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Telecommunications Monopolies versus European Community Law *

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In Europe, the telecommunications sector has traditionally been in the hands of legal public monopolies. These monopolies generally cover both the installation of telecommunications networks and the provision of telecommunications equipment and services. This situation is partially due to historical reasons.
Now, the maintenance of telecommunications monopolies is being questioned. One wonders whether they will be capable to adapt themselves to the fast development of information technologies. Proposals are being made to create some competition in the telecommunications sector, as has happened in the United States and Japan.
Such competition should create and stimulate a European wide market for telecommunication and should allow this market to face technological developments. It might also make European telecommunications industry one of the most important of this thriving industrial sector.

As from 1979, the European Communities have been active in responding to this challenge. They have adopted a number of measures to this effect. Among these are the utilization by the Commission and the Court of Justice of certain provisions of the Treaty of Rome against monopolistic situations considered as abusive or contrary to the principle of the free circulation of goods. The purpose of this note is to examine the applicability to telecommunications public monopolies (all European PTTs are public monopolies except British Telecommunications which has been liberalized and privatized by the Telecommunications Acts 1981 and 1984) of the EEC Treaty provisions on competition and free circulation of goods and services.

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I. Application of Competition Rules

The competition rules applicable to undertakings are contained in articles 85 and 86 of the EEC Treaty. Before examining the application of these articles to public telecommunications monopolies, the limitations imposed by the Treaty on the application of such rules to public monopolies will be discussed.

A. Limitations to the Applicability of Competition Rules to Public Monopolies

The PTTs whether they are integrated within the government administration or separate from it are "public undertakings" in the sense of the Treaty of Rome. They are "undertakings" since they are a "unity of material and personal elements organized in view of pursuing an economic objective" (E. Cerexhe, Les règles de la concurrence applicables aux entreprises, Droit des Communautés européennes, no. 2018).
They are "public" since they are subject to a dominating influence by the States. Finally, PTTs are "monopolies" since they are the sole source of supply of certain products and services for a number of acquirers.

a) Article 90

Under article 90(1) of the EEC Treaty, public undertakings and those to which Member States grant special or exclusive rights are, in principle subject to articles 85 and 86. However, undertakings entrusted with the operation of services of general economic interest are subject to the competition rules only to the extent that "the application of such rules does not obstruct the performance, in law or in fact of the particular tasks assigned to them". Telecommunications services constitutes "services of general economic interest" since this notion has been construed very broadly. Such interpretation has been confirmed in the British Telecommunications case before the Commission and the Court of Justice. In other European countries, they are legal provisions or principles similar to those which have been invoked in the British Telecom case which support the assertion that European PTTs are entrusted with the operation of a service of general economic interest in the same way as British Telecom.
As undertakings entrusted with the operation of a service of general economic interest, the PTTs are subject to the limitations contained in article 90(2). Authorities are of the opinion that this limitation has to be interpreted restrictively. The Commission did so in the British Telecom case when it deemed that for article 90(2) to apply it was not sufficient that the tasks assigned to the undertaking be "complicated" but that performance of such tasks had to be "impossible".
In the British Telecom case, the Court decided that the regulatory activities of British Telecom were also subject to article 86 because they were equivalent to contractual provisions as to the price and conditions of service.

b) Article 222

Although this point was not decided by the Court in the British Telecom case , article 222, pursuant to which the "Treaty shall in no way prejudice the rules in Member States governing the system of property ownership" does not limit the application of competition rules to public monopolies as was contended by the claimant.
Consequently, PTTs are submitted to competition rules to a large extent. The possible applications of these rules to the telecommunications sector shall now be examined.

B. Agreements Between Undertakings (Article 85)

International agreements are necessary to operate telecommunications networks on an international level. Such agreements are generally concluded between States and as such they normally fall outside the ambit of competition rules. In the event that agreements are entered into by the PTTs themselves (e.g. agreements made within the confines of the CEPT), article 85 would be applicable to the extent that such agreements have restrictive effects on competition within the Common Market e.g. agreements concerning the routing of circuits through certain Member States to the exclusion of others or imposing dissimilar conditions to equivalent services rendered to other trading parties. The distortion of competition would affect data service providers who would be subject to different conditions in the various Member States. However, to our knowlegde article 85 has not been applied to the telecommunications sector so far.

C. Abuse of a Dominant Position

The first application of competition rules to the telecommunications sector was the British Telecom case where the Commission condemned British Telecom for abusing its dominant position. The decision was appealed but it was confirmed by the Court of Justice. British Telecom tried to prevent private message-forwarding agencies from re-transmitting telex messages received from and destined for foreign countries. It did so by adopting regulations preventing message-forwarding agencies from charging their customers lower rates than would have been charged if they had sent their messages directly to their final destination. In fact, these regulations prevented private message-forwarding agencies from continuing their international activities.

One of these agencies lodged an application to the Commission claiming that there was a violation of competition rules. The Commission rendered a decision that the

above-mentioned regulations infringed article 86 of the Treaty. In this decision, the following points are noteworthy :

— British Telecom was an undertaking in the sense of article 86 and by virtue of its statutory monopoly it held a dominant position within a substantial part of the Common Market;
— the regulations which were adopted by British Telecom in order to restrict message-forwarding agencies to exercise their international activities constituted an abuse of dominant position;
— this abuse was capable of affecting trade between Member States.

The British government did not appeal the decision because at that time it was in the process of deregulating telecommunications in the United Kingdom. However the Italian Republic filed an appeal procedure under article 173, probably with the support of the CEPT.
The questions raised before the Court were those of (i) the applicability of the EEC competition rules to the regulatory activities of British Telecom and (ii) the existence of an abuse of dominant position in this case. The Court's answer to the first question has been examined above. With regard to the second question, the claimant contended that the answer was negative for three reasons : (i) the regulations in dispute were necessary to prevent an abusive use of telecommunications networks (ii) they were permissible under article 90(2) of the Treaty and (iii) they were taken pursuant to the International Telecommunications Convention. The arguments under (ii) and (iii) were examined above. With respect to argument under (i) the Court stated that "the fact of ressorting to new technology which allowed the transmission of messages to be speeded up could not be regarded as improper".

Therefore, the Court confirmed that British Telecom had abused its dominant position by adopting the regulations.

There are other examples of the application of article 86 to the telecommunications sector although they did not result in a Commission's decision or a Court judgement.

II. Application of Rules on Free Circulation of Goods

Public monopolies in the telecommunications sector generally include the provision of equipment to be connected to networks. Restrictions imposed by the PTTs in this respect should therefore be examined under the Treaty rules on free movement of goods.
Public telecommunications monopolies are "State monopolies of a commercial character" in the sense of article 37. They should therefore have been adjusted "so as to ensure that when the transitional period has ended no discrimination

regarding the conditions under which goods are procured and marketed exists between nationals of Member States". It is doubtful that this adjustment has been achieved in the telecommunications sector. However, the Commission has announced in its Programme for 1985 its desire to achieve it.
Article 37(2) contains a standstill obligation. Any legal or regulatory extension of a telecommunications monopoly on the provision of equipment is prohibited to the extent that it creates discrimination between nationals of different Member States with regard to the procurement and marketing of such goods. This provision was used by the Commission to prevent the German government from extending the Bundespost monopoly on cordless telephones.

III. Application of Rules on Freedom to Provide Services

PTTs monopolies include the operation of networks. This is the main purpose of telecommunications i.e. the transmission of information at distance via telecommunications networks. Such an activity is a "service" in the sense of article 59 et seq. of the Treaty. Television distribution which is another means of transmission of information has also been considered by the Court of Justice as a service.
Since there is no provision similar to article 37 among the Treaty rules on freedom to provide services, a legal or regulatory extension of a public monopoly on telecommunications services would normally fall outside the Treaty of Rome except to the extent that article 90 applies. This article which is drafted in very general terms states that in the case of public undertakings, Member States shall not enact any measure contrary to the rules contained in the Treaty. This provision could be used by the Commission against a Member State which extended its monopoly in telecommunication services.

IV. Conclusion

It appears from the above analysis that the following EEC Treaty rules may be applied in the following situations :

— article 85 could be applicable to restrictive agreements between public undertakings entrusted with telecommunications monopoly;
— article 86 could be applicable to a public undertaking entrusted with a telecommunications monopoly which abuses its dominant position;
— article 37 could be applicable in the event that a Member State extended its monopoly in telecommunications equipment;
— article 90 could be applicable in the event a Member State extended its monopoly in telecommunications services.

The Commission's willingness to create and stimulate a European wide market for telecommunications, notably by using the above mentioned Treaty provisions, is

apparent from its recent interventions in this sector and has been confirmed in the RACE Programme and the Commission's Programme for 1985.