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Telecommunications Monopolies and EC Law

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The telecommunications sector in Europe has traditionally been in the hands of legal public monopolies. These monopolies generally are responsible for both the installation of telecommunications networks and the provision of equipment and services. This situation is partially due to historical reasons. The maintenance of telecommunications monopolies is being called into question. One wonders whether they will be capable of adapting 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 stimulate a Europe-wide market for telecommunications and should allow this market to face technological developments. It might also make the European telecommunications industry one of the most important in this thriving industrial sector.

The European Communities (EC) since 1979 has been active in responding to this challenge. They have adopted a number of measures to this effect. Among them are the utilization by the EC 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 free circulation of goods.

EC rules

PTTs, whether they are integrated within a government administration or separate from it, are 'public undertakings' in the sense of the Treaty of Rome; undertakings, since they are a 'unity of material and personal elements organized with a view to pursuing an economic objective;' 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.

Under Article 90(1) of the 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 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 constitute '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 EC Commission and the Court of Justice. In other European countries there are legal provisions or principles similar to those which have been invoked in the British Telecom (BT) case, which support the assertion that European PTTs are entrusted with the operation of a service of general economic interest.

As such, the PTTs are subject to the limitations contained in Article 90(2), which the authorities feel should be interpreted restrictively. The commission did so in the BT 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 this case the court decided that the regulatory activities of BT were also subject to Article 86 because they were equivalent to contractual provisions as to the price and conditions of service.

Although this point was not decided in the BT 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, the PTTs to a great extent can be subject to competition rules, the possible application of which to the telecommunications sector will now be examined.

International agreements

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 EC, for instance 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 knowledge, Article 85 so far has not been applied to the telecommunications sector.

Dominant position

The first application of competition rules to the telecommunications sector was the BT case where the commission condemned BT for abusing its dominant position. The decision was appealed but it was confirmed by the Court of Justice. BT tried to prevent private message-forwarding agencies from retransmitting telex messages received from and destined for foreign countries. It did so by adopting regulations preventing such agencies from charging their customers

lower rates than would have been charged had they sent their messages direct to their final destination. In fact, these regulations prevented these agencies from continuing their international activities.

One of them lodged an application with the commission claiming that there was a violation of competition rules. The commission returned a decision that the above-mentioned regulations infringed Article 86 of the treaty. In this decision the following points are worthy of note: BT 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 BT in order to restrict message-forwarding agencies in exercising their international activities constituted an abuse of its dominant position; this abuse was capable of affecting trade between member states.

The questions raised before the court were those of: (a) the applicability of EC competition rules to the regulatory activities of BT; and (b) 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, the claimant contended that the answer was negative for three reasons: (1) the regulations in dispute were necessary to prevent an abusive use of telecommunications networks; (2) they were permissible under Article 90(2) of the treaty; and (3) they were taken pursuant to the International Telecommunication Convention. The arguments under 2 and 3 were examined above. With respect to the argument under 1 the court stated that the 'fact of resorting to new technology which allowed the transmission of messages to be speeded up could not be regarded as improper.'

There are other examples of the application of Article 86 to the telecommunications sector, although they did not result in a decision by the commission or a court judgment. At the national level, the president of the Brussels Commercial Court held, on July 31, 1986 in an interlocutory order, that the Belgian *Régie des télégraphes et téléphones* (RTT) had abused its dominant position and therefore violated Article 86 of the treaty in proposing to a telecommunications equipment manufacturer to enter into an exclusive distributorship agreement for the sale of a certain type of public access branch exchange (PABX).

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 announced in 1985 a 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 the 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.

Freedom of services

PTT 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 in 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, including the abolition of restrictions on freedom to supply services provided for in Article 59.

Conclusions

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

- Article 85 to restrictive agreements between public undertakings entrusted with telecommunications monopoly;
- Article 86 to a public undertaking entrusted with a telecommunications monopoly which abuses its dominant position;
- Article 37 in the event that a member state extended its monopoly in telecommunications equipment;
- Article 90 in the event a member state extended its monopoly in telecommunications services.

The commission's willingness to create and stimulate a Europe-wide market for telecommunications, notably by using the above-mentioned treaty provisions, is apparent from its recent interventions in the sector. Its views on the applicability of EC rules to the telecommunications sector are expected to be expressed in a *Green Paper* which should be published in the next few months.■

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