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Telecommunications : Recent Developments
in the European Economic Community

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TELECOMMUNICATIONS : RECENT DEVELOPMENTS IN THE EUROPEAN ECONOMIC COMMUNITY

Bernard E. Amory

Introduction

In June 1987, the Commission of the European Communities published its Green Paper on the future development of the telecommunications sector ¹ (hereinafter referred to as the "Green Paper"). The contents of the Green Paper is not summarized herein since it was presented and discussed at last year meeting of our Committees.

This paper reports and comments on the legal and regulatory developments in telecommunications which occurred after, and in many cases as a consequence of, the publication of the Green Paper both at the European Community level and within the Member States.

DEVELOPMENTS AT THE EUROPEAN COMMUNITY LEVEL

The EC Commission's Preliminary Conclusions on the Implementation of the Green Paper

The Green Paper was a discussion paper which gave rise to numerous and voluminous comments (from more than forty-five organizations). In February 1988, the EC Commission published a Communication containing its preliminary conclusions on the results of this consultation process ².

In its Communication, the EC Commission set out an action programme with strict deadlines in order to achieve the progressive opening of the telecommunications sector to competition by 1992. The EC Commission also established a timetable for the adoption of implementation measures of the Green Paper on the basis of the degree of consensus reached amongst interested parties (essentially the users, private services and equipment providers and telecommunications administrations). The proposed measures and the timetable for their adoption are as follows :

- The full opening of telecommunications terminal equipment markets by December 31, 1990. A Directive on the liberalization of terminal equipment was adopted in May 1988 and is discussed hereafter.
- The progressive opening of the telecommunications services market to competition from 1989 onwards except for the provision and operation of the network infrastructure and voice telephony.
- Full opening of receive-only satellite antennae not connected to the public network by December 31, 1989.
- Progressive implementation of cost-based telecommunications tariffs by December 31, 1992.

The EC Commission has also announced in its Communication the adoption of complementary measures deemed necessary to the creation of a competitive environment. Those measures are :

- The clear separation of the regulatory activities of the telecommunications administrations from their operating activities in order to prevent abuses of dominant positions. The EC Commission indicated that it would adopt a Directive in this respect before the end of 1988.
- The clear definition of "Open Network Provision" principles.
- The setting up of a European Telecommunications Standards Institute.
- The full mutual recognition of type approvals of telecommunications equipment. The EC Commission undertook to propose a Directive by December 31, 1988 which would extend the current Directive on mutual recognition of test results ³ to full recognition of type approvals throughout the Community.
- Ensurance of transparency of financial relations between the governments of the Member States and telecommunications administrations and application of value-added tax to all telecommunications administrations from January 1, 1990.

- Issuance of guidelines as to the application of EC competition rules to the telecommunications sector.
- Adoption of measures ensuring that public procurement of telecommunications equipment will not be discriminatory.

In its Communication, the EC Commission also indicated that, in other areas, the absence of consensus requires further discussions which should allow the definition of a common strategy before the end of 1988. Such areas are :

- The regulation of satellite communications.
- The definition of a European position on major international issues relating to telecommunications such as those discussed in the context of the GATT, the WATTC and bilateral relationships with countries such as the U.S. and Japan.
- The definition of a concept for the promotion of European-wide services (such as packet-switching, videotex and ISDN).
- The examination of social consequences of telecommunications liberalization.

Finally, the EC Commission's Communication identifies areas in which existing policies should be maintained or strengthened.

Those are :

- The long-term convergence and integrity of the network infrastructure including the creation of "Integrated Broadband Communications" through the implementation of the RACE program, the coordinated introduction of ISDN and the introduction of pan-European digital mobile telecommunications.

- The cooperation within European industry in order to guarantee a strong European presence in the developing services and industrial fields.

- The ensurance of equal participation of poorer European regions in the new telecommunications markets.

The EC Council of Ministers Resolution of June 30, 1988

On June 30, 1988 the Council of Telecommunications Ministers of the European Community adopted a Resolution giving general support to the EC Commission action plan submitted in its Communication of February 9, 1988 (see above).

This was the first formal meeting of the Council of Ministers which was devoted exclusively to telecommunications. In addition to giving its support to the implementation of the Green Paper, the Council of Telecommunications Ministers took a series of further decisions.

Amongst those measures are : the introduction of a single emergency call number throughout the Community and the preparation of EC common positions to be presented by the Member States at the forthcoming World Administrative Telephone and Telegraph Conference to be held in Melbourne in December 1988.

The Terminal Equipment Directive

On May 16, 1988 the EC Commission adopted a Directive on competition in the markets in telecommunications terminal equipment ⁴. It is the first legal measure implementing the principles contained in the Green Paper and the Communication of February 9, 1988. In addition to the substantive aspects of the Terminal Equipment Directive, the procedural approach followed by the Commission for adopting the Directive is discussed hereafter since it could be relevant for future implementation measures of the Green Paper.

Substantive Aspects :

- Abolition of monopolies

The Terminal Equipment Directive requires the Member States to withdraw exclusive or special rights currently enjoyed by public or private undertakings in respect of the importation, marketing, connection, bringing into service and maintenance of

telecommunications terminal equipment and to ensure that those activities can be exercised by private suppliers.

However the Member States can prohibit a private supplier from importing, marketing, connecting, bringing into service and/or maintaining terminal equipment in two cases : (i) in the absence of technical specifications, if such equipment does not comply with essential requirements such as safety and system compatibility, and (ii) if a private supplier does not possess the technical qualifications needed to carry out those activities (technical qualifications will be established on the basis of objective, non-discriminatory and publicly available criteria).

- Customers right to terminate existing contracts

Member States are required to make it possible for customers who lease equipment from undertakings which enjoy exclusive or special rights or have maintenance agreements with them, to terminate such contracts with maximum notice of one year. In respect of equipment not requiring type-approval, this right of termination must have been given by mid-August 1988. For other equipment, the timetable is as following : additional telephone sets, modems and PABX : December 31, 1988; telex terminals, data transmission terminals, mobile telephone and receive-only satellite stations not connected to the public network :

September 30, 1989; all other terminal equipment including first telephone set : June 30, 1990.

- Access to public network termination points

To enable private suppliers to freely connect and bring into service terminal equipment, they should have access to the new network termination points and the physical characteristics of the termination points of the public network (to which such equipment is to be connected) should be published. The Directive requires the Member States to make such publications prior to December 31, 1988. Furthermore, users should have access to existing public network termination points within a reasonable period after their request.

- Technical specifications

Member States are also required to publish the specifications and type-approval rules for terminal equipment in order to enable manufacturers to determine what specifications they must satisfy. Such specifications must be drawn up in accordance with European Community rules on technical standards.

The Member States were required to furnish to the EC Commission by mid-August 1988 a list of all published technical specifications and type-approval procedures. For those which have not yet been published the Directive sets out a timetable for their publication which is the same as the one applying to the right of termination of contracts mentioned above.

- Separation of regulatory and operating activities

In order to avoid constant and obvious conflict of interest situations, the Directive requires that the regulatory activities with regard to terminal equipment (i.e. the drawing up of specifications, the monitoring of their application and the granting of type-approval) be entrusted to a body independent from the undertakings offering goods and/or services in the telecommunications sector. This requirement should be complied with prior to July 1, 1989.

Procedural Aspects :

EC directives can be adopted by the EC Council of Ministers or the EC Commission under, respectively Art. 100/100A and Art. 90 (3) of the Treaty of Rome. An Art. 90 (3) directive can be adopted much more quickly than an Art. 100/100A directive. However, the authority of the EC Commission to adopt directives under Art. 90 (3) is restricted to cases where it is necessary in order to ensure the application of Art. 90. This provision provides that public undertakings and those to which Member States grant special or exclusive rights are, in principle, subject to the rules of the Treaty and more particularly the rules on competition. However, undertakings entrusted with the operation of services of general economic interest are subject

to those 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".

The Commission has very rarely used Art. 90 (3) to issue directives of general application (i.e. addressed to all Member States). In the recitals clauses of the Terminal Equipment Directive, the Commission justified its procedural approach by indicating that the only instrument by which it could efficiently carry out the tasks and powers assigned to it under the Treaty of Rome with regard to the monitoring of relations between the Member States and their telecommunications administrations was an Art. 90 (3) directive. Although there is a large consensus within the Member States on the need to liberalize the terminal equipment market, some Member States made reservations as to the validity of the legal basis of the Directive. On July 22, 1988 the French Republic brought an action against the EC Commission before the European Court of Justice. The French Republic claimed that Art. 2 (abolition of monopolies), Art. 6 (separation of regulatory activities from operating activities of telecommunications administrations), Art. 7 (right of termination of leasing and maintenance contracts) and Art. 9 (obligation for the Member States to

inform the EC Commission on progress made with regard to the implementation of the Directive) should be declared void by the Court . The French Republic argues that the Commission has exceeded its powers under Art. 90 (3) of the Treaty and that the Directive (at least with regard to the above-mentioned articles) should have been adopted by the Council of Ministers rather than the Commission.

The challenging of the Terminal Equipment Directive does not suspend its application (unless the European Court of Justice so decides), and it seems that the EC Commission will not delay the adoption of further implementation measures of the Green Paper under Art. 90 (3) such as the services directive.

The European Telecommunications Standards Institute

In its Communication of February 9, 1988, the EC Commission encouraged the creation of a European telecommunications standards institute by the CEPT ⁵. The European Telecommunications Standards Institute (*ETSI*) was formed on March 28-30 in Sophia Antipolis, France, by the 28 country CEPT administrations ⁶. The first General Assembly of ETSI discussed proposed rules of procedure including membership. According to

the proposed rules, ETSI would have four types of member : national administrations; network operators; manufacturers, including private companies providing services to third parties; and users. The proposed rules recognize two special observer status : (i) European organizations entitled to become members but not wishing to do so and (ii) European organizations composed of experts or chartered for research purposes.

The ETSI will consist of a General Assembly, a Secretariat, a Technical Assembly, Technical Committees and Project Teams.

The General Assembly would be responsible for appointing the director, ruling on questions of membership, adopting the budget and determining the general policies of the Institute. The Technical Assembly would be the highest authority for the production and approval of technical standards.

Project teams will be created by the Technical Assembly and prepare technical specifications. Members of ETSI will not support national standardization or develop standards conflicting with the ongoing work of the Institute.

The "Open Network Provision" Concept

The EC Commission announced in the Green Paper the issuance of a

Community directive on "Open Network Provision".

This directive would contain "clear definitions of general requirements imposed by telecommunications administrations on providers of competitive services for use of the network, including definitions regarding network infrastructure provision". According to the Commission, consensus should be achieved on standards, frequencies and tariff principles.

The implementation of Open Network Provision is one of the major action lines of the Green Paper. The GAP ("Groupe d'Analyse et de Prévisions" - "Analysis and Forecasting Group"), a sub-group of SOGT ("Senior Officials Group for Telecommunications") was asked to develop a general approach to this concept.

A first GAP report was issued in the Spring of this year and interested parties were invited to make their views known on ONP for leased lines at a meeting organized by the EC Commission on June 9, 1988. A further hearing is scheduled for November 8, 1988 where interested parties will be invited to comment on the outline of proposals prepared by GAP at that stage. The first GAP report discusses three key issues of ONP which are standardization of technical interfaces, supply and usage conditions and the definitions of tariff principles (the so-called "ONP trilogy").

The Services Directive

In its Communication of February 9, 1988, the Commission announced the issuance before the end of 1988 of a Commission directive on the progressive opening of the telecommunications services market from 1989 onward. This directive is currently under preparation and it seems that the Commission is willing to meet this deadline by adopting an Art. 90 (3) directive before the end of this year.

The general principles proposed to be introduced in the services directive are explained in the Communication of February 9, 1988 and are summarized hereafter.

The provision and operation of the network infrastructure would remain under the monopoly of the telecommunications administrations. (This raises the difficult question of defining the infrastructure). Voice telephony (which represents most of the telecommunications administrations revenues) would also remain under monopoly. All other services should be opened to competition by December 31, 1989. However, special consideration shall be given to telex and packet and circuit switched data services intended for general public use.

The Commission also indicated in its Communication of February 9, 1988 that by January 1, 1992 any remaining exclusive provision of services will have to be reviewed taking into account the technological developments and particularly the evolution towards a digital infrastructure.

Defining an EC Position on International Issues (WATTC)

In its Green Paper, the Commission recognized that the WATT 1988 Conference would have a major influence on the Community's future external relations in telecommunications. Therefore, according to the Commission, the Community should define a common position with regard to the Conference. This issue was identified in the Communication of February 9, 1988 as one on which a consensus remained to be achieved. The Council of Ministers of June 30, 1988 resolved that a common position should be worked out. The EC Commission is currently preparing a Community common position to be presented to the Council in accordance with Art. 116 of the Treaty ⁷. The issue is being discussed in the Senior Officials Group for Telecommunications (SOGT).

It seems that the EC common position will essentially address the questions relating to the relationships between telecommunications administrations and recognized private operating agencies, rather than issues such as charging and

accounting. It would appear that the EC Commission has drawn the attention of the Member States to the difficulties which would arise if the new regulations should conflict with the Community's telecommunications rules and policies. It is the author's view that if there was a conflict between the rules adopted by the WATT Conference and EC rules, the latter would prevail. Indeed, an international agreement entered into by a Member State and relating to matters which have been regulated by the European Community (e.g., competition) and conflicting with those EC rules would be invalid in the EC Member States. On the other hand, an international agreement relating to matters which are not regulated by the EC (e.g., as of today, use of and access to telecommunications networks) would be valid but any relevant EC rule (e.g. a directive on access to network) would prevail on such international rules as soon as it would be adopted ⁸.

Opening of Public Procurement ⁹

The EC Commission announced on June 22, 1988 the adoption of proposals for opening up public procurement markets in the telecommunications sector (which have been so far excluded from EC legislation on open public procurement). According to the proposal, major contracts passed by public telecommunications undertakings (which will be identified in the final text to be adopted) will be subjected to the new rules.

These rules provide for Community-wide publicity for calls for competitive bids, specifications of supplies and works in ways that encourage competition and common rules for all community participants. This should ensure that contracts are awarded without discrimination. According to the Commission the proposed rules contain provisions designed to ensure that the opening of public procurement does not lead to unilateral trade concessions to non-EC countries which would not be reciprocated. More specifically, it is proposed that contracting entities may exclude offers where less than half of the value of the goods or services to be supplied are of European Community origin.

Case-law developments

Although the implementation of the Green Paper should eliminate to a large extent the need of legal proceedings in order to fully enforce the rules of the Treaty of Rome to the telecommunications sector, those rules (particularly those relating to competition, the freedom to provide services and the free circulation of goods) ¹⁰ are currently applicable and can be invoked before the national courts, the EC Commission and the European Court of Justice. The recital clauses of the Terminal Equipment Directive clearly indicate that those rules are applicable. As in the past, the EC Commission encourages to

file complaints in case of possible violations of the Treaty provisions. Hereafter some recent cases are reported.

The RTT/GB-INNO-BM SA case ¹¹

In January 1988, the Brussels Commercial Court has made a reference for a preliminary ruling to the European Court of Justice containing the following questions :

- Are Belgian rules empowering the RTT (the Belgian telecommunications authority which operates the public network and sells apparatus to be connected to that network) to grant authorization to connect to the public network apparatus which is not supplied and sold by it, compatible with Art. 30 of the Treaty ?

- To what extent is the monopoly granted to the RTT to deliver authorization to connect apparatus to the public network and to organize the rules concerning apparatus not supplied or sold by it, together with the related power for the Régie to fix arbitrarily the standards with which such apparatus must comply, constitute a practice prohibited by Art. 86 (b) and (c) of the Treaty? ¹³

The European Court of Justice has not rendered its ruling yet in this case. One should note that the implementation of the Terminal Equipment Directive (and more particularly its Art. 6 which requires the separation of regulatory from operating activities of the telecommunications administrations by July 1, 1989) should eliminate situations as the one raised in this case.

The Alsatel v. Novasam Case ¹⁴

This is also a reference for a preliminary ruling made by a Strasbourg (France) court to the European Court of Justice. It relates to the interpretation of Art. 86 of the Treaty with regard to contracts for the rental of telephone installations. More particularly, the French court asked the European Court of Justice whether the very long-term rental contracts (more than 10 years) under which the customers are bound to Alsatel (which has exclusive rights in this respect) is not violative of Art. 86 of the Treaty of Rome. The Court has not yet rendered its ruling in this case. Again, this issue is addressed in the Terminal Equipment Directive which requires the Member States to give a right of termination of rental contracts with a maximum notice of one year.

The Belgian Telephone Sets Case

In early 1988, a complaint was filed with the EC Commission concerning the import and marketing in Belgium of telephone sets legally manufactured and marketed in other Member States. The EC Commission started an action on the basis of Art. 169¹⁵ of the Treaty of Rome. The Commission indicated to the Belgian Government that the requirement by the RTT that telephone sets imported from other Member States comply with RTT specifications for telephone sets to be connected to the public network is in violation of Art. 30 of the Treaty to the extent that those specifications are not "essential" i.e. exceed safety and "no harm to the network" requirements. Furthermore, the Commission informed the Belgian Government that the rules requiring that labelling of telephone sets can only be done by the owner of the approval or its designee were violative of Art. 30 of the Treaty. Moreover, since those rules were not notified to the Commission pursuant to Directive No 88/189, they were not opposable to third parties.

LEGISLATIVE DEVELOPMENTS IN THE MEMBER STATES

Hereafter is a summary of recent important legislative developments in selected countries of continental Europe.

In Belgium, the Minister of Telecommunications has announced the publication in September 1988 of a draft law reforming current telecommunications rules. Nothing has been issued so far. However, it is understood that the draft law will propose to remove burdensome constraints currently imposed on the RTT (the Belgian telecommunications public authority). The proposed law would also implement the Terminal Equipment Directive and liberalize to some extent telecommunications services.

In France, a Decree on the provision of value-added services has been adopted on September 24, 1987¹⁶. Under the Decree, one can freely use leased lines for communications with a third party, provided the third party is designated in an agreement. In principle, such a leased line cannot be connected to the public network. However, one can connect a leased line to the public network and carry third-party traffic on it, provided it transmits data and offers a value-added service. Value-added services are defined on the basis of a ratio between the cost of transmission and the total turnover of the operation of the service. In order to qualify as a value-added service such ratio should not be inferior to 15%. Depending on the external access capability of the service, the provision of value-added services should either be notified or subjected to prior authorization. On the other hand, the draft law on telecommunications issued in August 1987 has not yet been adopted.

In Germany, a draft law is currently discussed by Parliament. It provides that the monopoly of the Deutsche Bundespost - Telekom will be restricted to voice telephony. All other services will be open to competition. Also, under the draft law, the provision of certain competitive services can be imposed on the Deutsche Bundespost - Telekom for public utility reasons (those services are known as "Pflichtdienste" or "obligatory services").

In The Netherlands, four bills were introduced in Parliament in December 1987 and were approved by the House of Deputies in May 1988. They have been submitted to the Senate. These bills relate respectively to the following issues : (i) the status of PTT personnel, (ii) the provision of telecommunications facilities, (iii) the establishment of "PTT Nederland NV" a limited liability company and (iv) the revision of the Post Act. Revision Bill. The draft law on telecommunications facilities ("Wet op de telecommunicatievoorzieningen") grants to PTT Nederland NV a monopoly on the setting-up, operation and maintenance of the telecommunications infrastructure. These activities will actually be carried out by a subsidiary of PTT Nederland NV, namely PTT Telecommunicatie BV. The PTT will be obliged to provide basic services i.e. voice telephony, telex, data transmission services and (temporarily) telegraph services. The PTT are also obliged to furnish leased lines to any person who would request it. All services except the above-mentioned

obligatory services can be offered by private suppliers without notification or authorization. The draft also liberalizes the terminal equipment market. Finally, the draft law transfers all telecommunications regulatory powers (such as the establishment of tariff principles and type-approval) to the Ministry of Transport.

* * *

FOOTNOTES

1. "Towards a Dynamic Economy - Green Paper on the Development of the Common Market for Telecommunications Services and Equipment" [COM (87) 290 final of June 30, 1987 herein referred to as the "Green Paper"]
2. "Towards a Competitive Community-wide Telecommunications Market in 1992 - Implementing the Green Paper on the Development of the Common Market for Telecommunications Services and Equipment - State of Discussions and Proposals by the Commission [COM (88) 48 final of February 9, 1988, herein referred to as the "Communication" or the "Communication of February 9, 1988]"
3. EC Council Directive of July 24, 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment, O.J. No L217/21 of August 5, 1986
4. EC Commission Directive of May 16, 1988 on competition in the markets in telecommunications terminal equipment, O.J. No L 131/73 of May 27, 1988 (herein referred to as the "Terminal Equipment Directive")
5. The CEPT is the "Conférence Européenne des Postes et Télécommunications".
6. See report by Prof. Y. Pouillet in Transnational Data Report, August/September 1988, pp 6-7, of which excerpts are reproduced herein.
7. Art. 116 of the Treaty of Rome provides that "the Member States, in respect of all matters of particular interest to the common market, proceed within the framework of international organisations of an economic character only by common action. To this end, the Commission shall submit to the Council, which shall act by a qualified majority, proposals concerning the scope and implementation of such common action".
8. See EUSIDIC, European Telecommunications. The Information Industry Perspective, London, 1987, at p. 78.
9. See COM (88) 335 and Press Release P-77 of June 22, 1988

10. For a more extensive discussion of this issue, see Bernard Amory, Telecommunications monopolies v. European Community Law, International Business Law Journal, 1986, No 2, pp.117 to 130.
11. Case No 18/88, O.J. No C 43/4 of February 16, 1988
12. Art. 30 of the Treaty of Rome provides that "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States".
13. Art. 86 of the Treaty of Rome reads as following : "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in : ...
 - (b) limiting production, markets or technical development to the prejudice of consumers;
 - (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;..."
14. Case No 240/86, O.J. No C265/5 of October 21, 1986
15. Article 169 of the Treaty of Rome provides that : "If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission the latter may bring the matter before the Court of Justice".
16. Décret No 87-775 du 24 septembre 1987 relatif aux liaisons spécialisées et aux réseaux télématiques ouverts à des tiers, J.O. 25 septembre 1987, p.11201