

2009

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Recommended Citation

Dorit Rabinstein Reiss, *Participation in Governance from a Comparative Perspective: Citizen Involvement in Telecommunications and Electricity in the United Kingdom, France and Sweden*, 2009 J. Disp. Resol. (2009)

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Participation in Governance from a Comparative Perspective: Citizen Involvement in Telecommunications and Electricity in the United Kingdom, France and Sweden

*Dorit Rubinstein Reiss**

I. INTRODUCTION

This paper draws on empirical research to compare modes of citizen participation in administrative actions among the United States and three European countries: the United Kingdom, France and Sweden.¹

An important value for modern governments is citizen participation.² Many believe that increased citizen involvement will solve many problems facing current administrative agencies.³ Scholars suggest that participation can improve the legitimacy of agencies, improve decision-making, and provide benefits to the participating citizens.⁴

In both Europe and the United States, agencies have been experimenting with different forms of increased participation. However, the starting point and the mechanisms adopted in Europe were, in many respects, different than the reality in the United States of the twenty-first century. This paper examines what was

* Associate Professor of Law, UC-Hastings, College of the Law. I would like to thank Frederic Carteron, Miriam Engstrom, David Jung, Shelley Kennedy, Ethan Lieb, and Pillar Stillwater for their comments on previous drafts of this paper, or on its contents, in discussions with me. I would also like to thank the organizers of the Collaborative Governance Conference, and especially David Jung and Chris Knowlton, for giving me the chance to complete and present the paper, and to the conference participants for insightful comments.

1. I also address, to some degree, industry participation, but the focus is on citizens.

2. See B. GUY PETERS, *THE FUTURE OF GOVERNING. FOUR EMERGING MODELS* 21-71 (1996).

3. ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* 3, 61-64 (2004).

4. See PAUL HIRST, *ASSOCIATIVE DEMOCRACY: NEW FORMS OF ECONOMIC AND SOCIAL GOVERNANCE*, 15-44 (1994); CHRISTOPHER HOOD, *THE ART OF THE STATE*, 120-142 (2d ed., 2000); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 *ADMIN. L. REV.* 411 (2005); Archon Fung, *Varieties of Participation in Complex Government*, 66 *PUB. ADMIN. REV.* 66 (2006). *But see* Cary Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy?*, in *ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGULATORY INNOVATION IN THE UNITED STATES AND EUROPE* 93, 106-113 (Eric W. Orts & Kurt Deketelaere eds., 2001); BRONWEN MORGAN, *SOCIAL CITIZENSHIP IN THE SHADOW OF COMPETITION: THE BUREAUCRATIC POLITICS OF REGULATORY JUSTIFICATION* 215-220 (2003) (for a discussion of the forms of participation that actually have an impact, and suggesting they are of a specific variety); Cary Coglianese, *Citizen Participation in Rule-making: Past, Present, and Future*, 55 *DUKE L.J.* 943 (2006) (for doubts about the effectiveness of participation).

done to increase citizen participation in the telecommunications and electricity sectors in the United Kingdom, France, and Sweden. The emphasis will be mostly on mechanisms voluntarily adopted by agencies in these countries, but I will also examine some that were imposed on agencies through law or through the political branches. However, since all of these mechanisms were adopted in a top-down fashion (whether through the agency or through government), the focus will be on what the agency/government actors wanted to achieve through them—what their goals *were*—rather than focusing on the goals in terms of citizens' moral development.

The data used in this paper were collected during a field study of the electricity and telecommunications regulators in those three European countries. The sources used are a wealth of internal and external documents—both in hard copy and on the Web—produced by the agencies and by other actors, in addition to qualitative, semi-structured interviews with more than 100 people.⁵

Since the goal is to compare the European experiments with those adopted in the United States, the paper is structured around that comparison. This part introduces the issues and the methodology. Part II provides a brief description of the case studies, addressing similarities and differences among the European countries. Part III then discusses several mechanisms considered necessary to participation in the United States that have been rejected by the agencies in the European countries. Part IV describes the parallels, though it also points out differences between the countries individually, as well as between them and the United States collectively. Part V describes mechanisms that go beyond the prevailing practice in the United States. The paper concludes that the European agencies made substantial efforts to increase their transparency and increase participation, but the content and the success of the efforts varied across countries, strongly influenced by the institutional structure surrounding the agencies.

II. THE CASE STUDIES

The six agencies at the center of this paper are those in the United Kingdom (Ofotel and later Ofcom for telecommunications; Offer and later Ofgem for electricity);⁶ in Sweden (PTS for Telecommunications and STEM for energy);⁷ and France (ART and later ARCEP for telecommunications; CRE for energy).⁸ Their names and years of creation are summarized in Table 1.

5. The interviews were conducted in accordance with the confidentiality requirements of the Committee for Protection of Human Subjects at the University of California, Berkeley. Accordingly, throughout the article, the interviews are referred to only by the institutional affiliation of the interview subjects in order to maintain confidentiality. All of the interviews are on file with the author.

6. Ofotel is the Office of Telecommunications, later Ofcom, the Office of Communications; Offer is the Office of Electricity Supply Regulation, later Ofgem, the Office of Gas and Electricity Markets.

7. Post-och Telestyrelsen, the Swedish National Post and Telecom Agency, is PTS; Energimyndigheten, the Swedish Energy Agency, is STEM.

8. ART is l'Autorité De Régulation Des Télécommunications, or the authority for regulating telecommunications, later l'Autorité De Régulation Des Communications Électroniques et De Poste, or the authority for regulating electronic communications and the postal service, ARCEP. CRE is the Commission de Régulation d'Énergie, the commission for the regulation of energy.

Table 1: Basic Information about Agencies Researched

	Telecommunications	Electricity
U.K.	Oftel (1984-2003) Ofcom (2003-present)	Offer (1989-1999) Ofgem (2000-present)
France	ART (1997-2005) ARCEP (2005-present)	CRE (2000-present)
Sweden	PTS (1993-present)	STEM (1998-present)

These agencies have both advantages and disadvantages as case studies. One major advantage is the fact that the agencies are motivated to experiment with new mechanisms of participation for a number of reasons. First, these agencies are relatively new, and in Britain and France, they also they represent a new and untried mode of regulation.⁹ They, therefore, had fewer obstacles to experimenting with new models of regulation—less path dependency that, as demonstrated by institutional literature, could make them harder to change.¹⁰ Since they were created at an age when, as explained above, governance and participation were the new and exciting thing in public administration, it was natural for them to adopt these new modes of decision-making.¹¹

Beyond that, the agencies work in an environment that is very much oriented towards Europe as a source of governance. The laws governing them were passed in compliance with E.U. directives;¹² parts of their work involve reporting to and

9. See Mark Thatcher, *Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation*, 25 W. EUR. POL. 125 (2002); Mark Thatcher, *Regulation after Delegation: Independent Regulatory Agencies in Europe*, 9 J. EUR. PUB. POL'Y 954 (2002); Mark Thatcher & Alec Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, 25 W. EUR. POL. 1 (2002).

10. See generally JOHN L. CAMPBELL, *INSTITUTIONAL CHANGE AND GLOBALIZATION* (2004); W. RICHARD SCOTT ET AL., *INSTITUTIONAL CHANGE AND HEALTHCARE ORGANIZATIONS: FROM PROFESSIONAL DOMINANCE TO MANAGED CARE* (2000); Paul Pierson, *From Expansion to Austerity: The New Politics of Taxing and Spending*, in *SEEKING THE CENTER: POLITICS AND POLICYMAKING AT THE NEW CENTURY* 54-80 (Martin A. Levin, et al. eds., 2001); Tim Bartley & Marc Schneiberg, *Rationality and Institutional Contingency: The Varying Politics of Economic Regulation in the Fire Insurance Industry*, 45 SOC. PERSP. 47, (2002); Peter Evans, *Development as Institutional Change: the Pitfalls of Monocropping and the Potentials of Deliberation*, 38 STUD. COMP. INT'L DEV. 30 (2004); Richard Freeman & Michael Moran, *Reforming Health Care in Europe*, 23 W. EURO. POL. 35 (2000); Christopher Pollitt, *Clarifying Convergence: Striking Similarities and Durable Differences in Public Management Reform*, 4 PUB. MGMT. REV. 471 (2002); Gerard Roland, *Understanding Institutional Change: Fast-Moving and Slow-Moving Institutions*, 38 STUD. COMP. INT'L DEV. 109 (2004).

11. This is clearly a very simplified version of the process of creating the new agencies and their experimentation with more participatory mechanisms. For studies looking closely at the development of British regulators' experiments with participatory mechanisms and a detailed discussion of the role of such mechanisms, see COSMO GRAHAM, *REGULATING PUBLIC UTILITIES: A CONSTITUTIONAL APPROACH* (2000); CLARE HALL ET AL., *TELECOMMUNICATIONS REGULATION: CULTURE, CHAOS AND INTERDEPENDENCE INSIDE THE REGULATORY PROCESS* (2000); TONY PROSSER, *LAW AND THE REGULATORS* (1997). For a collection of studies of the French regulatory agencies, see MARIE-ANNE FRISON-ROCHE, *RESPONSABILITÉ ET RÉGULATIONS ÉCONOMIQUES* § 5 (2007).

12. The most current set of directives in telecommunications includes the communication package, which is composed of six directives and a resolution. See Europe's Information Society, *Regulatory*

receiving approval from the E.U. commission;¹³ and the agencies have a European regulators' network that meets several times a year and runs an email list used by the regulators as a discussion board. The regulators participating in the board compare notes and discuss best practices in regulations, during which there is an informal competition as to their relative reputations.¹⁴ The European Union promotes and experiments with various kinds of governance mechanisms, such as the Open Method of Coordination (OMC)¹⁵ and Comitology.¹⁶ That approach—encouraging innovation and collaborative governance—has an influence on the agencies.

Finally, in the United Kingdom and France (but not in Sweden, as will be described below), the agencies in question were new creations, outside the traditional civil-service structure. They, therefore, had to create their legitimacy, both towards the traditional administration and towards the public. The traditional accountability justification of government by elected officials, however weak and doubtful even when used by civil servants in the regular ministerial departments, cannot apply to these independent agencies. They had to find new ways to legitimize themselves.¹⁷

Using participatory mechanisms served two purposes. First, it created an alternate source of legitimacy for these non-elected institutions. In essence, they can say, "We may not be elected, but we are transparent and responsive, which is

Framework for Telecoms in the EU Today, http://ec.europa.eu/information_society/policy/ecomms/current/index_en.htm (last visited Oct. 27, 2009). The energy sector is governed by Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 Concerning Common Rules For The Internal Market In Electricity, 1996 O.J. (L 27) 1, and added to by Directive 2003/54/EC Of The European Parliament And Of The Council Of 26 June 2003 Concerning Common Rules For The Internal Market In Electricity And Repealing Directive 96/92/EC, 2003 O.J. (L176). See Europe's Information Society, *Regulatory Framework for Telecoms in the EU Today*, http://europa.eu/legislation_summaries/energy/european_energy_policy/l27005_en.htm (last visited Oct. 23, 2009).

13. For example, the market analysis process that the telecommunications agencies have been required to undertake involves getting the European Commission's approval for two steps of the process. JOACHIM SCHERER, *ELECTRONIC COMMUNICATION LAW AND POLICY OF THE EUROPEAN UNION* (2005).

14. Interview with members of ART, in Paris, France, (Dec. 17, 2004); interviews with members of PTS, in Stockholm, Sweden (Sept. 7, Oct. 15, 2004); interview with members of STEM, in Eskiltuna, Sweden (Sept. 27, 2004); interview with members of Ofgem, in London, England (Dec. 1, 2004). This network can itself be seen as an aspect of "new governance," and fits in nicely with Slaughter's analysis of the role of network in the modern world. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004). However, since the focus of the paper is on mechanisms allowing participation by private actors, I am not addressing the role of networks in a new governance framework—it is beyond the scope of this article.

15. See European Union Center of Excellence, *OMC Forum*, <http://eucenter.wisc.edu/omc/> (last visited October 31, 2009); Tamara K. Hervey, *The European Union and the Governance of Health Care*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US*, 179 (Gráinne de Búrca & Joanne Scott eds., 2006); Claire Kilpatrick, *New EU Employment Governance and Constitutionalism*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US*, 121 (Gráinne de Búrca & Joanne Scott eds., 2006); Neil Walker, *EU Constitutionalism and New Governance*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US*, (Gráinne de Búrca & Joanne Scott eds., 2006).

16. C. JOERGES, "Good Governance" Through Comitology?, in *EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS*, 311 (1999).

17. See GRAHAM, *supra* note 11, at 38 (regulators act in innovative ways to increase transparency) and 92-95 (regulators made use of consumer committees to give voice to consumers to increase legitimacy); Tony Prosser, *Regulating Public Enterprises*, 2001 PUB. L. 505 (2001).

more than you can say for the regular elected branches.”¹⁸ And all of the agencies do indeed stress the large number of consultations with stakeholders and their transparency as sources of legitimacy.¹⁹ In France, for example, transparency and participation are used by the newly created independent administrative agencies to sever or dilute their traditional links with the core civil service.

Second, the agencies can and do call on public support and use it in cases where they do not have support from the government, are defying established ministries, or going against the established state incumbent. For example, the French energy regulator publishes *avis*, or opinions, that can be used by Parliament members to oppose the wishes of the Ministry of Economy, Finance, and Employment regulating the sector.²⁰ Similarly, the British telecommunications regulator, Oftel, used support from customer organizations and favorable media coverage in putting in action its decision to regulate mobile phone termination prices.²¹

We can therefore expect a high level of innovation and experimentation with participation mechanisms from the agencies.

On the other hand, the areas these agencies regulate present at least two obstacles to public participation. The first obstacle is the nature of utility sectors. The issues the regulators handle are technically complex, and it may, therefore, be difficult for members of the public to participate. Lay people often find agency materials hard to understand even when the agency is attempting to reach out. For example, the British National Consumer Council wrote the following about a consultation by Oftel:

[C]omplexity of subject matter is not an excuse for impenetrability. It is also regrettable that the [consultation] document does not contain a clear consumer impact assessment. . . . Oftel needs to address how it presents information in consultation documents as a matter of urgency, both in terms of comprehensibility and format.²²

Similarly, when responding to a consultation by Ofgem, the Friends of the Lake District, a consumer organization, observed, “With reference to the consultation documents, it might be beneficial to provide a Plain English Summary ver-

18. None of the agencies actually say it that way, but Graham makes the argument in his study of the British regulators. See GRAHAM, *supra* note 11, at 63.

19. Interviews with members of the Swedish Telecommunications Agency, PTS, in Stockholm, Sweden (Sept. 7, 15, 23; and Oct. 7, 2004); interview with members of STEM, in Eskiltuna, Sweden (Sept. 27, 2004); interviews with members of Ofcom (previously Oftel), in London, England (Oct. 26, Nov. 10, 2004); interviews with members of Ofgem, in London, England (Oct. 20, Dec. 1, 2004); interviews with members of ART, in Paris, France (Dec. 8, 2004).

20. Interviews with members of CRE, in Paris, France (Dec. 16, 2004); interview with a former member of CRE, in France (Jan. 26, 2005) (a more accurate location is omitted to preserve interviewee’s anonymity); interview with members of General Directorate for Energy and Raw Materials in the Ministry of Industry, in Paris, France (Jan. 26, 2005).

21. Interview with members of Ofcom (previously Oftel), in London, England (Oct. 26, 2004); interview with members of PUAf (the Public Utility Access Forum), in London, England (Nov. 15, 2004).

22. NATIONAL CONSUMER COUNCIL, REVIEW OF PRICE CONTROL ON CALLS TO MOBILE PHONES: RESPONSE TO OFTEL CONSULTATION, available at <http://www.ofcom.org.uk/static/archive/oftel/publications/responses/2001/ctom0201/ncc.pdf>.

sion to explain the main issues for those outside the industry who would like to respond.”²³

These critiques reflect unhappiness with the way the agencies present the materials, but they also stem from the nature of the subjects themselves. They often involve issues that require a lot of explanation, and getting from the public the level of commitment required for understanding the issues and providing meaningful feedback is not easy.

The second obstacle is that utility issues tend to be invisible unless there is a problem with them. This is ironic, because in modern life, our dependence upon electricity and telecommunications is extensive. Electricity powers our most basic working tools. It is often used to heat buildings in winter. It lets us see in dark buildings and spaces, cook on electric stoves, watch TV, and charge our cell phones. Many businesses depend on electronic communications to function—Internet and phone services, for example—and individuals in developed countries are used to always being “in touch.”

But people tend not to interest themselves in the workings of the sector unless there is a crisis or scandal—a blackout, an energy crisis, or a collapse of a network. Professor Chevalier from (among other places) l’Université de Paris IX Dauphine talked about “*la fée de l’électricité*,” or the “electricity fairy,” which is invisible until it stops doing its magic for us.²⁴

This means getting people involved in the routine running of the utility sectors is not easy. Involvement tends to be limited to subject-specific consumer organizations (for example, in the United Kingdom, the Public Utilities Access Forum, PUAf, is an association of organization fighting for access to utilities for low-income consumers)²⁵ or to limited numbers of employees in general consumer organizations.²⁶ Consumer organizations openly admit that they have limited resources to invest in the sectors and probably miss some of the important issues, even when they are focused on the sector.²⁷ For example, a representative of an organization promoting consumer interests in relation to utilities in the United Kingdom told me, when I asked why they did not comment on an electricity distribution price review, that:

There are an awful lot of consultations, and that was probably an important one that we should have responded to The distribution price controls was all very abstract and we didn’t quite get what it’s about and

23. Letter from Carol Douglas, Project Officer, Friends of the Lake District, to Paul O’Donovan, Ofgem (Apr. 8, 2005), available at http://www.ofgem.gov.uk/Networks/ElecDist/PriceCntrlrs/DPCR4/Documents1/10934-9105_Fld.pdf.

24. Interview with Professor Jean-Marie Chevalier, l’Université de Paris IX Dauphine, in Paris, France (Jan. 2, 2005).

25. Information about PUAf can be seen on their website. Public Utilities Access Forum, <http://www.puaf.org.uk/> (last visited Oct. 31, 2009).

26. For example, when I interviewed members of the National Consumer Council they mentioned three employees, one of whom was on maternity leave, who regularly handled utility issues. Interview with members of the National Consumer Council, in London, England (Nov. 16, 2004).

27. Interview with a member of PUAf (the Public Utility Access Forum), in Bristol, England (Nov. 24, 2004); interview with members of the National Consumer Council, in London, England (Nov. 16, 2004); interview with a member of UFC-Que Choisir, French consumer organization, in Paris, France (Dec. 21, 2004).

then quite late on we realized it was actually quite important, and it's just one of those—we don't have enough time for things, and when that realization hit us we were all buried under a lot of other work so I'm afraid that's one we missed. But we will probably rue the day.²⁸

On the other hand, in times of crises, there is often political outcry and strong condemnation of industry in the sector. However, the citizen input tends to be accusatory, rather than constructive problem solving, which may fit more with old government than new collaborative governance.²⁹

For these reasons, creating participatory mechanisms that work for routine issues and at the same time remain functional over the extended time needed to make decisions on complex issues is not easy.

Beyond these similarities, there are, unsurprisingly, substantial differences between the three countries—the United Kingdom, France, and Sweden—both in terms of the liberalization process (i.e., the speed and extent to which the market was opened to competition) and in terms of the political and administrative structure and tradition in which the agencies exist.³⁰ These differences are important to understanding the different forms of participation used by each country. A short introduction to each country's liberalization process and the relevant aspects of the political and administrative culture is provided below, in chronological order of liberalization, from the earliest liberalizer (the United Kingdom) to the most recent (France).³¹

28. Interview with a member of PUAf (the Public Utility Access Forum), in Bristol, England (Nov. 24, 2004).

29. William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in *LAW AND NEW GOVERNANCE*, *supra* note 15, at 37.

30. For further discussion, see MARK THATCHER, *THE POLITICS OF TELECOMMUNICATIONS: NATIONAL INSTITUTIONS, CONVERGENCE AND CHANGE* (1999) (on England and France's liberalization of telecommunications); Lennart Hjalmarsson, *From Club Regulation to Market Competition in the Scandinavian Electricity Supply Industry*, in *INTERNATIONAL COMPARISONS OF ELECTRICITY REGULATION* 126 (Richard J. Gilbert & Edward P. Kahn eds., 1996) (on electricity in Sweden); MAGNUS KARLSSON, *THE LIBERALISATION OF TELECOMMUNICATIONS IN SWEDEN: TECHNOLOGY AND REGIME CHANGE FROM THE 1960S TO 1993* (1998) (Ph.D. dissertation, Linköping University) (for telecommunications liberalization in Sweden); Stephen Thomas, *Evaluating the British Model of Electricity Deregulation*, 75 *ANNALS OF PUB. & COOPERATIVE ECON.* 367 (2004) (on British electricity); Nicolas Charbit, *Country Report: France*, in *THE LIBERALIZATION OF ELECTRICITY AND NATURAL GAS IN THE EUROPEAN UNION* 123 (Damien Geradin ed., 2001) (on electricity in France); see also Dorit Rubinstein, *Regulatory Accountability: Telecommunications and Electricity Agencies in the UK, France and Sweden* (Spring 2007) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author) (for a comparison between the three countries). However, for a view that there are strong similarities in development in addition to differences, see Ian Bartle, *When Institutions No Longer Matter: Reform of Telecommunications and Electricity in Germany, France and Britain*, 22 *J. OF PUB. POL'Y* 1 (2002).

31. For further reading on the liberalization process, see Bartle *supra* note 30; PETER CAMERON & MICHAEL BROTHWOOD, *COMPETITION IN ENERGY MARKETS: LAW AND REGULATION IN THE EUROPEAN UNION* (2002); Martin Cave & Luigi Prosperetti, *The Liberalization of European Telecommunications*, in *TELECOMMUNICATIONS ON TWO SIDES OF THE ATLANTIC* (Martin Cave & Robert W. Crandall eds., 2001); Richard Green, *Electricity Liberalisation in Europe—How Competitive Will It Be?*, 34 *ENERGY POL'Y* 2532 (2006); DIETER HELM, *ENERGY, THE STATE, AND THE MARKET: BRITISH ENERGY POLICY SINCE 1979* (2004); Hjalmarsson, *supra* note 30; WILLEM HULSINK, *PRIVATISATION AND LIBERALISATION IN EUROPEAN TELECOMMUNICATIONS: COMPARING BRITAIN, THE NETHERLANDS, AND FRANCE* (1999); Lars Hultkrantz, *Telecommunications Liberalisation in Sweden: Is "Intermediate" Regulation Viable?*, 9 *SWEDISH ECON. POL'Y REV.* 133 (2003); Nicolas Jabko &

A. The United Kingdom

The United Kingdom was the first country in Europe to liberalize³² its utility sectors, starting with telecommunications. The British telecommunications incumbent was privatized in 1984, and the sector was opened to competition in 1991.³³ Oftel, the regulator of the sector, was created together with the initial reform, in 1984. Liberalization of other utility sectors followed: electricity was liberalized in 1989, and the Office of Electricity Supply Regulation (Offer) was created.³⁴ Offer merged with the gas regulator (Ofgas) to form the Gas and Electricity Market Regulator (Ofgem) in 1999.³⁵ These liberalizations were done as part of general market-oriented reforms put in place by the Thatcher government, and were controversial.³⁶

The British independent regulators are known throughout Europe as leaders in liberalization. Other countries look to their innovations in regulations.³⁷ As the first regulators, they had substantial time to experiment with different participatory mechanisms and evaluate regulation and accountability in a very sophisticated manner. However, as the first to regulate, they also ran first into some of the pitfalls of regulation—rising prices in electricity and gas, manipulation of prices by large production companies, and dealing with large, sophisticated incumbents in both electricity and telecommunications.³⁸ In some cases, the agencies came under strong political and media attack, and some of the mechanisms adopted—especially by Ofgem—were put in place in direct response to such attacks as a way to deal with criticism and loss of a sense of legitimacy. According-

Rainer Eising, *Moving Targets: National Interests and Electricity Liberalization in the European Union*, 34 COMP. POL. STUD. 742 (2001); Tooraj Jamasb & Michael Pollitt, *Electricity Market Reform in the European Union: Review of Progress Toward Liberalization & Integration*, 26 THE ENERGY J. 11 (2005), working paper version available at <http://tisiophone.mit.edu/RePEc/mee/wpaper/2005-003.pdf>; Karlsson, *supra* note 30; Helena Lindskog, *The Telecommunications Market In Sweden From Monopoly to Competition*, presentation at the 2004 Applied Business Research Conference, San Juan Puerto Rico (2004) available at <http://www.heldag.com/articles/Telecom%20market%20ABR%202004%20%20H%20Lindskog.pdf>; FRANÇOIS SOULT, EDF CHRONIQUE D'UN DÉSASTRÉ INÉLUCTABLE (2003); David Coen & Mark Thatcher, *The National Politics of European Regulation: Institutional Reform in Telecommunications*, in UTILITIES REFORM IN EUROPE (Susan Boriotti et al. eds., 2001); THATCHER, THE POLITICS OF TELECOMMUNICATIONS, *supra* note 30; Mark Thatcher, *Winners and Losers in Europeanisation: Reforming the National Regulation of Telecommunications*, 27 W. EUR. POL. 284 (2004); Thomas, *supra* note 30; Leonard Waverman & Esen Sirel, *European Telecommunications Markets on the Verge of Full Liberalization*, 11 J. ECON. PERSP. 113 (1997); Rubinstein, *supra* note 30, chapter 2, pp. 35-74 (describing liberalization in detail).

32. I am focusing on liberalization, i.e., opening a sector to competition, and not privatization because while not all the countries in Europe privatized or intend to privatize their utilities, all of them have opened the sectors to competition, whether willingly or because of E.U. directives. The debate on the comparative effects of liberalization v. privatization is beyond the scope of this paper.

33. See PROSSER, *supra* note 11; MARK THATCHER, THE POLITICS OF TELECOMMUNICATIONS: NATIONAL INSTITUTIONS, CONVERGENCE AND CHANGE IN BRITAIN AND FRANCE (1999); C.D. FOSTER, PRIVATIZATION, PUBLIC OWNERSHIP AND THE REGULATION OF NATURAL MONOPOLY (1992).

34. PROSSER, *supra* note 11; GRAHAM, *supra* note 11.

35. GRAHAM, *supra* note 11.

36. See PROSSER, *supra* note 11; GRAHAM, *supra* note 11.

37. Interviews with members of PTS, in Stockholm, Sweden (Sept. 7, 2004); interview with members of STEM, in Eskiltuna, Sweden (Sept. 27, 2004); interview with a member of Orange, France, in Paris, France (Jan. 28, 2005).

38. See PROSSER, *supra* note 11; GRAHAM, *supra* note 11.

ly, the agencies' mechanisms are now aimed primarily at increasing transparency and giving stakeholders a voice, rather than at achieving consensus (although the regulators make an effort to cooperate with industry on many issues).³⁹

The first independent agency, the Office of Fair Trade (OFT), was established in 1973. The structure and regulatory framework provided for all the other utility regulators—OfTel, Offer, Ofgas—was, with slight variation, a repetition of the OFT model; regulators examined here were modeled after it.⁴⁰ Their situation in terms of accountability to the ministry in charge of utility sectors—the Department of Trade and Industry—has always been a bit blurry; they are independent, but the ministry is responsible to Parliament for what they do. This is reflected in the recent review of accountability of independent agencies by the House of Lords.⁴¹ In that review, the concerns about traditional accountability were answered by a new model of accountability, “360-degree” accountability, which acknowledged that regulators were, and should be, accountable in many directions and through many mechanisms.⁴² The idea was that while agencies are not accountable directly to ministers in the traditional sense, they are accountable through procedures ensuring responsiveness to stakeholders and transparency.⁴³ Indeed, OfTel (later imitated by the other regulators) emphasized consultation and transparency and made most of its decisions through meetings with stakeholders and intensive public consultation.⁴⁴

B. Sweden

Like the United Kingdom, Sweden was a relatively early liberalizer, opening its telecommunications market to competition in 1993 and its electricity market in 1998. However, the process of liberalization in Sweden was much more consensual—at least in telecommunications.⁴⁵ This meant that the regulatory system put in place was, in its first stages, based on a high level of trust and cooperation between industry, the regulators, and the consumer industry, and the need for additional participation mechanisms was not felt as strongly.⁴⁶

In addition, the created agencies were nothing unusual. Sweden has a tradition of independent agencies dating back to its 1809 constitution. They are generally autonomous and rich in staff and resources. The constitution forbids political interference in their activities, other than passing regulations and laws, and there is a constitutional convention enforcing that prohibition.⁴⁷ This means that the rela-

39. PROSSER, *supra* note 11.

40. *Id.* at 60.

41. SELECT COMMITTEE ON THE CONSTITUTION, THE REGULATORY STATE: ENSURING ITS ACCOUNTABILITY, 2003-4, H.L. 68-I, at ¶ 5.

42. *See id.* at ¶¶ 48-49 (reflecting ideas described in Colin Scott, *Accountability in the Regulatory State*, 27 J.L. & SOC'Y. 38, (2000)).

43. *See id.* at ¶¶ 19-23.

44. CLARE HALL, ET AL., TELECOMMUNICATIONS REGULATION: CULTURE, CHAOS AND INTERDEPENDENCE INSIDE THE REGULATORY PROCESS, 48-53 (2000).

45. *See* Hjalmarsson, *supra* note 30; Karlsson, *supra* note 30; Lindskog, *supra* note 31.

46. *See* Hjalmarsson, *supra* note 30; Rubinstein, *supra* note 30, at 159.

47. HUGH HECLLO & HENRIK MADSEN, POLICY AND POLITICS IN SWEDEN: PRINCIPLED PRAGMATISM (1987); Jaqueline Yates, *Sweden*, in *COMPARATIVE PUBLIC ADMINISTRATION* (J.A. Chandler ed., 2000).

tionship between agencies and government is well-established, and the agencies did not need to establish their legitimacy in the same way as their French and British counterparts had to.

Furthermore, even before the creation of these agencies, Sweden had a tradition of consultation and extensive open government laws.⁴⁸ Therefore, much that was new and exciting for the British and French agencies in terms of increasing participation and transparency was, for the Swedish agencies, simply business as usual. They did add participation mechanisms—for example, as will be described below, advice mechanisms for consumers, partnership with industry, and online consultations open to anyone⁴⁹—but many of the ideas of open government, consultation, and government by consensus were already in place.

Finally, unlike its British or French counterparts, Swedish government enjoys a high level of trust from its citizens (although it declined in the 1980s and 1990s, to a degree where Swedish scholars talk of a crisis of legitimacy);⁵⁰ trust in government is still very high compared to other democracies.⁵¹ Therefore, Swedish agencies are not subject to substantial pressures to increase participation.⁵²

C. France

France was a late liberalizer; both in telecommunications and in electricity, the market was liberalized after, not before, the enactment of E.U. directives. In both cases it only opened the full market to competition at (and not before) the final deadline the directives set.⁵³ In terms of participation mechanisms, this gave France both a disadvantage and an advantage compared to other European countries. On the one hand, it started late, and therefore it is still adjusting to some of the mechanisms other countries have been using for years. French decision-making in these sectors started with the decision-making process of three actors: the ministry, the agency, and the incumbent company, or the “national champion.”⁵⁴ Under these circumstances, including other actors in industry—from both the sector’s industry (i.e., telecommunication operators or electricity operators) and other industries—was an expansion and should be regarded as a substantial

48. HECLO & MADSEN, *supra* note 47; Yates, *supra* note 47. *But see infra* notes 94-99 and accompanying text about the extent and openness of consultations.

49. *See discussion infra* § V.B.

50. HECLO & MADSEN *supra* note 47; Jon Pierre, *Legitimacy, Institutional Change, and the Politics of Public Administration in Sweden*, 14 INTER’L. POL. SCI. REV. 387 (1993); Olof K. Ruin, *The Duality of the Swedish Central Administration: Ministries and Central Agencies*, in HANDBOOK OF COMPARATIVE AND DEVELOPMENT PUBLIC ADMINISTRATION (Ali Farazmand ed., 2001).

51. *See* SEOK-EUN KIM, *The Role of Trust in the Modern Administrative State: An Integrative Model*, 37 ADMIN & SOC’Y 611(2005).

52. Under the approach that participation mechanisms are a response to failures and problems of traditional government mechanisms. *See* Fung, *supra* note 4.

53. And there is a debate ongoing about whether it was a willing or reluctant liberalizer. *See* Bartle, *supra* note 30, HULSINK, *supra* note 31; JABKO & EISING, *supra* note 31; SOULT, *supra* note 31; THATCHER, *supra* note 30.

54. THATCHER, *supra* note 30 at 255-256; interviews with members of ART, in Paris, France (Dec. 8, 2004); interviews with members of CRE, in Paris, France (Jan. 10, 2005); interviews with a former member of CRE, in France (Jan. 26, 2005) (location omitted to preserve interviewee’s anonymity).

change. Citizen participation is still in very early stages on most issues.⁵⁵ On the other hand, as a latecomer, France could anticipate some of the problems the other countries faced without advanced preparation. Indeed, in a number of areas, France made clever use of sophisticated participation mechanisms to overcome such problems.⁵⁶

The independent agencies are new phenomena in France, and the administrative apparatus is still adjusting to them. Many questions as to their roles and powers are still open.⁵⁷ However, in the case of the telecommunications and electricity agencies, it is clear they are somewhat outside the general administrative structure. While most of their members are civil servants and not independent contractors,⁵⁸ and while most of them went to the Grands Ecoles and are members of the Grands Corps,⁵⁹ they are not quite part of the traditional civil service. Unlike traditional civil servants, members of these new agencies also face pressures from their European colleagues and the Commission to assert their independence and achieve goals that are not necessarily in line with the ministry or the incumbent.

The French energy regulator (CRE)⁶⁰ has clashed more than once with EDF, the national electricity company, and with the ministry.⁶¹ While the French telecommunications regulator (ART)⁶² enjoyed substantial support from the ministry, it was attacked by Parliament members and (almost inevitably) clashed with France Telecom, the incumbent telecommunications company.⁶³ In those strug-

55. There is strong union involvement in opposing privatization, mostly because of concerns about layoffs and the status of employees in the former incumbents. But they have very little involvement in most other issues in the sector. Dominic Di-Natale, *French Unions Attack Privatisation Plans* (B.B.C. News broadcast, July 18, 2003), available at <http://news.bbc.co.uk/2/hi/business/3077439.stm>. Michel Berne & Gerard Pogorel, *Privatization Experiences in France* 21 (CESifo Working Paper Series No. 1195, 2004), available at <http://ssrn.com/abstract=559965>.

56. See discussion *infra* § V.A.

57. See FRISON-ROCHE, *supra* note 11; Mark Thatcher, *The Third Force? Independent Regulatory Agencies and Elected Politicians in Europe*, 18 GOVERNANCE 347 (2005).

58. A substantially different status in France. Civil service employees enjoy special protections against dismissal and—for the higher echelons at least—considerable status. Barry Owen, *France, in COMPARATIVE PUBLIC ADMINISTRATION* 50, 56, 69 (J.A. Chandler ed., 2000). Independent contractors do not enjoy the same protections or status (though an outsider interacting with the agency may not know the status of different employees).

59. The Grands Ecoles are part of the French system of higher education; unlike public universities, entry to them is governed by competitive examinations that students sit for after extensive preparatory courses. While it is not clear which schools are included in this category, most of the high ranking civil servants are recruited from these schools. Some of the most prestigious include l'École Nationale d'Administration and l'École Polytechnique.

The Grands Corps are the organizations of senior members of the civil service. Examples of such corps include the Council of State, the Court of Accounts, the Finance Inspectorate, the Diplomatic Corps and the Prefectoral Corps, the Corps of Mining Engineering and the Corps of Roads and Bridges. An official's primary focus of identification and loyalty is to her corps, rather than to the civil service as a whole. Each corps has a different functional role, but they may be called upon to do other jobs, since their quality is highly valued and they are in high demand. Members can take leave and go into politics, retaining their membership and a right to return. Owen, *supra* note 58, at 50.

60. The Commission de Régulation de l'Énergie.

61. Interview with members of CRE, in Paris, France (Jan. 10, 2005); interview with a former member of CRE, in France (Jan. 26, 2005) (a more accurate location is omitted to preserve interviewee's anonymity); interview with a member of RTE (the independent electricity network operator, a subsidiary of EDF), in Paris, France (Jan. 11, 2005).

62. The Autorité de Régulation de Télécommunications.

63. Interview with members of ART, in Paris, France (Dec. 8, 2004); interview with a member of AFORS, in Paris, France (Jan. 31, 2005).

gles, the agencies used participation mechanisms to create legitimacy that strengthened their position. Indeed, by associating more organizations, institutions and interest groups with the decision-making process, CRE is reducing the remains of state department's "tutelage"—or political mastery—over its activities.

The rest of this paper discusses the participation mechanisms used by the six regulatory agencies, contrasting them with common practice in the United States.⁶⁴ Most of the mechanisms described here have either been adopted by the European agencies on their own initiative or, if they were imposed on the agencies, the agencies went far beyond the legal requirements. With one exception: external consumer watchdogs (i.e., agencies whose job it is to monitor the sector on behalf of consumers) were usually created by legislatures.

III. THE STRATEGIES THAT WOULD NOT TRAVEL, METHODS REJECTED

Before discussing mechanisms that parallel what is used in the United States to provide for citizen participation, this section will address two rules justified in the United States as providing for meaningful participation or preventing an undermining of participation that were rejected by the agencies researched. These are open meetings and rules prohibiting *ex parte* communication.

Rules forbidding *ex parte* communication are part of the federal practice of administrative law, certainly in formal adjudications,⁶⁵ but possibly also in rule-making, at least according to one opinion of the U.S. Court of Appeals for the D.C. Circuit.⁶⁶ They have been included in statutes governing specific agencies⁶⁷ and adopted by agencies through their own rules. They exist in most states to some degree.⁶⁸ In at least some situations they have even been anchored in the due process clauses of the Fifth and Fourteenth Amendments.⁶⁹ These rules mandate that after a certain stage in the decision-making process, an agency will not meet separately with any of the parties involved, that meetings are limited to public hearings or written communications open to the other side, and that any meetings that do occur will be recorded.

The other relevant laws require decision-making meetings inside agencies to be held in public. These are codified in laws on the federal level, such as the

64. Comparison to the United States is always problematic. Even more than other countries, the United States is large and complex, and its decentralization means that any claim will probably not apply somewhere. The discussion below of methods not used in the United States, used in the United States, and beyond the typical in the United States, applies to the "average" or common decision-making process in the United States, to the best of my knowledge. There are bound to be one or two counterexamples, but the general picture is as described below.

65. 5 U.S.C. § 557(d).

66. *Home Box Office v. F.C.C.*, 567 F.2d 9, 57 (D.C. Cir. 1977).

67. *See, e.g.*, 15 U.S.C. § 57a (placing *ex parte* communication limitations on the FTC).

68. *See* Suzanne J. Piotrowski & Erin L. Borry, *Open Public Meetings in New Jersey: History and Current Issues*, 3 OPEN GOV'T 1 (April 2007), available at <http://www.opengovjournal.org/article/view/616/790>.

69. *Sangamon Valley Television Corp v. U.S.*, 269 F.2d 221, 222-224 (D.C. Cir.1959) (commonly interpreted to be based on an interpretation of the due process clause); *see* Richard J. Pierce, *Reply: Waiting for Vermont Yankee III, IV, and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 912 (2007).

Government in the Sunshine Act and the Federal Advisory Committee Act.⁷⁰ They are included in state laws in most state statutes.⁷¹

The relevant justification for such rules is that meetings with one party alone or meetings away from the public eye could negate the public participation process. If agency officials can meet parties separately, without public knowledge of the content of such meetings, they may base decisions on secret arguments and reasons raised in such meetings, including illegitimate arguments and undue influences. That is the concern raised by those worried about agency capture by industry or other groups. Such meetings also reduce the accountability of agencies—because if it would be impossible to know what their decisions are actually based on, how could the stakeholders or the public prevent abuses of discretion or decisions based on illegitimate considerations?

However, as mentioned above, these arguments have been rejected by the European agencies studied here. In fact, these agencies take the opposite approach and emphasize both their willingness to meet with any actor at any stage of the process and the high number of bilateral (meaning here between the agency and one party) meetings they hold.⁷²

To explain their reluctance to follow the *ex parte* rules that apply in the United States, the six agencies discussed in this article both emphasize the critical role of bilateral meetings and express disagreements with the concerns raised about them.⁷³ First, these agencies see bilateral meetings as critical to their job in more than one way. That meetings with stakeholders provide invaluable information is uncontroversial, but these agencies add that they receive more candid and more accurate information in bilateral meetings, when the stakeholders do not need to worry about the impression their words will make or the ability of adversaries to use their words against them (accepting as legitimate the unwillingness of stakeholders to say certain things in the presence of rivals).⁷⁴ Such meetings are also appropriate forums to achieve compromises, which is exactly the concern raised by opponents—that “secret deals” will be struck. In addition, these agencies see the meetings as critical in another way.⁷⁵ The regulators cannot draw their legiti-

70. Kathy Bradley, *Do You Feel the Sunshine? Government in the Sunshine Act: Its Objectives, Goals, and Effect on the FCC and You*, 49 FED. COMM. L.J. 473, 476 (1997); Suzanne J. Piotrowski & Erin L. Borry, *Transparency and Local Government Websites*, in HANDBOOK OF RESEARCH ON STRATEGIES FOR LOCAL E-GOVERNMENT ADOPTION AND IMPLEMENTATION: COMPARATIVE STUDIES 390, 392 (Christopher G. Reddick ed., 2009).

71. Piotrowski & Borry, *supra* note 68, at 4; Piotrowski & Borry, *supra* note 70, at 400-04.

72. Interviews with members of the Swedish Telecommunications Agency, PTS, in Stockholm, Sweden (Sept. 7, 15, 23; and Oct. 7, 15, 2004); interviews with members of STEM, in Eskiltuna, Sweden (Sept. 8, 23, 27, 2004), in Stockholm, Sweden (Oct. 6, 2004); interview with members of ART, in Paris, France (Dec. 8 2004); interviews with members of CRE, in Paris, France (Dec. 16, 2004 and Jan. 10, 2005); interview with members of Ofgem, in London, England (Oct. 20, Dec. 1, 2004). A similar finding in relation to Ofitel was found by Hall, Hood and Scott in their in depth study of that agency, see HALL, ET AL., *supra* note 11.

73. Interviews with members of the Swedish Telecommunications Agency, PTS, in Stockholm, Sweden (Sept. 7, 15, 23; and Oct. 7, 2004); interviews with members of STEM, in Eskiltuna (Sept. 8, 23, 27, 2004), in Stockholm, Sweden (Oct. 6, 2004); interviews with members of ART, in Paris, France (Dec. 8, 2004); interviews with members of CRE, in Paris, France (Dec. 16, 2004 and Jan. 10, 2005); Interview with members of Ofgem, in London, England (Oct. 20 and Dec. 1, 2004); interview with members of Ofcom (previously Ofitel), in London, England (Oct. 26, 2004).

74. See *supra*, sources cited note 73.

75. See *supra*, sources cited note 73.

macy from elections, being that they are unelected; meeting with the parties can serve as an alternative source of legitimacy by showing openness and willingness to listen to the public.⁷⁶ In essence, the regulator in these circumstances is claiming, “While not elected, I am responsive to a variety of actors, willing to listen and address their concerns, and therefore legitimate.”

Naturally, some stakeholders claim that secret deals and behind-the-scenes dealings were held between an agency and other actors. For example, both in France and the United Kingdom, concerns were raised about the illegitimate influences of politicians.⁷⁷ In both countries, concerns were also expressed about deals made between the agency and the respective industry.⁷⁸

However, agency members respond to such claims in two ways. First, they emphasize the desirability of discussion and consultation, even in face of such fears. Second, they say, it comes down to trust.⁷⁹ If agency members want to strike a deal with an actor, they can find an opportunity to do so—for example, in the United States, one result of *ex parte* rules was to make the early stages in the process, before such restrictions apply, more important.⁸⁰ If they seek to base their decisions on illegitimate considerations, *ex parte* and open meetings rules will not prevent considering such issues. And they come with too high a price in terms of information lost.

IV. PARALLELS TO THE UNITED STATES

A. Consultations

The first parallel between the six agencies and the United States is actually not a mechanism of new governance, but of old government. Several scholars have commented on the increase in participation mechanisms adopted in the United States in relation to rulemaking during the 1970s and 1980s.⁸¹ Increased participation requirements were established both by Congress and by the federal courts.⁸² As a result, today’s rulemaking process includes both the opportunity for parties to comment on proposed rules and an agency’s duty to address issues raised in those comments.⁸³ These mechanisms are criticized for not allowing enough meaningful participation but are seen as an important minimum require-

76. See *supra*, sources cited note 73.

77. Interview with a member of AFORS, in Paris, France (Jan. 31, 2005); interview with members of the British energy industry (company names omitted to preserve confidentiality), in London, England (Nov. 8, 30, 2004).

78. Interview with a member of UFC-Que Choisir, French consumer organization, in Paris, France (Dec. 21, 2004); interview with members of PUAf (the Public Utility Access Forum), in London, England (Nov. 15, 2004); interview with a member of PUAf, in Bristol, England (Nov. 24, 2004); interview with members of the National Consumer Council, in London, England (Nov. 16, 2004).

79. Interview with members of PTS, in Stockholm, Sweden (Sept. 7, 15, 23; and Oct. 15, 2004); interview with members of STEM, in Eskiltuna, Sweden (Sept. 8, 2004).

80. See generally CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* (3d ed. 2003).

81. See generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1670 (1975); MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION* (1988).

82. SHAPIRO, *supra* note 81, at 45-46.

83. Coglianese, *Citizen Participation in Rulemaking*, *supra* note 4, at 946.

ment to at least allow some public input.⁸⁴ It is also still the most common mode of participation: new governance mechanisms are adopted occasionally, but most rules have a comment period.⁸⁵

The European parallel to this process, increasingly adopted by the agencies studied and now also included in the E.U. directives,⁸⁶ are consultations. Before an important policy decision, the agencies discussed here publish a draft decision on the Internet and provide an email and mailing address for comments. The final decision is made after consideration of those comments.⁸⁷

Given the importance of consultations in Europe and of the notice and comment parallel in the United States, this section will detail the consultation process in the three countries studied. The general format is described above. But while the basic process is similar, the form and inclusiveness of the consultations vary across countries.

1. The United Kingdom

The United Kingdom adopted a consultation process in the relatively early years of liberalizations, and the agencies are extensive users of consultations. For those familiar with the “Yes, Minister”⁸⁸ culture and its hostility to open government and its elitist ethos, it may be surprising to hear British regulators discuss consultations in these terms:

The essence of regulation is consultation and transparency. . . .⁸⁹

You are likely to get much better decisions. And it is a virtually novel idea for government that you expose everything in advance, rather than just say, we have decided to do X, but I mean it’s actually easier in a non-ministerial body. That’s . . . the purpose of [what] consultation is for; you take [sic] better decisions if you have exposed your developing thinking at various stages to everybody’s reaction.⁹⁰

However, today, consultation is the agencies’ modus operandi. In electricity, it was partly a response to criticism for lack of transparency;⁹¹ in telecommunications it was self-imposed by the regulator.⁹² The British consultations are based

84. *Id.*

85. There are some exceptions to the APA comment requirements, though they are beyond the scope of this article.

86. Council and Parliament Directive 2002/21 § 15, 2002 O.J. (L 108) 33-50 (providing a common regulatory framework for electronic communications networks and services); Council and Parliament Directive 2005/89, art. 4, 2006 O.J. (L 033) 22-27 (concerning measures to safeguard security of electricity supply and infrastructure investment).

87. British agencies also create a “Regulatory Impact Analysis,” paralleling the OMB review process. However, that discussion goes beyond the issue of participation.

88. See generally JONATHAN LYNN & ANTONY JAY, *THE COMPLETE YES MINISTER: THE DIARIES OF A CABINET MINISTER BY THE RIGHT HON. JAMES HACKER MP* (1989).

89. Interview with members of Ofcom (previously Oftel), in London, England (Oct. 26, 2004).

90. Interview with members of Ofgem, in London, England (Oct. 20, 2004).

91. See PROSSER, *LAW AND THE REGULATORS*, *supra* note 11.

92. See HALL, et al., *supra* note 11.

on open participation and have a wide range of stakeholders regularly participating.⁹³ They routinely receive submissions from industry, consumer organizations, individual consumers, academics, local governments, and other interested parties. The British agencies routinely hold oral hearings in addition to written consultations and allow extensive expression by anyone who wants to attend. Additionally, they usually hold more than one round of consultations, and they respond to comments extensively in subsequent drafts and in final decision documents.⁹⁴ The agencies hold frequent meetings with any interested party to discuss the issues included in the consultations. The regulators have substantial experience at this process and are constantly involved in a dialogue with stakeholders.⁹⁵

If anything, the criticism heard in Britain is that agencies hold too many consultations that are too long and too detailed, which is a concern voiced by several interviewees:

I think our regulator has really gone a bit over the top. Their consultation papers are huge. They are very, very long, very detailed; they come out about twice a day, you know, there's a constant stream of them, and . . . small companies can't, even big companies, they have a regulatory manager who spends all his time going through consultations, responding to consultations.⁹⁶

A member of Ofcom noted, "Ofcom has had an awful lot of consultations. When it started, it was criticized for having twenty consultations at a time, to which they replied, 'We believe we're obliged to have most of them. The reviews require consultations.'"⁹⁷

Even a consumer representative who thought consultation was a good thing pointed out that, "I don't feel that the consumer world as a whole is adequately resourced to cope with it."⁹⁸

This places the agency in an unwinnable situation. However, most actors agreed that it is better to have too many consultations than too few. The best phrasing came from a member of the Department of Trade and Industry:

Can't win, can you? Ofcom [has] taken [the] view that they will always consult before they regulate, and I think that is a good principle because otherwise how can you judge that it's proportionate? And regulation determines if [a] business plan is viable or not, and if you don't give people

93. Rubinstein, *supra* note 30, at ch.4, 148-49.

94. A fact which was cited by more than one French interviewee as a practice that should be adopted by French agencies. Interview with a member of Orange, France, in Paris, France (Jan. 28, 2005); interview with members of a telecommunications operator, in Paris, France (Jan. 24, 2005); interview with a member of AFORS, in Paris, France (Jan. 31, 2005).

95. HALL ET AL., *supra* note 11, at 47-48; Dorit Rubinstein Reiss, *Administrative Agencies as Creators of Administrative Law Norms: Evidence from the U.K., France and Sweden*, in *COMPARATIVE ADMINISTRATIVE LAW* (Susan Rose-Ackerman & Peter Lindseth, eds.) (forthcoming 2010).

96. Interview with a members of the Department of Trade and Industry working on energy issues, in London, England (Nov. 3, 2004).

97. Interview with members of Ofcom (previously Ofel), in London, England (Oct. 26, 2004).

98. Interview with a member of PUAf (the Public Utility Access Forum), in Bristol, England (Nov. 24, 2004).

in business an opportunity to comment, you can inadvertently cause a lot of damage. . . . [N]othing forces people to respond to consultation. It does take a bit longer, but by ten-to-one it's better to consult than not.⁹⁹

2. Sweden

Swedish consultations are very different than British ones. Sweden has a long tradition of consultation and decision-making by consensus.¹⁰⁰ Consultation was an inbuilt part of decision-making by the agencies from the start. In Sweden the decision went through at least two rounds of in-depth consultation with a number of important actors, with each actor reading the proposals carefully and commenting in detail, and the subsequent rounds including everyone's comments.

This process is still used by the regulators and also within government towards different actors on different levels. Essentially, the process ensures agency proposals are thoroughly reviewed. On the one hand, this consultation process includes a very specific set of actors. The materials are distributed to government actors, such as the ministry, the competition agency and the consumer agency; they are provided to the workers' unions, the employers' unions, and to industry. While this range of actors is pretty broad (the workers' union, for example, has a membership of about 2 million workers, a relatively high percentage of people in a country of 9 million people),¹⁰¹ it does not provide a channel for individual consumers or consumer organizations to comment.

On the other hand, these actors are not barred from the process. Since Sweden has extensive open government laws, interested parties can get access to the consultation documents, and the Swedish National Post and Telecom agency (PTS)¹⁰² has been, in recent years, posting its consultations on the Web site in the belief that it will help reduce litigation.¹⁰³ In addition, the relatively limited inclusiveness of the process also stems from the high level of trust these agencies enjoy. Constantly, all actors expressed their respect for the agencies, which are seen as competent, honest and well intentioned (though many of the actors disagree with some of their substantive decisions).¹⁰⁴ Under these circumstances, there are no pressures on the agency to add more actors to its consultations.

99. Interview with a member of the Department of Trade and Industry specializing in energy issues, in London, England (Oct. 20, 2004).

100. See HECLÓ & MADSEN, *supra* note 47, at 9-12; YATES, *supra* note 47 at 154-55.

101. LO SWEDEN, THE SWEDISH TRADE UNION CONFEDERATION 5, available at [http://www.lo.se/home/lo/home.nsf/unidView/2C54A4FCCAA32884C1256E750051BE88/\\$file/egpresentation2004.pdf](http://www.lo.se/home/lo/home.nsf/unidView/2C54A4FCCAA32884C1256E750051BE88/$file/egpresentation2004.pdf) (last visited Dec. 6, 2009). Union membership in 2002 was 1,918,800. Rate of unionization in 2002 was at eighty-three percent. *Id.* at 6.

102. Post-och Telestyrelsen, the Swedish National Post and Telecom Agency.

103. Interviews with members of PTS, in Stockholm, Sweden (Sept. 7, 2004). PTS faces a very high volume of cases brought against it by operators.

104. Interview with a member of Svenskenergi, the Swedish Energy Industry association, in Stockholm, Sweden (Sept. 16, 2004); interview with members of the Swedish Consumer Agency, in Stockholm, Sweden (Sept. 22, 2004).

3. France

As explained above, at the start of the process, the decision-making in France was done by a triumvirate of actors: the agency, the government, and the national champion (the incumbent national company). However, as time went by, the agencies started to use more and more consultations, partly because of E.U. directives, partly to establish their independence from government and incumbents, and partly to create legitimacy.

By 2004, French consultations were frequent and extensive. They are mainly published online, though the agencies also meet with any interested actors to discuss issues. The agency emphasizes that its behavior is legitimate by referring to its extensive consultations and the opportunity to respond. As explained by one agency member, “Since our work is completely transparent, because we conduct public consultations on everything, actors have an opportunity to express their views.”¹⁰⁵

The main participants in the consultations are, however, industry members, rather than consumer organizations. Consumer organizations, as opposed to workers’ unions, are, according to the interviews conducted for this project, very weak in France and unrepresentative.¹⁰⁶ For example, in telecommunications, one of the leading consumer organizations, UFC Que-Choisir, had a staff devoted to telecommunications that consisted of one member. On the other hand, that member was very active and well known to agency members, expressing his views on many issues and filing suit against the agency on at least one issue, mobile phone termination prices.¹⁰⁷

In addition, some industry members expressed a desire to see more discussion of their comments and response to those comments by agency. The agencies, they said, were inconsistent; they sometimes responded to comments and sometimes did not. The stakeholders wanted clear indications that their input was read and considered, even if it was eventually rejected.¹⁰⁸

For all of the agencies, however, consultations have become an important part of their operations.

B. Consumer Agencies and Ombudsmen

Like the United States, each country studied attempted to create a customer-representation and customer-support apparatus to assure consumer interests are represented. In the United States, there is the National Ombudsman in the Small Business Administration, for example, devoted to helping small businesses handle

105. Interview with members of ART, in Paris, France, (Dec. 17, 2004 (My translation from “(Comme) notre travail est tout a fait transparent, parce que tous ce qu’on fait on fait des consultations publique, il y a occasion de se exprimer.”).

106. Or at least, their presence in these fields is very weak. Interview with members of ART, in Paris, France (Dec. 8, 2004); interviews with members of CRE, in Paris, France (Dec. 16, 2004 and Jan. 10, 2005). The causal connection—are they weak because they are unrepresentative or unrepresentative because they are weak?—is unclear.

107. Interview with members of ART, in Paris, France, (Dec. 9, 2004).

108. Interview with a member of Orange, France, in Paris, France (Jan. 28, 2005); interview with a member of AFORS, in Paris, France (Jan. 31, 2005); interview with a member of TelecomItalia France, in Paris, France (Jan. 27, 2005).

excessive regulation.¹⁰⁹ Similarly, in 1998 Congress passed the IRS Restructuring and Reform Act, in which it created the office of the National Taxpayer Advocate, which is independent from the Internal Revenue Service.¹¹⁰ The Consumer Product Safety Commission was created with a similar goal.¹¹¹ Similarly, the countries studied had their own more or less independent bodies to represent consumer interests.

1. *Consumer Agencies*

One form that this mechanism takes in the three countries examined is to create specialized agencies whose job definition is to represent consumer agencies—like the Consumer Protection Agency in the United States (though one of those described here is a sector-specific agency). Two such agencies deserve special attention: the Swedish Consumer Agency and Energywatch, the British agency created to represent consumers' interests in the energy sector.

Sweden generally believes in one mandating law per agency, so to protect consumers it created a special agency with its own law.¹¹² In Sweden, in addition to the sector regulators, there has always been a consumer agency—*konsumentverket*—to represent consumer interest.¹¹³ This agency gets to comment on any policy changes at the draft stage.¹¹⁴ Any major policy change or decision receives its input.¹¹⁵ It also initiates action and policy changes on issues that consumers complain about, mostly based on reports from the municipal advisors discussed below.¹¹⁶ The agency also can create help mechanisms for consumers; for example, the consumer agency created price comparison software that allows consumers to compare prices between different electricity and telecommunications companies.¹¹⁷

Similarly, Energywatch was created in the 2000 Utilities Bill to address consumer issues in the English energy industry. Like the Swedish agency, Energywatch handles consumer complaints and can raise problematic issues with the regulators. It also publishes reports and initiates campaigns of its own. For ex-

109. U.S. Small Business Admin., About the Office of the National Ombudsman, http://www.sba.gov/aboutsba/sbaprograms/ombudsman/aboutus/OMBUD_ABOUTUS.html (last visited Oct. 24, 2009).

110. 26 U.S.C § 7811 (2006).

111. See U.S. Consumer Product Safety Commission, CPSC Overview, <http://www.cpsc.gov/about/about.html> (last visited Oct. 24, 2009).

112. Rubinstein, *supra* note 30, at 120.

113. *Id.* at 120, 125-126.

114. *Id.* at 125.

115. *Id.*

116. *Id.* at 135-136.

117. See Konsumentverket, Consumer Advice, <http://www.konsumentverket.se/otherlanguages/English/Personal-advice/Consumer-advice/> (last visited November 27, 2009) (for useful information for consumers); Konsumenternas Tele, TV, & Internetbrya, <http://www.ktib.se/> (last visited Nov. 27, 2009) (for information provided by the industry). The comparison engine for telecommunications prices can be found at Telepriskollen, <http://www.telepriskollen.se/Oversikt.aspx> (last visited Apr. 1, 2009). For electricity prices, visit Min Beräkning, <http://www.energimarknadsinspektionen.se/elpriskollen/min-berakning> (last visited Nov. 10, 2009).

ample, Energywatch forced the regulator to defend its positions on prepaid meters, and to work on debt relief and mis-selling.¹¹⁸

These agencies are not a mouthpiece for government or another regulator. They take their role as consumer representatives very seriously and have, on more than one occasion, clashed with the regulator when they do not see it as sufficiently protective of consumer interests.¹¹⁹ They tend to have different priorities than the regulator, and there is quite a bit of tension between the consumer protection agencies and the regulators.¹²⁰

2. Consumer Assistance

Created for similar purposes, though mostly initiated by the regulator, consumer assistance programs are bodies aimed at helping consumers by means of advice or mediation. In the Swedish electricity industry, the regulator decided (with the consent of industry), after facing many complaints about customers have trouble switching their retail supplier, to create an advisory body. The Electricity Advice Bureau is financed by industry, but its board, which includes representatives from industry, the regulator and the consumer agency, has a majority of government representatives. The board gives advice to consumers and can also help mediate between them and the companies.¹²¹

Similarly, Britain has a telecommunications ombudsman to handle complaints. The British service is mainly an arbitration service, which, interestingly, is mandatory for the member companies but not for consumers.¹²²

3. Stakeholders Groups: Working with Industry and Consumers

At the heart of the governance movement, it seems, are participatory mechanisms that involve joint decision-making between stakeholders and the government.¹²³ The United States has been experimenting with regulatory negotiation,

118. Rubinstein, *supra* note 30, at 225-226, 274-279.

119. *Id.*

120. Interview with members of Ofgem, in London, England (Oct. 20, 2004); interview with members of Energywatch (the British government's energy sector watchdog), in London, England (Oct. 27, 2004); interview with members of STEM, in Stockholm, Sweden (Oct. 6, 2004); interviews with members of the Swedish Telecommunications Agency, PTS, in Stockholm, Sweden (Sept. 7, 15, 23; and Oct. 7, 2004); interviews with members of the Swedish Consumer Agency, in Stockholm, Sweden (Sept. 22, 2004).

121. See Swedish Consumer Electricity Advice Bureau, Summary in English, http://www.elradgivningsbyran.se/artikel/article.asp?_tp_article_id=109&avd=ART_OOS (last visited Nov. 11, 2009).

122. See www.adrnow.org.uk, Office of Telecommunications Ombudsman, http://www.adrnow.org.uk/go/SubPage_67.html. (last visited Nov. 27, 2009).

123. See HIRST, *supra* note 4; JOHN CAMPBELL, ET AL., GOVERNANCE OF THE AMERICAN ECONOMY (1991); STEPHEN GOLDSMITH & WILLIAM D. EGGERS, GOVERNING BY NETWORK: THE NEW SHAPE OF THE PUBLIC SECTOR (2004); DAVID M. TRUBEK & LOUISE G. TRUBEK, THE COEXISTENCE OF NEW GOVERNANCE AND LEGAL REGULATION: COMPLEMENTARY OR RIVALRY (2005); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Jody Freeman, *The Private Role in the Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003); Marc Schneiberg, *Political and Institutional Conditions for Governance by Association: Private Order and Private Controls in American Fire Insurance*, 27 POL. & SOC'Y 67 (1999).

deliberative juries, advisory committees, and other forms of joint decision-making.¹²⁴ This form of decision-making has been adopted in the three countries discussed to help deal with consumer problems. In Britain, stakeholder groups are used in issues related to debt relief, aide to low-income consumers, disconnections, and competition problems.¹²⁵ In France, they were used to address competition problems.¹²⁶ In Sweden, they were used to address the setting of distribution prices.¹²⁷ Several notable examples are described below.

In 2002, the Swedish electricity regulator, General Håkan Heden, decided to change the way the agency reviewed electricity distribution prices. Instead of examining a company's accounting books to see if the prices it charged were reasonable in relation to the costs, or instituting a cap on prices—both methods tried by the previous regulator—Heden decided to create a computer model that assesses what a utility should be charging given its performance. The regulator then compares the projected prices with the actual prices.¹²⁸

To develop the model, Heden set up a collaborative effort between members of his small regulatory agency and engineers from the electricity distribution firms.¹²⁹ Together, they developed the aspects to be considered and created the software platform later put in use.¹³⁰ Unfortunately, after the results of test runs of the model became public, industry changed its view of it and became hostile. The model became a source of contention—a concern for those who see increased participation by private actors as a way to defuse future conflicts.¹³¹

Similarly, when in response to complaints and negative media coverage the regulator initiated an “electricity advice bureau,” the industry association Swedenergy (Sevenk Energi) agreed to finance it. The board running the bureau was composed of members of the regulator, the consumer agency and industry (with government having a majority).¹³²

However, the story that stands out the most is that of electricity in France; important to the background of that story were the switching problems regulators in the United Kingdom and Sweden faced. When electricity was liberalized, the regulators in Sweden and the United Kingdom found themselves facing substantial problems from unsavory competition practices by both established incumbents, who did not want to let customers go, and new entrants, who were desperate to grab new customers. The problems included resistance from established

124. See Coglianesi, *Citizen Participation*, *supra* note 4; KERWIN, *supra* note 80; Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Governmental Information Through the Internet*, 50 ADMIN. L. REV. 391 (1998).

125. Rubinstein, *supra* note 30, at 226.

126. *Id.* at 279.

127. *Id.* at 182-183.

128. Interview with members of STEM, in Eskiltuna, Sweden (Sept. 8 2004), in Stockholm, Sweden (Oct. 6, 2004).

129. *Id.*

130. Interview with members of STEM, in Eskiltuna, Sweden (Sept. 8, 2004), in Stockholm, Sweden (Oct. 6, 2004); interview with a member of the Electricity Advice Bureau in Stockholm, Sweden (Oct. 4, 2004).

131. Interview with members of STEM, in Eskiltuna, Sweden (Sept. 8, 2004), in Stockholm, Sweden (Oct. 6, 2004).

132. Interview with members of STEM, in Eskiltuna, Sweden (Sept. 8, 2004); interview with a member of Svenskenergi, the Swedish Energy Industry association, in Stockholm, Sweden (Sept. 16, 2004); interview with members of the Swedish Consumer Agency, in Stockholm, Sweden (Sept. 22, 2004).

companies who refused to comply with requirements that would enable customers to switch providers or sabotaged the customers' ability to do so (for example, in Sweden, company employees refused to give customers their meter number—a necessary piece of data in order to switch suppliers—although they were legally required to do so). Other problems were abusive practices by salespeople who filled in switching forms for customers who refused to switch, whether face-to-face or on the phone. This also included salespeople who threatened customers who lied to them. In an extreme example in Britain, two salespersons for the British subsidiary of EDF went into the local library, opened the voters' register and filled switching forms for all the people in the register. That trick led the regulator to impose a £2 million fine on the company, which made it sit up and pay attention.¹³³

In hindsight, some may claim the problems could have been anticipated, but the agencies did not have the benefit of prior experience, and in spite of the technical and economic expertise of the members, the agencies did not anticipate them.¹³⁴ The problems led customers to mistrust the electricity companies and often just shy away from the process of switching suppliers and also to problems of legitimacy for the whole liberalization experience.

However, in France, as explained above, the regulators have an email list and meet regularly to compare notes. They know what is going on in the other countries and where the problems are. So when France was forced to open its electricity market to competition (because of a E.U. deadline and waiting till the last moment to comply with it), the French were aware of the problems and prepared for them—demonstrating the advantage of being the latecomer. To prepare for these kinds of problems, the French created a work group that included consumer representatives of both residential and industry consumers, industry representatives from the various parts of the electricity sector, and public bodies' representatives.¹³⁵ The goal of the group was to put in place measures to protect consumers.¹³⁶ Its powers included assuring that relevant information was available to consumers and creating methods for handling complaints.¹³⁷ The group included several topical committees and a general board.¹³⁸ It was so successful that CRE not only kept it operating but extended its responsibilities to include, for example

133. See Rubinstein, *supra* note 30, at ch.6 (elaborating on liberalization in Sweden and the United Kingdom and noting additional references).

134. And that kind of Monday-morning quarterbacking is inherently unfair.

135. Groupe de Travail Electricité 2007, <http://www.gte2007.com/> (last visited Oct. 27, 2009); Interview with members of CRE, Paris, France (Jan. 26, 2005).

136. Groupe de Travail Electricité 2007, *supra* note 135 (“Les directives européennes du 26 juin 2003 prévoient que tous les consommateurs d’électricité et de gaz pourront choisir librement leur fournisseur à partir du 1er juillet 2007. A cette date, les mesures relatives à la protection des consommateurs . . . devront également avoir été mises en place. Pour se préparer à cette échéance, la Commission de régulation de l’énergie (CRE) a mis en place des instances de concertation entre les différents acteurs concernés, dénommées ‘Groupe de Travail Electricité 2007’ . . .” I have translated this to: “The European Directives of June 26, 2003 require that all consumers or gas and electricity have the freedom to choose their supplier from July 1, 2007. At that date, the measures related to protecting consumers need to be in place. To prepare for that event, CRE put in place spaces for consultation between the different concerned actors. Those spaces are named ‘Work group in electricity 2007’ . . .”).

137. *Id.*

138. See Groupe de Travail Electricité, <http://www.gte2007.com/charte.php> (last visited Nov. 11, 2009).

the creation and monitoring of rules for provision of information by the distribution networks.

This group model is somewhat different from the “reg-neg” model used in the United States¹³⁹ in several ways. First, unlike reg-neg, the agency does not have to consult on or publish the composition of the group (though if the goal is to get representation, it has an interest in finding good representatives). Second, and more importantly, the group’s end result is not just the start of a process of making policy; subject to agency’s approval, the group’s decisions are the final rule.¹⁴⁰ And from my perusal, the agency regularly approves the product.

The British agencies also initiated workgroups that included agency members and industry representatives in order to write industry-wide codes regulating selling practices.¹⁴¹ However, these groups are different from those workgroups used by the French communication agency in terms of the level of impact. The products created by the French telecommunications groups do not enjoy the same kind of general acceptance; they may well be rejected. The groups’ recommendations are sometimes considered and sometimes not. To give two examples, in relation to local loop unbundling,¹⁴² the consensus of all actors in the group was to impose sanctions if France Télécom acts in a problematic manner. Unsurprisingly, France Télécom’s offer for local loop unbundling did not include a sanction mechanism. The agency, which has the authority to approve or reject France Télécom’s proposal, did not insist on including such a mechanism. In contrast, in relation to including local calls in the preselection program, the format under which calls were included was determined by the input from alternative operators that ART, the telecommunications regulator, accepted.¹⁴³

4. *Consumer Panels*

Another mechanism used in the United States that has been adopted by the British telecommunications regulator is consumer advisory panels. Ofcom in particular has been consulting with consumer panels. Ofcom even created a stronger and better-protected panel as part of its reorganization.¹⁴⁴ There are several indications that it has been taking their advice very seriously. To give one example: when considering the mechanisms through which low income customers are helped to finance telecommunications services, the consumer panel’s support of including an option to make outgoing calls in the low-cost incoming calls

139. See Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rule-making*, 46 DUKE L.J. 1255 (1997); William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA’s Woodstove Standards*, 18 ENVTL. L. 55 (1987); Philip J. Harter, *Assessing the Assessors: the Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32 (2000).

140. Group de Travail Electricité, *supra* note 135.

141. Rubinstein, *supra* note 30 at 276-279. British agencies also created workgroups to deal with disconnection issues. See *id.* at 209, 226.

142. Local loop unbundling is one way the European telecommunications regulators attempted to increase competition. It requires incumbent telecommunications company to allow competitors access to the copper wires going into people homes—the local loop—which those companies initially put in place, i.e., it requires them to lease out their equipment up to the circuit in peoples’ homes.

143. Interview with a member of Orange, France, in Paris, France (Jan. 28, 2005).

144. See Communications Consumer Panel, Home, <http://www.ofcomconsumerpanel.org.uk/> (last visited October 27, 2009).

service that British Telecoms (BT) was about to offer led BT to allow collect calls as part of the plan, and its input led Oftel to simplify some of its documents.¹⁴⁵

V. BEYOND THE UNITED STATES

This last section addresses several mechanisms that do not have parallels in the United States.¹⁴⁶

A. Using Electronic Communications¹⁴⁷

Technology has been used by both American and European agencies to improve the interface between citizens and government for at least a decade. Most administrative agencies in both continents have Web sites today, usually with a large amount of information available on it.¹⁴⁸ In the United States, the Web site [regulations.gov](http://www.regulations.gov) allows interested citizens to comment on proposed regulations,¹⁴⁹ though there are conflicting views on the effectiveness of e-rulemaking.¹⁵⁰ One of the first innovations was the French telecommunications regulator's use of electronic communications not just to provide information, but also to create a dialogue with citizens.

The staff of the French regulator, ART (today ARCEP, with the addition of electronic communications and posts), includes a high number of talented telecommunications engineers, graduates of the *École Nationale Supérieure des*

145. Dorit Reiss, *Agency Accountability Strategies After Liberalization: Universal Service in the United Kingdom, France, and Sweden*, 31 L. & POL'Y 111 (2009).

146. There is a clear problem here: the United States is a very big country, it is decentralized and the fragmented nature of its government encourages local variety and possible experimentation. For example, after presenting this topic at the Collaborative Governance conference at the University of California—Hastings and discussing the Swedish municipal advisors described below, a member of the audience approached me and mentioned that the municipality in which she worked more than 15 years ago had, for a period, a position of a municipal advisor. The municipality was in a transition period and used the advisor to help citizens navigate the government process in this confusing time. In other words, chances are that the examples described below exist somewhere in the United States in some form. However, they are clearly not the modus operandi; they are not very common.

147. Any government mechanism that attempts to increase participation using electronic communications raises concerns about the distributive effects. The concern is that vulnerable citizens, those on low income, the disabled, or foreign citizens, will not be able to use those mechanisms. While addressing those concerns is beyond the scope of this paper, at least two points can be raised in response. First, participation should, as a pragmatic matter, be treated relatively. Even those supporting an extremely strong form of government participation may support an increase that does not quite achieve that goal. Using electronic communications allows citizens that have access to the Internet participate in ways that before would require a much greater commitment of time and resources, for example, traveling to the government center. Second, at least in many United States or European countries, free access to electronic communications is usually available through public libraries. Indeed, when this author as a graduate student was traveling through Europe, I used the Internet in public libraries extensively to work on my research. Therefore, the range of people with access to those communications is not necessarily limited to the wealthy.

148. Though the ease of use and the quality of information can vary substantially between agencies.

149. *Regulations.gov—Your Voice in Federal Decision-Making*, <http://www.regulations.gov> (last visited October 27, 2009).

150. See, e.g., Coglianesi, *Citizen Participation*, *supra* note 4, at 946, 949; Johnson, *supra* note 124, at 404, 406.

Télécommunications.¹⁵¹ These engineers are easily conversant with the newest technologies and enjoy using them.¹⁵² It is therefore not surprising that the regulator they are part of has been using several interactive electronic communications techniques to communicate with citizens and exchange information.

Two methods in particular stand out. The first is the use of a blog.¹⁵³ One of the concerns facing the agency is the relationship between the central government and local authorities. Tense relationships between the government in Paris and the other parts of France have long been a reality of French administrative culture.¹⁵⁴ To improve relationships and reduce tensions on this issue, the French telecommunications regulator created a blog on the topic, the “BLOG de l'équipe Collectivités.”¹⁵⁵ The goals of the blog are both to provide information and to enable interested citizens to provide comments, raise concerns and ask questions. Accordingly, it appeals both to the goal of increasing transparency and the goals of enhancing the agency's legitimacy and increasing trust between the agency and the citizens. Naturally, such a blog requires constant maintenance, and unless there is at least one agency member committed to it, it is hard to keep it going in the long term. Nonetheless, it suggests an interesting avenue for exchanging thoughts between citizens and government, which may become more and more relevant as today's new adults—nicknamed “Generation Y”—start using those mechanisms.

The other mechanism ARCEP utilizes that suggests interesting possibilities is the use of online chats to answer citizens' questions and concerns.¹⁵⁶ ARCEP organizes periodic chats on issues they think citizens would be interested in. They publish the subject and time of the chat in advance, and a staff member is available to answer questions. The format looks exactly like any online chat room, with participants able to see each others' questions and comments, except that it is also possible to see comments posted online before joining the chat. To give one example, on July 7, 2007, ARCEP held a chat on the topic of universal service,¹⁵⁷ in

151. See Owen, *supra* note 58 (for a discussion of the Grands Ecoles and the French method of recruiting young graduates to high positions).

152. Interview with members of ART, in Paris, France (Dec. 8, 2004); interviews with members of France Telecoms, in Paris, France (Jan. 5, 31, 2005).

153. After the writing of this paper, I came across a small number of U.S. government blogs. For example, the Department of Transportation created a blog in April 2008, which can be found at <http://fastlane.dot.gov/>. The Transportation Security Administration has a blog, found at <http://www.tsa.gov/blog/>. Both of these are newer than the French blog, and their existence supports the suggestion that this new method has promise as a way to increase access.

154. See JONAH D. LEVY, *TOCQUEVILLE'S REVENGE: STATE, SOCIETY, AND ECONOMY IN CONTEMPORARY FRANCE* (1999). Even with more recent reforms giving more powers to local government, the relationship with the center is a sensitive issue. See, e.g., Bernard Bizet, *Deconcentration versus Decentralisation of Administration in France: a Centre-Periphery Dilemma*, 25 *CAN. J. REGIONAL SCI.* 475 (2002).

155. Blog de l'équipe Collectivités, <http://www.art-telecom.fr/index.php?id=2201> (last visited July 20-25, 2008). The blog seems to be inactive in the last few months, though it was very active at first.

156. Autorité de regulation des communications électroniques et des postes (ARCEP), <http://www.arcep.fr/index.php?id=1> (follow “Actualités” hyperlink on left side of page) (last visited Oct. 26, 2009).

157. Universal Services refers to allowing all citizens access to a telecommunications network for an affordable fee. Universal service includes geographic leveling (preventing prices in remote, rural areas from being substantially higher than those in urban areas) as well as special programs for low income consumers and special equipment for consumers with disabilities. For a more detailed discussion, see

which two agency representatives, Gaëlle Nguyen and Stéphane Kuna, responded to customers' questions.¹⁵⁸

These chats, like the blog, serve at least two purposes. First, they promote the information flow as the authority answers questions and thus compensates for problems with the agency's materials on its Web site—gaps in such material or areas where it is hard to understand. The agency also receives direct communications from consumers about their questions and concerns. But in addition to that, the chats and the blog, by providing direct response and an interface for citizens with questions, increase the agency's transparency and responsiveness to concern. Both mechanisms, therefore, have the potential to increase the agency's legitimacy.

To what degree that potential will be realized depends not only on the execution of these projects (for example, the chats and blog), but also on things the agency cannot control, such as the public's attitude to government in general and the level of trust in what the agency says. But chats and blogs and similar electronic communications can certainly contribute to the accuracy, comprehensiveness and timeliness of information given by an agency.¹⁵⁹

B. Swedish Municipal Advisors

Another mechanism that has no parallel in the United States,¹⁶⁰ and that has the potential to improve citizen satisfaction with and trust in government in the United States, is the use of municipal-level advisors in Sweden. Municipal authorities in Sweden have, for some time, utilized municipal advisors.¹⁶¹ These officials' job description is answering citizens' concerns. The citizen can approach them with any question about government operation and receive aid in interacting with government, but they are not limited to questions about managing government. The example I was presented with was that they can ask for advice about which brand of toaster to buy, and the advisor will answer to the best of their ability.¹⁶²

After the liberalization of the energy market was accompanied by problems around consumer switching, as mentioned above, the government initiated, in

Dorit Reiss, *Agency Accountability Strategies After Liberalization: Universal Service in the United Kingdom, France, and Sweden*, 31 L. & POL'Y 111, 118-119 (2009).

158. ARCEP, Script du chat sur 'annuaire universel du 5 juillet 2007 avec Gaëlle Nguyen, responsable du service universel, et Stéphane Kuna, responsable consommateurs à l'ARCEP (July 5, 2007), available at <http://www.ARCEP.fr/fileadmin/reprise/chat/script-chat-annuaire-050707.pdf>.

159. An interesting question that is unclear from the agency's Web site is whether what is said by the agency's representative under these circumstances creates an estoppel, i.e., whether it binds the agency. This discussion, however, is beyond the scope of this paper. Regardless, electronic communications offer a way to improve connections between citizens and government that seems underused in most agencies.

160. Aside from the situation mentioned by the conference participant mentioned above, which she presented as a temporary measure.

161. Interview with members of the Swedish Consumer Agency, in Stockholm, Sweden (Sept. 22, 2004); interview with a member of the electricity advice bureau, in Stockholm, Sweden (Oct. 4, 2004).

162. Interview with a consumer representative working for one of Sweden's electricity companies, in Stockholm, Sweden (the name of the company has been withheld to protect the identity of the representative) (Oct. 13, 2004); interview with members of the Swedish Consumer Agency, in Stockholm, Sweden (Sept. 22, 2004).

addition to the regular advisor, the creation of the Swedish municipal advisors for energy.¹⁶³ These advisors' job is to provide up-to-date, competent information. Municipalities receive government subsidies to help finance them, and the energy regulator helps train them.¹⁶⁴ This is what the Swedish energy agency said about these advisors:

Every year some 150,000 households visit their local energy advisor. There is a local energy advisor in each Swedish municipality, providing free, impartial advice on how to save energy on a day-to-day basis and on heating systems for homes. . . . A 2006 survey shows that [40 percent] of visitors considered the municipal advice service their most important channel of energy information. One in seven visitors said that the advice had been a very important factor in their purchasing decisions and investments.¹⁶⁵

The advisors—the general advisors and the energy ones—not only advise consumers but also insert the questions they are asked and the answers they provide into a national database (a non-published one) managed by the consumer agency.¹⁶⁶ The effect is three-fold. First, the national agency can provide quality control and correct answers. Second, if there are recurring questions, municipal advisors can benefit from each others' experience, which both saves them from researching an answer themselves and provides consistency. Finally, if there are recurring questions, the concentration in a unified database allows the consumer agency to identify and address widespread problems or simply things that are not clear. They can then raise those issues with the relevant regulator and work together to solve them.

In terms of participation, the municipal advisors have the potential of achieving the same two goals as the electronic communications mentioned above, in somewhat different ways. First, they increase the information available both to citizens and to government. They can compensate for shortcomings in government provision of information and let government actors know which problems are salient for their citizens.

However, just as important is their legitimacy-building effect. The ability to approach a government official and receive answers to questions or help in navigating complex bureaucratic structures, and at least be listened to, has the potential to build trust in government (providing, of course, that the municipal advisors are reasonably competent and service-oriented; in Sweden, substantial care is

163. For more information, see The Swedish Consumer Electricity Advice Bureau Summary in English, http://www.elradgivningsbyran.se/artikel/article.asp?_tp_article_id=109&avd=ART_OOS (last visited Oct. 27, 2009).

164. Swedish Energy Agency, Improving Energy Efficiency, <http://www.energimyndigheten.se/en/About-us/Mission/Energy-efficiency/> (last visited Nov. 11, 2009).

165. See Swedish Energy Agency, http://www.swedishenergyagency.se/WEB/STEMEx01Eng.nsf/F_PreGen01?ReadForm&MenuSelect=89010EFFF481BC80C125739800280A0E (last visited Sept. 14, 2009).

166. Interview with members of the Swedish Consumer Agency, in Stockholm, Sweden (Sept. 22, 2004).

taken to ensure they are well trained).¹⁶⁷ The existence of these advisors may be one of the reasons there is a relatively high level of trust in government in Sweden.¹⁶⁸

Both of these participation approaches—the municipal advisors and the electronic communications—have potential to improve interactions between citizens and government and should at least be considered by other countries.

VI. CONCLUSION

As shown above, these six agencies have made substantial efforts to provide for citizen participation in decision-making, albeit at varying levels and through various mechanisms.¹⁶⁹ However, the degree of actual citizen participation in decision-making is still not completely clear.

First, as described above, individual citizens are not often interested in participating in the regulation of utilities unless there is a crisis, especially since such participation requires substantial investment of time and effort to understand the complex technical issues involved. Even generalized consumer organizations devote only limited attention to them. Second, since these countries have been experimenting with participation in these sectors for a relatively short time, they are still in the process of experimenting with approaches already tested in the United States. The agencies are promoting participation through comments on policy documents, while in the United States that kind of participation has been strongly criticized by those addressing the rulemaking process (though it is still the most common form of participation).¹⁷⁰ All six agencies put substantial effort into learning the views and preferences of stakeholders. However, since they started from a decision-making process that involved a very small number of actors, the growth in the number of participants has been gradual. Also, mirroring the same developments in the United States, the number of citizens actively participating is very small compared to industry participation, and the level of resources available to consumer organizations is very limited.

On the other hand, these countries have made substantial changes to participation. Decisions are now made in a much more transparent manner, and in all of the countries there is an opportunity to participate for all citizens. If in the past the agencies approached participation from the point of view of a much more centralized and dominant system of public administration, very strong compared to both local authorities and other branches of government, today they make use of intermediate bodies, such as consumer agencies and advisors, as well as mechanisms aimed directly at citizens, such as the online consultations.

Finally, one development that this paper does not directly address but that may affect the participation situation is the increase of litigation in telecommunications and electricity in the three countries. More and more, industry (and some

167. I do not have information on the level of services they provide, but my interactions with other government official would lead me to expect courteous, efficient services.

168. This high level of trust exists even now, in spite of claims of a crisis of legitimacy. See Pierre, *supra* note 50.

169. See Fung, *supra* note 4 (discussing different levels of participation).

170. CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 180-181 (3d ed., 2003).

citizens) turns to the courts when it is dissatisfied with regulatory decisions. In participation terms, this means that there is strong pressure on the agencies to be transparent and to review and explain their decisions and review of such decisions.¹⁷¹ It also provides another forum for private actors to influence citizens' decisions, although whether such a forum—litigation—has positive or negative benefits, or no impact at all, on public administration is a hotly debated topic.¹⁷²

171. Martin Shapiro, *The Giving-Reasons Requirement*, 1992 U. CHI. LEGAL F. 179 (1992).

172. See generally CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF THE BUREAUCRACY* (1990); ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2003); Martin Shapiro, *Judicial Delegation Doctrines: the U.S., Britain, and France*, 25 W. EUR. POL. 173 (2002); JAMES Q. WILSON, *BUREAUCRACY—WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT*, ch.15 (1989); Jerry L. Mashaw, *The Story of Motor Vehicle Manufacturers Association of the U.S. v. State Farm Mutual Automobile Insurance Co.: Law, Science and Politics in the Administrative State*, in *ADMINISTRATIVE LAW STORIES* (Peter L. Strauss ed., 2005); Colin Scott, *The Juridification of Regulatory Relations in the U.K. Utilities Sectors*, in *COMMERCIAL REGULATION AND JUDICIAL REVIEW* (Julia Black et al., eds., 1998); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61 (1997); Patricia M. Wald, *Judicial Review in the Time of Cholera*, 49 ADMIN. L. REV. 659 (1997).

