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Constitutional Barriers and the Privatization of Public Utilities in Rich Democracies*

Carina Schmitt and Herbert Obinger

Abstract

This paper examines the impact of constitutional barriers on the privatization of public utilities in 21 OECD-countries between 1980 and 2008. We present new and improved indicators for privatization and constitutional barriers. Three empirical findings stand out: first, national privatization trajectories differ across both countries and sectors. Second, there is a significant cross-national variation in terms of constitutional provisions related to public utilities which, thirdly, constitute important impediments to privatization.

KEYWORDS: privatization, constitutions, public utilities, OECD

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1. Introduction

Public provision of network-based infrastructures such as telecommunications, postal services, energy and water supply has been a core attribute of modern statehood in almost all advanced democracies in the 20th century. The post-war era was characterized by a broad consensus concerning the public supply of what in different contexts has been called ‘public utilities’ (Graham 2000), ‘services publics’ (Auby & Raymundie 2003) or ‘Daseinsvorsorge’ (Forsthoff 1938). This consensus rested on the notion that network-based infrastructures, by virtue of particular technological properties (e.g. decreasing average costs over the entire output and sub-additive cost functions), represent natural monopolies which should therefore be controlled by the government. The political and economic importance of these sectors was often mirrored by constitutional provisions that granted these sectors a special legal status in many OECD countries.

However, in light of technological changes, growing economic imbalances, and the global spread of neo-liberalism, the post-war consensus concerning the public provision of these services has increasingly come under pressure in the recent past. In consequence, almost all advanced democracies launched major privatization programs from the early 1980s onwards. The privatization wave peaked out in the 1990s (OECD 2003) and did not spare public services. Even though public utilities were almost everywhere privatized, considerable cross-national differences in terms of timing, form and intensity of privatization can be observed. Not least because of the special constitutional status of public utilities, policy-makers aiming at privatization of state-owned enterprises confronted considerable difficulties.

This article examines how and in what ways national constitutional frameworks have influenced the scope of privatization in advanced democracies. Focusing on postal services, telecommunications and railways¹, we selected three classic public utility sectors which, in addition, are typically operated at the national level. Since the first privatizations of state-owned enterprises in these sectors commenced in the early 1980s (Boix 1997), the empirical analysis covers the period between 1980 and the advent of the global economic crisis in 2008. Our sample consists of 21 long-term member states of the OECD. More recent members such as Turkey or Mexico were excluded because of their relatively low level of economic development. The post-communist countries were not considered since the privatizations in Central and Eastern Europe were mainly driven by the transformation from a command to a market economy.

This article makes a novel contribution to the existing literature in three respects. By focusing on the national constitutional framework, we suggest a new

¹ Due to European legislation, the railway network was separated from passenger transportation and freight traffic. We focus on passenger transportation in this paper.

institutional variable that to-date has not systematically been used to elucidate cross-national differences in privatization activities. Second, we not only refer to material privatizations (i.e. the transfer of property rights from public to private actors), but also include formal privatizations (i.e. changes in the legal status of a public company). Even though the latter type of privatization is of eminent relevance in the public utility sectors, it has hitherto been widely neglected in comparative empirical research (Daintith 1994; Lane 1997; Graham 2003). Third, we have compiled a new privatization data set and, using findings derived from legal studies, have developed a new indicator to measure the impact of constitutional barriers on the intensity of privatization.

The article is organized as follows. Section 2.1 reviews the existing literature and sheds light on problems in previous research. Our main hypothesis is derived in section 2.2. Next, we discuss the measurement of the relevant variables and present some descriptive findings. Section 4 offers an empirical test of our hypothesis according to which particular constitutional provisions influence the intensity of privatization. The final section concludes.

2. Constitutional Barriers and the Privatization of Public Utilities

2.1. A Brief Review of the Literature

The role of constitutional provisions for privatizing public utilities is largely discussed in legal studies. The focus there is on the general constitutional conceptualization and the status of public utilities within a particular legal order (Braconnier 2003; Kühling 2004; Graham 2000). While some studies compare the legal status of public utilities across countries (cf. Hrbek & Nettesheim 2002; Krajewski et al. 2009; Marcou & Moderne 2006), only a few take a systematic comparative approach. However, even these typically include only a limited number of countries (Bullinger 2003; Graham & Prosser 2003). Other studies that explicitly deal with the privatization of public utilities are concerned with legal regulations in specific sectors (Brosius-Gersdorf 2002; Schweitzer 2001; Kämmerer 2001; Kühling 2004).

In the study of public administration, privatization is mainly discussed by the New Public Management (NPM) literature. While some case studies analyze the privatization of particular sectors in more detail, only a few examine NPM oriented reforms from a comparative perspective (Verhoest et al. 2007; Pollit & Bouckaert 2004; PIQUE 2009).

Macro-quantitative studies in political science and economics only refer to material privatization. In terms of the dependent variable, these studies either use privatization revenues (Boix 1997; Bortolotti & Siniscalco 2004; Belke et al. 2007; Zohlnhöfer et al. 2008) or changes in the shares held by the government

over time (Schneider & Tenbücken 2004; Schneider & Häge 2008). Formal privatizations, however, are completely ignored by this body of literature due to an absence of data. Likewise, the impact of constitutional provisions on privatization outcomes is neglected. The institutional variables analyzed in previous research mainly include veto points, the type of democracy and corporatism (Boix 1997; Bortolotti & Siniscalco 2004; Schneider & Tenbücken 2004; Belke et al. 2007; Zohlnhöfer et al. 2008). As we show in section 3.1 these factors differ conceptually and empirically from the constitutional provisions examined in this paper. What is emphasized in veto-point theory, for instance, is whether a political arena is constitutionally qualified to veto a proposal (Immergut 2010: 232). Lijphart's types of democracy mainly capture the degree of power fragmentation, whereas corporatism denotes a negotiation-based system of interest mediation. Our concept of constitutional barriers, by contrast, refers to a particular constitutional arrangement that is strongly shaped by a nation's legal tradition. It not only embodies a particular idea of the state's role in society, but also creates barriers for privatization activities. To date, only Bortolotti and Siniscalco (2004) have shed light on a nation's affiliation to a legal family or legal tradition. However, their measurement is problematic as they simply use dummy variables to measure a country's affiliation to a particular law tradition.

In sum, we can draw three lessons from this brief overview of the existing literature. First, the literature in both legal studies and public administration is dominated by case studies. The latter is mainly concerned with formal privatizations and typically does not refer to the constitutional framework. Second, legal studies only point to the special legal status of public utilities or describe the privatization of specific sectors. A systematic comparative approach is lacking in both disciplines. Finally, macro-quantitative comparative public policy research has so far completely neglected the concept of formal privatization. In this literature, institutional constraints to privatization typically are captured with standard indices mapping institutional veto points or corporatism.

This contribution aims to overcome these shortcomings as we offer a more nuanced analysis of the impact of constitutional provisions on privatization outcomes. We do so by integrating insights from law and public administration into macro-quantitative research in political science.

2.2. Concepts, Theory and Hypotheses

When it comes to privatization of public utilities, both formal *and* material privatization is of particular relevance. Formal privatization denotes changes in the legal status of a public enterprise. Two types of formal privatizations can be distinguished. The first one refers to the reorganization of a departmental agency

of a ministry into a public corporation. While a departmental agency does not have its own legal personality and is subordinated to a ministry, a public corporation is an autonomous body with its own legal status and a partially commercial structure (Bös 1986; Mühlenkamp 2001; Topsch 2002). The second type of formal privatization denotes the reorganization of a public corporation into a state company subject to private law such as a joint stock company². In contrast to public corporations or departmental agencies, state companies are only responsible for the well-being of the enterprise itself and are subject to a commercial budget constraint. The state remains the unique stakeholder (Bös 1986). Formal privatization finally paves the way for material privatization, i.e. the partial or complete selling of public shares to private investors.

Because of the special constitutional status that public utilities enjoy in many countries, the privatization process entails comprehensive legal changes which may also include constitutional amendments. Our basic argument is that different constitutional settings influence both the timing and the extent of privatizations as they constitute different legal barriers in the privatization process. This holds true for formal and material privatizations alike so that both types of privatization have to be taken into account.

In fact, the legal status of public utilities differs widely among rich democracies (Ambrosius 2000: 18; Püttner 195; Graham & Prosser 2003). For example, the term ‘services publics’ in the French Constitution is of essential importance and reflects a particular state and administration doctrine (Krajewski 2009; Braconnier 2003; Dreyfus 2009). The preamble to the French Constitution of 1946, which is still valid, stipulates “that all property and all enterprises that have or that may acquire the character of a public service or de facto monopoly shall become the property of society” (Ambrosius 2000: 19). However, public utilities have not everywhere gained a similar relevance in the legal order. While the classic network-based infrastructures in the German-speaking countries were of similar size and enjoyed a similar monopoly position, there was no cohesive legal conception of public utilities comparable to the French notion of “public services”. Nevertheless, sectors such as postal services, railways, and telecommunications enjoyed a special constitutional status in countries such as Germany and Switzerland (Daintith 1994; Ambrosius 2000; Hellermann 2001). In contrast to France and Germany, there is no public law in the United Kingdom defining particular state functions and their implementation. Even though public utilities were supplied by state-owned enterprises during the post-war period, this did not happen under the umbrella of a constitutionally protected jurisdiction of government (Graham & Prosser 2003; Bell 2007; Glenn 2007).

² A direct reorganization from a departmental agency into a company liable to private law is also possible.

The question now is what kinds of constitutional provisions may influence national privatization activities and which causal mechanisms are relevant in this respect. Six constitutional parameters are considered to be important in the legal studies literature.

A first factor refers to the constitutional status of the public service. Generally, the staff of state-owned enterprises was made up of public employees and civil servants. In case of privatizations, these public employment contracts have to be converted into contracts liable to private law. In practice this typically involves interim solutions. If a constitution contains comprehensive provisions concerning the public service or if it actually guarantees tenure or a right to resist a transfer of personnel, policy-makers have to find solutions in line with the constitution. By contrast, privatizations can be implemented more rapidly in countries where constitutional provisions concerning the public service are lacking.

Second, a Common Law tradition might have an impact on privatization. In a narrow sense, Common Law³ denotes the law that is generated either by parliamentary acts or by case law. It is continuously enhanced and refined by courts and parliament (Barendt 1998; Topsch 2002; Tiemann 2009) and thus provides legal interpretation with a good deal of flexibility and readiness for change. It is therefore assumed that privatizations can be implemented rather quickly in Common Law settings (Zweigert & Kötz 1998; Youngs 2007).

Third, privatizations might be influenced by constitutionally guaranteed social rights. Basic rights such as a right to social security constitute particular claims for citizen vis-à-vis the government. In contrast to civil liberties, which basically demand non-interference by government, social rights explicitly make active state intervention necessary. If comprehensive social rights are guaranteed by a constitution, problems of legitimacy might arise from a retreat of the state from public utilities. Moreover, policy-makers have to make sure that basic social rights are still warranted in the wake of privatizations (Lee 1997; Kämmerer 2001).

Fourth, several constitutions enumerate a variety of state duties, while others merely comprise provisions that adumbrate basic principles of state organization. An explicit enumeration of state duties goes along with an activist role of government in various policy areas. This not only foreshadows the political process, but also impedes a departure from a particular conceptualization of government stipulated in the constitution.

Fifth, if a constitution states that the provision of public utilities is a matter of government, privatizations are difficult to achieve. This is particularly the case

³ The term Common Law is not clear-cut. In a wider sense it denotes the law of the Anglo-American countries. In a narrow sense, it refers to a specific attribute of this legal tradition (Zweigert & Kötz 1998).

if a constitution includes regulations that dictate public provision of services or even stipulates a ban on privatization (Tiemann 2009: 29; Gramm 2000). Any privatization of public enterprises would therefore require high levels of consensus, since a constitutional amendment is necessary before the privatization process can be initiated at all.

Sixth, and finally, certain state principles spelled out in the constitution may also decelerate privatizations. For example, some scholars infer from the principle of democracy the necessity of a continuous ‘chain of legitimacy’ that ranges from the people, its representatives in parliament and government to state-owned enterprises (Püttner 1985). However, in countries with co-determination of employees in corporations such a linkage is not warranted in a formally privatized joint stock company by the mere representation of employees in the board of management. In consequence, management decisions lack democratic legitimacy. The rule of law principle stipulates that any political decision is subject to law. A privatized firm in the postal and telecommunications sector, for instance, has to guarantee the sanctity of the mail and the secrecy of telecommunications. Finally, a welfare state principle, such as article 20 of the German Basic Law, imposes a constraint on unfettered capitalism. It makes comprehensive privatizations more difficult or requires at least a search for socially acceptable solutions in the aftermath of privatizations (Lee 1997; Püttner 1985; Kämmerer 2001; Storr 2001).

Against this backdrop our central hypothesis runs as follows: The more the aforementioned six parameters are anchored in a constitution, the lower is the intensity of privatization.

3. Constitutional Barriers and the Privatization of Public Utilities in the OECD-World

This section describes the measurement of the central independent and dependent variables and presents first descriptive results.

3.1. The Independent Variable: Constitutional Barriers

In collaboration with experts in constitutional law⁴ and based on the previous theoretical considerations, we have developed an additive index (‘Index of Constitutional Barriers’) to measure the national constitutional barriers. Table 1 summarizes the measurement of the six components of the index.

⁴ We thank Professor Michael Fehling and Professor Axel-Jörn Kämmerer (both of Bucerius Law School Hamburg) as well as Professor Markus Krajewski (University of Erlangen-Nuremberg) for their advice and support. The authors are solely responsible for any errors.

Table 1: Measurement of constitutional barriers

Constitutional Parameter	Value	Measurement
1) Public service	0	No constitutional regulations concerning public service
	.5	Constitutional regulations concerning public service
	1	Encompassing constitutional guarantees concerning public service
2) Common law	0	Yes
	1	No
3) Social rights	0	No codification of social rights
	.5	Codification of social rights
	1	Encompassing codification of social rights
4) State duties/functions	0	Constitution contains no state duties/functions, only organizational regulations
	1	Constitution contains state duties/functions
5) Sector specific regulations	0	No constitutional prescriptions regarding public utilities
	.5	Constitution contains sector specific regulations, but only legislative jurisdiction
	1	Constitution contains specific prescriptions that stipulate either a public provision of services or a prohibition of privatization
6) State principles	0	Constitution includes no state principles
	1	Constitution includes state principles

Table 2 illustrates the country specific values of the six parameters and the additive index.⁵ A factor analysis sustains the assumption that the ‘Index of Constitutional Barriers’ measures a dimension which is different from other general indices of political institutions. While the indices of Huber et al. (1993), Schmidt (1996) and Lijphart (1999) load on one factor⁶, the ‘Index of

⁵ In some countries, the constitutional framework has changed over time. We collected data for the constitutional framework in 1980 since these have been the constitutional barriers which had to be overcome for privatizations.

⁶ The factor loadings range between .89 and .97 and the Eigen value of the factor is 3.50.

Constitutional Barriers' loads on a separate factor⁷. In addition, the correlation between the 'Index of Constitutional Barriers' and the aforementioned indices is very low with correlations of between -.09 and .14.

Table 2 reveals remarkable differences among the 21 OECD-countries. It shows that the constitutions of the countries of Southern Europe contained encompassing social rights and state duties at the beginning of the period of observation. However, the public utilities analyzed in this contribution (postal, telecommunication and railway services) did not enjoy a special constitutional status in the Latin rim. The opposite applies to the constitutions of the German-speaking countries which, together with the constitutional settings in the Nordic countries, are additionally characterized by a broad range of special rights granted to the public service. In sum, the constitutions of the German speaking and southern European countries plus France contained the highest constitutional barriers for privatizations while the constitutional restrictions in the English speaking countries were only weakly developed. The Nordic and the Benelux countries are grouped between these extremes.

⁷ The factor loading equals .80 and the Eigen value 1.27.

Table 2: Constitutional barriers to the privatization of public utilities

<i>Parameter/country</i>	AUS	AUT	BEL	CAN	DEN	FIN	FRA	GER	GRE	IRE	ITA	JPN	NOR	NE	NZ	POR	SPA	SWE	SWI	UK	USA
Public service	0	1	.5	0	1	1	.5	1	1	0	.5	.5	1	.5	0	1	.5	.5	.5	0	0
Common law	0	1	1	0	1	1	1	1	1	0	1	1	1	1	0	1	1	1	1	0	0
Social rights	0	0	.5	0	.5	.5	.5	.5	1	.5	1	.5	.5	.5	0	1	1	.5	.5	0	0
State duties	1	1	0	1	0	0	1	1	1	0	1	0	0	0	0	1	1	0	1	0	1
Sector specific regulations	.5	.5	0	0	0	0	.5	1	0	0	0	0	0	0	0	.5	.5	0	1	0	0
State principles	0	1	1	0	0	1	1	1	1	1	1	1	0	0	0	1	1	1	1	0	0
Index of Constitutional Barriers	1.5	4.5	3	1	2.5	3.5	4.5	5.5	5	1.5	4.5	2	2.5	2	0	5.5	5	3	5	0	1

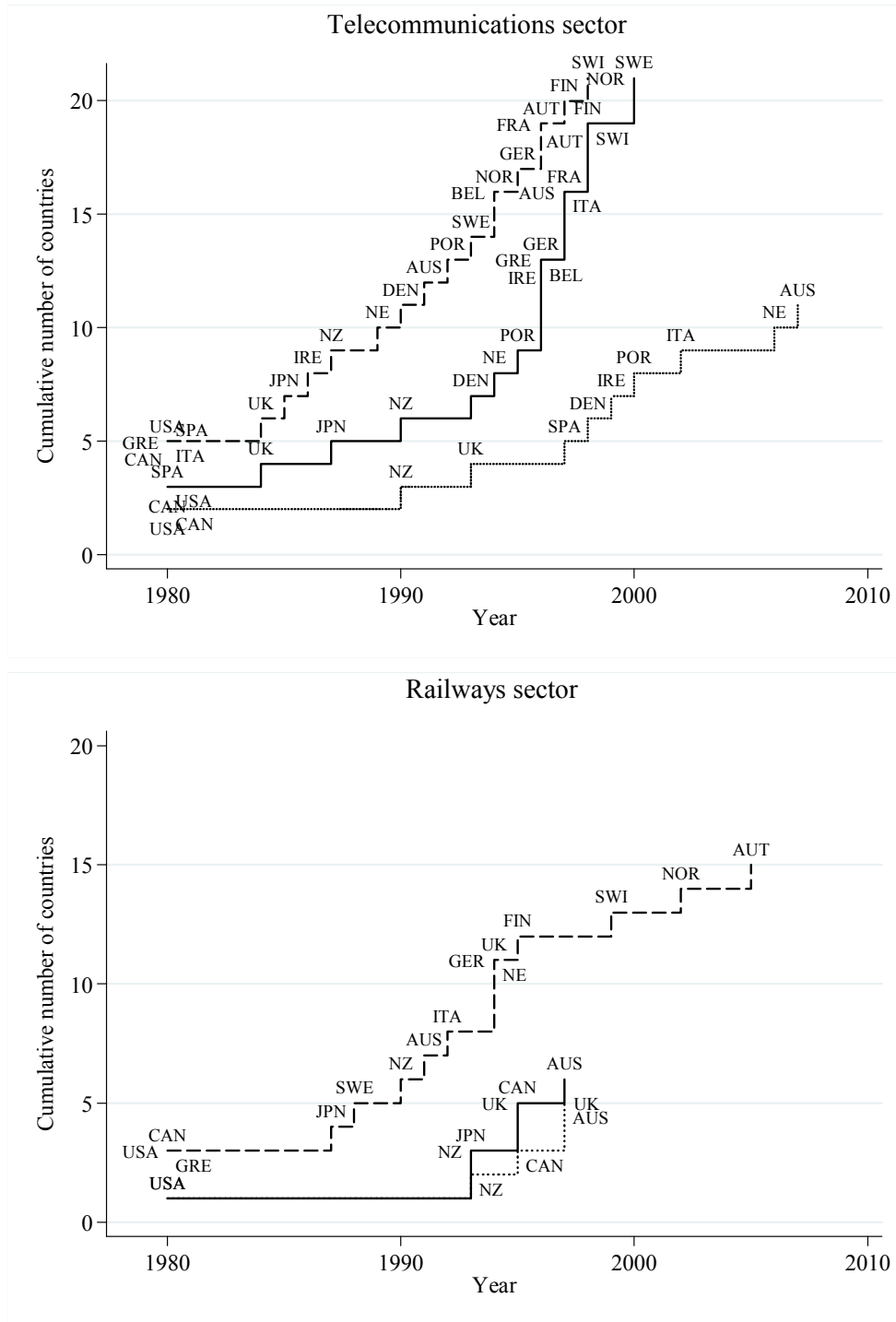
Source: Own compilation based on the national constitutions and statutes in countries with unwritten constitution

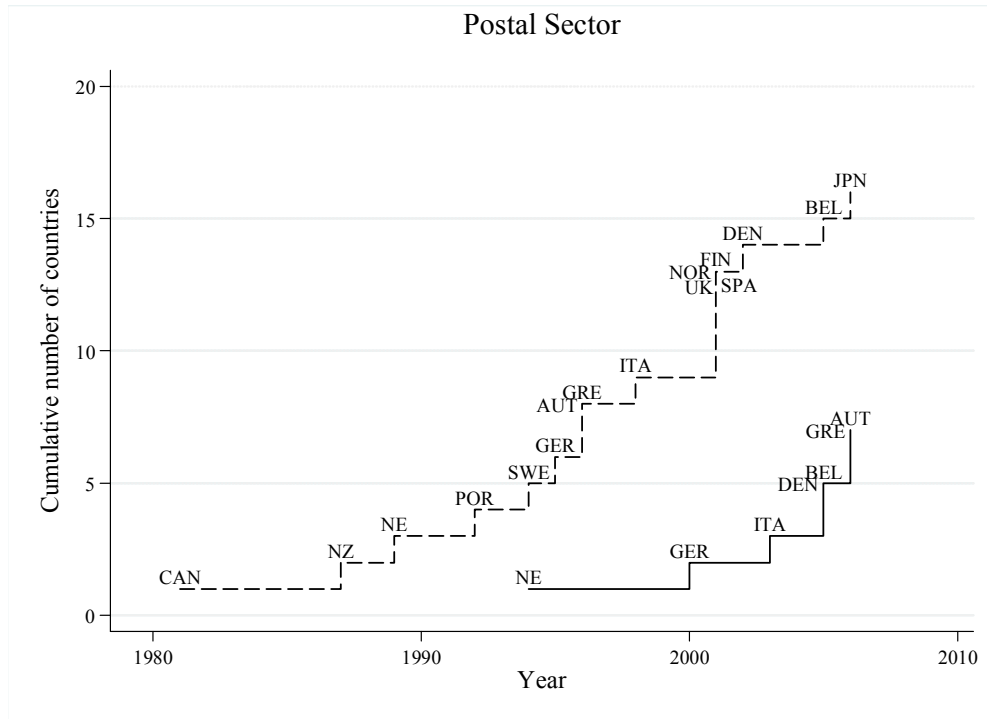
3.2. Dependent Variable: Privatization Intensity

To illustrate the measurement of the dependent variable we first of all show the privatization trajectories in our 21 OECD-countries. We distinguish between formal and material privatization as well as by sector (Figure 1). The horizontal axis indicates the time dimension while the vertical axis displays the cumulative number of countries which either has completed the formal privatization process or where the respective provider always has been a private law company (dashed line). In addition, the cumulative number of countries is presented which have begun the material privatization process (solid line) or have already finished material privatization by selling all public shares (dotted line).

To begin with, there are remarkable differences regarding the timing of formal and material privatization. Moreover, formal privatization seems to be of greater relevance than the divestment of shares. This supports the notion that previous macro-quantitative research with its focus on material privatization has neglected an important dimension of privatization. Moreover, the three sectors differ widely from each other. In the telecommunications sector, all 21 countries have formally privatized their telecommunications provider and have commenced the material privatization process. In ten countries, the telecommunications provider is by now completely materially privatized. In the railways sector, by contrast, even formal privatization has not been implemented in all countries and only the English-speaking countries and Japan have divested public shares. Privatization activities are less pronounced in the postal sector since the formal privatization process started later than in the other two sectors and none of the 21 OECD-countries has completely divested its postal provider.

Figure 1: Sector specific privatization trajectories

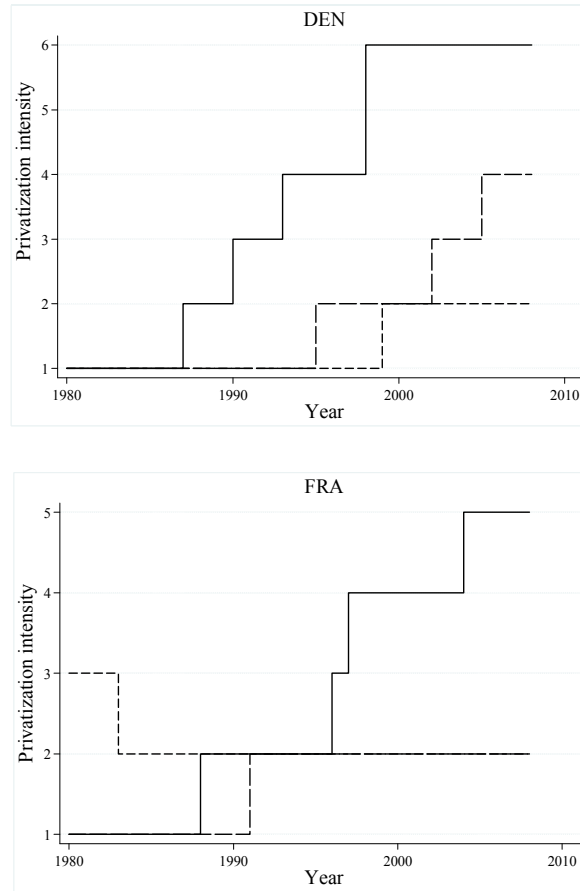


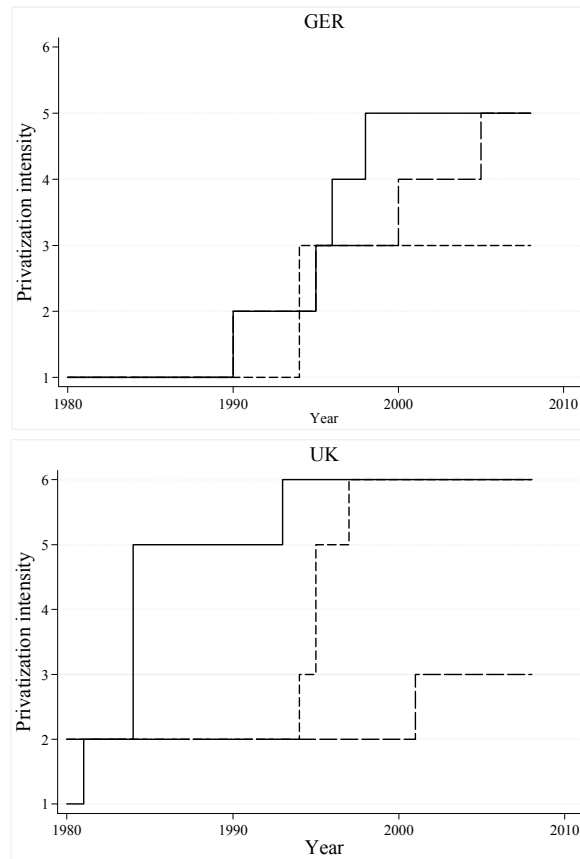


Notes: - - - - - formal privatization ————— material privatization
 complete privatization (public shares=0 percent)

Figure 1 demonstrates that an adequate measurement of privatization requires the consideration of the formal as well as of the material dimension. In a first step, we have therefore developed an ordinal indicator that enables the simultaneous measurement of both forms of privatization. Next, we collected data from the responsible national ministries for both forms of privatization. The indicator has six values mapping the depth of privatization: The indicator equals 1 when the public utility is provided by a departmental agency without an own legal personality. The first type of formal privatization refers to the reorganization of a departmental agency into a public corporation liable to public or special law. When the service is provided by a public corporation the indicator equals 2. The value 3 denotes that the respective company is transformed into a joint stock company liable to private law. However, the state remains the unique shareholder and the material privatization has not yet begun. The value 4 indicates the listing of the company at the stock market. When the shares held by the government drop below the 50 percent threshold, so that the state is no longer the majority shareholder, the indicator equals 5. The value 6 indicates that the company is completely divested by the state.

Figure 2: Privatization trajectories in four countries and three sectors





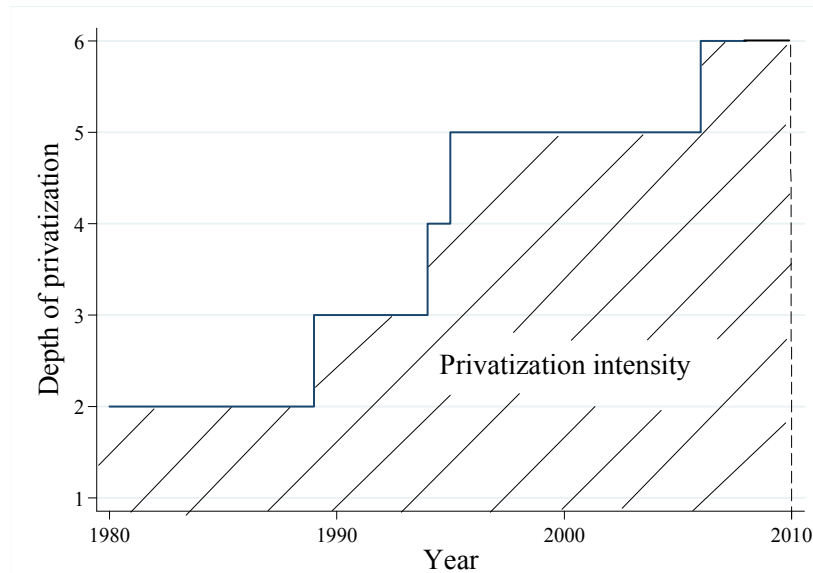
Notes: - - - - Postal sector ——— Telecommunications sector
 - · - · - · Railways sector

By taking the time dimension into account, we can eventually illustrate the entire privatization process. This is exemplified in Figure 2 for four countries with different constitutional barriers. The horizontal axis shows the time dimension, while the vertical axis indicates the ordinal indicator (‘depth of privatization’). Figure 2 once more reveals remarkable differences in the privatization pathways between countries and sectors. Moreover, it is shown that, in some countries, all privatization steps were implemented successively (e.g. telecommunications in Denmark) while other countries have formally and materially privatized their providers at the same time (e.g. telecommunications and railways in the United Kingdom) or have not started the material privatization process at all (particularly in the postal sector).

Based on these considerations we have constructed an indicator for our dependent variable which captures both the depth of privatization and the timing of formal and material privatization. We call this indicator ‘privatization

intensity’ which is measured by the hatched area enclosed by the privatization path (see figure 3).

Figure 3: Measurement of privatization intensity



In the next section we examine whether and to what extent the different constitutional barriers have influenced privatization intensity in the three sectors under investigation.

4. The Influence of the Constitutional Barriers on Privatization: An Empirical Test

To test the influence of the constitutional barriers on privatization intensity, we estimate multivariate cross-sectional OLS regressions. A cross-sectional design is appropriate for the following reasons: First, we focus on cross-national differences in privatization intensity in the long run but not on short term changes or privatizations in specific years. Second, the data structure of the dependent variable and the central independent variable, which is time invariant, suggests a cross-sectional design.

Besides the ‘Index of Constitutional Barriers’, we include a comprehensive set of control variables which are discussed in the theoretical and empirical privatization literature. Fiscal problem pressure is measured by the net interest payments as a percentage of the GDP. High interest payments increase the pressure for budget discipline (Castles 2007) and should, in consequence, lead to higher privatization intensity. Moreover, privatization is influenced by party

preferences. Since leftist governments are ideologically inclined to state interventions they should opt for the public provision of services and therefore be more skeptical of privatization than centre-right parties (Boix 1997; Belke et al. 2007; Zohlnhöfer et al. 2008). The same holds true for trades unions which typically expect negative employment effects in the wake of privatizations. Moreover, labor unions are traditionally well organized in the public sector (Zohlnhöfer et al. 2008). Policy-makers are also exposed to institutional constraints. In addition to the constitutional barriers discussed here, a substantial number of institutional veto points might hamper the reform steps necessary for privatizations by offering opponents of privatization opportunities to veto a proposal (Immergut 1992). Furthermore, we assume that the system of interest mediation affects national privatization pathways. Corporatism provides unions with bargaining power and opportunities to avert large-scale privatizations (Schneider & Tenbücken 2004). Moreover, inter- and supranational influences have to be considered. In particular, the European Union seems likely to be of relevance for two reasons. First, the Economic and Monetary Union imposes constraints on fiscal policy and, in consequence, puts budgets under strain. Second, the Commission has forcefully promoted the liberalization of network-based public utilities since the 1990s (Schmidt 1998; Scharpf 1999; Clifton et al. 2006; Höpner et al. 2011; Schneider & Häge 2008). Finally, the degree of privatization intensity should depend on the policy legacy of the past, i.e. the organizational structure of public enterprises at the beginning of the observation period. Table 3 summarizes these hypotheses as well as the measurement of all variables.

Table 3: Measurement of all variables

Variable	Description	Source	Predicted effect
<i>Dependent variable</i>			
Privatization intensity	Area enclosed by the privatization trajectory = \sum Length of company type _i x depth of privatization _i	Own compilation based on official information provided by the responsible national ministries	
<i>Independent variable</i>			
Constitutional barriers	Additive index containing the six parameters of Table 2	Constitutions and statutes in countries with unwritten constitutions (e.g. UK: Magna Charta, Petition of Rights, Bill of Rights), own compilation	-
<i>Control variables</i>			
Company type	Type of company at the beginning of the observation period (1980)	Own compilation, see privatization intensity	+
Interest payments	Annual net interest payments as a percentage of GDP, average 1980-2008	OECD Economic Outlook 84 (2008)	+
EU-membership	Length of the EU-membership of a country as a percentage of the observation period	Own calculation	+
Leftist government	Cabinet share of leftist parties, average 1980-2006	Armingeon et al. (2008)	-
Veto-point index	Additive index (federalism, parliamentarianism, proportional representation, bicameralism and referendum)	Huber et al. (1993)	-
Labor union	Union density, average 1980-2007	http://www.oecd.org/dataoecd/25/42/39891561.xls	-
Corporatism	'Integration score', average of the values for the 1980s and 1990s	Siaroff (1999: 198)	-

Table 4 presents the empirical findings of our regressions. In the baseline model I, the impact of the constitutional barriers is estimated together with the variable that reflects the initial organizational structure in the respective sector. Due to the small sample size, the models II to VII test the effect of constitutional barriers and one explanatory factor taken from our set of control variables. Model VIII eventually includes all explanatory factors for each sector.

The results⁸ strongly support our hypothesis concerning the negative influence of constitutional barriers on privatization intensity in the

⁸ Cross-sectional analyses in quantitative comparative public policy research typically suffer from the small-N problem and thus are very sensitive to minor modifications in the model specification. It is therefore necessary to check carefully whether there are outliers or influential cases. However,

telecommunications and railways sector. The coefficients for the 'Index of Constitutional Barriers' are significant at the 1 per cent level in all models even controlling for the impact of alternative explanatory variables. Constitutional barriers are therefore of considerable relevance for explaining the degree of privatization intensity in the 21 OECD countries. Apart from the policy legacy variable, the results for the control variables factor are less clear-cut. Even though the coefficients show the theoretically predicted sign, they remain mainly insignificant. Only corporatism and the EU-membership turn out to exert a statistically significant influence in line with our hypotheses. However, this result is restricted to the telecommunications sector (model VI and VII) and not robust (model VIII). Strikingly, EU-membership retards privatizations in the railway sector. The extent of privatization activities in Non-EU countries as well as exception clauses in EU-legislation regarding public transport subsidies (e.g. the Altmark-ruling of the European Court of Justice) might account for this result. The veto-point index of Huber et al. (1993) is associated with lower privatization intensity. However, the coefficient remains insignificant in all models. Alternative measurements of political institutions (cf. Schmidt 1996; Lijphart 1999) lead to similar findings (not reported). Additionally, we analyzed the influence of the components of these veto-point indices separately. Only the rigidity of the constitution (i.e. the difficulty of amending the constitution) has a significant influence. This finding supports our assumption that constitutional parameters are highly relevant for privatizing public utilities.

While strong constitutional barriers slow down privatization in the telecommunications and railways sector, this impact is absent in the postal sector. With the notable exception of the policy legacy variable, none of the explanatory factors shows a statistically significant influence. One explanation might be that the privatization of the postal sector has to-date not made much progress so that there is not enough variance to be explained. With the full liberalization of the postal market by 2010 (for some countries by 2012) this might change considerably.

it turns out that this is of relevance only in the railway sector, with the DFFIT values in the models I, III, IV and VI indicating a relatively strong influence of New Zealand on the estimations. We have therefore re-estimated these models with a dummy for New Zealand. The effect of constitutional barriers remains the same, however. The standardized residuals are smaller than 2 and therefore unproblematic. Moreover, all models have been estimated with the jackknife procedure. The coefficient of the constitutional barriers variable remains significant. In none of models do the VIF-values indicate multicollinearity. The Cook Weisberg test reveals that the variance of the residuals is homoscedastic.

Table 4: Empirical results of the regression analyses

Dependent variable: privatization intensity								
	I	II	III	IV	V	VI	VII	VIII
<i>Telecommunications Sector</i>								
Company type (1980)	14.93(2.21)***	14.30(2.24)***	14.70(2.42)***	13.72(2.48)***	15.97(2.15)***	11.26(2.37)***	16.40(1.90)***	14.29(2.75)***
Constitutional barriers	-7.99(2.21)***	-8.50(2.12)***	-7.79(2.27)***	-8.50(2.16)**	-8.25(1.99)***	-6.82(1.88)**	-9.87(1.87)***	-9.15(2.61)**
Interest payments	-	1.75(1.44)	-	-	-	-	-	-1.15(1.77)
Leftist governments	-	-	-0.06(.20)	-	-	-	-	-0.13(.18)
Labor union	-	-	-	-0.22(.21)	-	-	-	-0.23(.26)
Veto points	-	-	-	-	-3.12(1.70)	-	-	-2.52(1.96)
Corporatism	-	-	-	-	-	-10.16(3.86)*	-	-3.71(5.85)
EU-Membership	-	-	-	-	-	-	22.40(7.51)**	19.43(11.02)
Adj. R ² (SEE)	.76(16.46)***	.77(16.24)***	.75(16.89)***	.76(15.05)***	.79(15.48)***	.82(14.27)***	.83(13.72)***	.84(13.37)***
<i>Railways Sector</i>								
Company type (1980)	18.80(3.84)***	18.69(4.03)***	19.02(4.16)***	15.70(4.30)***	16.55(3.93)***	16.80(4.47)**	17.79(3.55)***	12.67(4.33)*
Constitutional barriers	-9.63(2.53)***	-9.71(2.67)**	-9.74(2.67)**	-10.87(2.60)***	-9.71(2.43)***	-9.40(2.56)**	-8.08(2.43)**	-9.00(2.98)**
Interest payments	-	.22(1.71)	-	-	-	-	-	2.48(2.16)
Leftist government	-	-	-0.04(0.23)	-	-	-	-	-.24(.22)
Labor union	-	-	-	-0.36(0.24)	-	-	-	-0.12(.32)
Veto points	-	-	-	-	3.33(2.06)	-	-	1.99(2.48)
Corporatism	-	-	-	-	-	-4.26(4.81)	-	-5.34(6.50)
EU-Membership	-	-	-	-	-	-	-19.55(9.26)*	-28.83(12.27)
Adj. R ² (SEE)	.72(18.93)***	.71(19.47)***	.71(19.46)***	.74(18.33)***	.75(18.13)***	.72(19.04)***	.77(17.34)***	.79(16.37)***
<i>Postal Sector</i>								
Company type (1980)	25.99(7.96)**	23.00(9.37)*	25.93(8.19)**	26.40(8.17)**	25.19(8.03)**	27.07(8.36)**	21.13(9.32)*	19.06(11.26)
Constitutional barriers	-0.40(1.98)	-0.66(2.06)	-0.50(2.15)	-0.23(2.05)	-0.57(2.00)	-0.68(2.09)	-1.27(2.17)	-3.13(3.31)
Interest payments	-	-1.00(1.57)	-	-	-	-	-	2.19(2.40)
Leftist government	-	-	0.03(.18)	-	-	-	-	0.05(.23)
Labor union	-	-	-	0.09(.18)	-	-	-	-0.23(.34)
Veto points	-	-	-	-	-1.55(1.67)	-	-	-2.37(2.52)
Corporatism	-	-	-	-	-	1.94(3.57)	-	6.81(6.31)
EU-Membership	-	-	-	-	-	-	9.64(9.62)	3.62(13.53)
Adj. R ² (SEE)	.30(15.53)*	.28(15.79)*	.26(15.97)*	.27(15.86)*	.30(15.59)*	.28(15.84)*	.30(15.53)*	.13(17.32)
N	21	21	21	21	21	21	21	21

Notes: *p<.05, **p<.01, ***p<.001, unstandardized regression coefficient with standard errors in bracket

5. Conclusions

In this contribution we have argued that constitutional barriers influence the privatization of public utilities. This hypothesis has been tested empirically for three network-based utilities in 21 OECD countries. We have developed an indicator for privatization which takes formal as well as material privatization into account. Moreover, in collaboration with experts in constitutional law, an indicator measuring the constitutional barriers against privatization has been created. Three results stand out. First, formal as well as material privatization trajectories differ across countries and sectors. While in the English-speaking countries formal and material privatizations often were implemented simultaneously and very fast, there is a considerable time lag between formal and material privatization in most other countries. Furthermore, it has been shown that the telecommunication sector is characterized by a comprehensive retreat of the state from service provision, while in the railway and the postal sector formal privatizations have been the norm. Second, there is significant cross-national variation in terms of constitutional provisions related to public utilities. In particular, the Southern European and German-speaking countries faced high constitutional barriers to the privatization of public utilities. In contrast, privatization in the English-speaking countries faced far fewer obstacles. Third, these differences explain variation in privatization intensity in the telecommunications and railways sector. The higher the number of constitutional barriers, the lower is the privatization intensity. Policy specific constitutional provisions therefore have more explanatory power than the more general institutional indices used in the literature.

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