distorting competition.</td>
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<td>15.</td>
<td>Bouygues Telecom</td>
<td>Attacking system for not considering immaterial advantage</td>
<td>To annul the 2003 decree for not considering these advantages</td>
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<td></td>
<td></td>
<td>The method takes those cost into consideration in a different way; the government did nothing wrong by delegating to ART the authority to set the method to calculate those benefits; there is no problem with the current system.</td>
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<td>To annul the 2003 decree for not considering these advantages</td>
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<td>16.</td>
<td>L'association Française Des Operateurs De Réseaux Et Services De Télécommunications (AFORS Telecom),</td>
<td>Attacking system for not considering immaterial advantages</td>
<td>System is ok (addressing substance).</td>
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<td></td>
<td>To annul the 2003 decree for not considering these advantages</td>
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<td>17.</td>
<td>S.A. Bouygues Telecom</td>
<td>The legality of the minister decreeing the costs of universal service for 1998-1999 without the law being changed first</td>
<td>1. Decree annulled—ECJ overturned system, new system not yet in place, no urgency.</td>
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<td>Annulling the decree and ordering the reimbursement of the company</td>
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<td>2. As for reimbursement, denied for lack of jurisdiction, should go to the &quot;Tribunal Administratif&quot;</td>
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<table>
<thead>
<tr>
<th></th>
<th>Case Number</th>
<th>Date</th>
<th>Parties</th>
<th>Action</th>
<th>Result</th>
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<tr>
<td>18.</td>
<td>262646</td>
<td>12 December 2005</td>
<td>Société Française de Radiotéléphone (SFR), Société Réunionnaise Du Radiotéléphone, S.A. Bouygues Telecom, Société Cegetel</td>
<td>Attacking the mode of calculation</td>
<td>Annulment of a decree</td>
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<tr>
<td>19.</td>
<td>250656</td>
<td>28 December 2005</td>
<td>L'association Française Des Operateurs De Réseaux Et Services De Télécommunications ; L'association Française Des Operateurs De Réseaux Et Services De Télécommunications</td>
<td>Attacking mode of calculation</td>
<td>Annulling the decree setting sum for 2002 and retroactively for 1997-2000</td>
</tr>
</tbody>
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