TELECOMMUNICATIONS IN THE COMMON MARKET

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The growing interdependence between data processing and telecommunications has led, in all the Member States of the European Community, to considerable re-regulation or, at least, to political discussions about regulatory reform in the telecommunications field.

The Commission of the European Communities, which is both, a legislative and the executive organ of the EEC, is now actively participating in the movement toward re-regulation of the telecommunications sector in Europe.

This re-regulation concerns mainly four areas:

(1) **Telecommunications Networks**

Telecommunications networks - or "facilities" - are the technical infrastructure, that is the lines, the microwaves, the satellites, the cables over which telecommunications services are provided.

(2) **Telecommunications Services**

Telecommunications services are provided via the telecommunications network infrastructure. They encompass, of course, POTS - that is, "Plain old telephone service" - but also data services and other, more enhanced services such as videotext services, electronic mail services, message storage and forwarding services, and other services combining telecommunications and data processing functions.

(3) **Provision of terminal equipment**

With the merging of telecommunications and data processing known as telematics (la télématique), such terminal equipment has become more and more sophisticated and multifunctional.

(4) **Organisational Structures**

Re-regulation of the telecommunications sector concerns the organisational structures of the traditional providers of telecommunications networks, services and terminal equipments: that is, the national Telecommunications Administrations or PTTs.

At the core of the European Communities' telecommunications policy stands the Green Paper published by the Commission of the European Communities. Its official name is "Green Paper on the Development of the Common Market for Telecommunications Services and Equipment".[1] Technically, it is a communication which was adopted by the Commission and submitted to the Council, where the governments of the Member States are represented.

The Green Paper is based upon the premise that the creation of a supranational, internal market, that is, a market without national boundary lines impeding the free trade of goods and the free provision of services requires, by necessity, the creation of a supranational market infrastructure, including supranational telecommunications networks and facilities.

In view of the political goal to achieve the European internal market by the end of 1992, the Commission has given a high priority to its telecommunications policy and has already started to implement its Green Paper.

The Green Paper is a **policy** paper.

In essence, it is characterised by four main positions which define the scope of re-regulation of the European telecommunications enterprises.

(1) The **de jure** network monopolies of the national Telecommunications Administrations are permissible under European law and will, in essence, be tolerated by the Commission.

(2) The **de jure** service monopolies of the Telecommunications Administrations will be restricted.

(3) The **de jure** terminal equipment monopolies of Telecommunications Administrations will be abolished.

(4) The organisational structures of the national Telecommunications Administrations will have to be adapted to the newly developing market structures.

I. Telecommunications Networks

The Commission's Green Paper accepts the exclusive right of Telecommunications Administrations to provide network infrastructures.[2] A Member State may choose a more liberal regime, for example a duopoly of network providers, as it is the case in the United Kingdom. However "the short and long term integrity of the general network infrastructure should", according to the Commission, be safeguarded.

The policy decision in favour of **de jure** network monopolies is a consequence of the commitment of both the Commission and the EC Member States to the co-ordinated introduction of an Integrated Services Digital Networks (ISDN).

According to the Commission's policy proposals, the ISDN will become the Community's "open network infrastructure" over which services will be provided. This network integration strategy requires that the "financial viability" of the Telecommunications Administrations be safe-guarded in order to ensure both the investments in network infrastructure and the provision of "public service" obligations.

At first glance, the existence of national telecommunications network monopolies would appear to be a blatant violation of the Treaty of Rome which guarantees, in its Article 59, the freedom to provide services.

From a legal point of view, however, the Telecommunications Administrations' exclusive right to provide telecommunications network infrastructures is justifiable under the Treaty of Rome. In particular, the Treaty allows exemption of public undertakings from the competition rules if and when the operation of services of general economic interest by public undertakings is endangered.

Arguably, the provision of a modern telecommunications network infrastructure is such a "service of general economic interest". It may justify exemptions from the freedom to provide services, guaranteed in Article 59 of the Treaty, if it can be demonstrated that network competition would "obstruct the performance, in law or in fact", of the particular public service task assigned to the Telecommunications Administrations.

With respect to satellite services, the Commission proposes to restrict the scope of the Telecommunications Administrations' monopolies. The Green Paper suggests that two-way satellite communications systems "should be allowed to develop European-wide services and where the impact on the financial viabilty of the main provider(s) is not substantial".

This policy decision is the result of technological and legal considerations. From a technological point of view, satellite systems may be considered part of the network infrastructure or part of the provision of telecommunications services. Article 59 of the Treaty guarantees the freedom to provide transborder satellite services. Consequently, a Telecommunications Administration will, in general, have to license two-way satellite telecommunications systems for the provision of transborder services. However, if it can show, on a case-by-case basis, that the operation of the satellite system in question would "obstruct the performance, in law or in fact", of the Telecommunications Administration's public service task, the licence could be denied.

In summary the European telecommunications network infrastructure will essentially remain the exclusive domain of the Telecommunications Administrations. Europe is on its way towards a highly integrated telecommunications network.

II. Provision of Telecommunications Services

The EEC policy concerning telecommunications services is based upon a distinction between reserved services and competitive services. With respect to the re-regulation of the provision of telecommunications

services, a comparative analysis shows that one of the crucial problems which regulators are facing, is to draw the boundary lines between services which should be provided on the basis of a **de jure** monopoly and services which should be provided on a competitive basis.[3]

In the United States, the Federal Communications Commission (FCC) has drawn a regulatory boundary line on the basis of technological criteria. The FCC has distinguished "basic" and "enhanced" services on the basis of technologically defined service functions. "Basic" services were defined as services offering a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information. "Enhanced" services were, by contrast, defined as any service other than basic services.

As the American experience has shown, technological boundary lines are in constant need of re-regulation and adjustment to new technological developments. The Commission has therefore chosen a different approach. The European boundary line between telecommunications service providers will be drawn on the basis of social and political considerations, namely a consensus that:

- certain telecommunications services should be provided on a universal basis (i.e. with general geographical coverage to all users on reasonably the same terms, regardless of the user's location);

- the financial viability of the Telecommunications Administrations should be secured in order to ensure both the provision of universal services and their ability to innovate the telecommunications system.

At present, the only "obvious candidate" for the reserved services category, according to the Commission, is voice telephony. Consequently, all other telecommunications services may be provided on a competitive basis. Voice telephony currently accounts for 85-90% of all telecommunications revenue of the European Telecommunications Administrations.

The evolving regulatory regimes for telecommunications infrastructure and telecommunications services provided via this infrastructure and the evolving boundary lines between reserved services and competitive services will necessitate new technical standards. They will have to define the components of both infrastructure and services, their respective technical specifications and their functions. Furthermore, these standards will have to define the technical and legal interfaces between "network" and "services".

The EEC Commission has announced that these legal interfaces will be defined by European rather than by national law. The legal instrument which the Commission intends to use is a Community law directive on Open Network Provision (ONP). A directive is a regulatory instrument under European law. It is, in principle, not directly applicable in the Member States but requires national legislation implementing it. In the language of the Treaty of Rome, a directive "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods" (Article 189(3)).

The overall goal of the ONP Directive, according to the Commission, will be to ensure fair and open access to the European telecommunications infrastructure for users and competing service providers. In particular, the following main issues will be tackled by the ONP Directive:

- technical network specifications concerning standards and interfaces offered for interconnection;

- access conditions for providers of transborder telecommunications services, in particular

  - general tariffing principles for access by users and providers of competitive services,

  - rules concerning the "unbund-

ling" of tariffs for "bearer" and "value-added" service features;

- "general principles" for the provision of leased lines;

- usage-restrictions in order to protect "reserved services".

A crucial question will be whether or not the Commission is empowered to enact the ONP Directive on its own or if such a Directive has to be enacted by the Council on the basis of a qualified majority of the Member States. Given the diverging regulatory approaches of the Member States, the Council's participation in preparing the ONP Directive could result in lengthy bargaining.

Provision of Terminal Equipment

With respect to the provision of terminal equipment by Telecommunications Administrations there is a development, in most Member States, toward competitive provision of most if not all types of terminal equipment. At present, the scope of the terminal equipment monopolies of the national Telecommunications Administrations varies greatly. The Commission's proposed policy attempts to foster and co-ordinate the development toward competitive provision of all types of terminal apparatus. For a transitory period, exclusive provision by the Telecommunications Administrations of the first conventional telephone set will be tolerated. An extension of the exclusive right of a Telecommunications Administration to provide telecommunications terminal equipment may arguably violate Article 37(2) and 86 of the Treaty of Rome: the Commission has already used these Treaty provisions in proceedings concerning attempts, by the German Federal Post Office, to extend its terminal equipment monopoly to cordless telephones and to modems. Both cases were settled without formal decisions, but the attempted extensions of the terminal equipment monopoly were withdrawn. When the Commission ordered the Belgian government to abolish the monopoly of its national Telecommunications Administration concerning modems and telex terminals, the Belgian government refused to comply. As a consequence, the Commission has now started a formal procedure for violation of the Treaty of Rome which may eventually be decided upon by the European Court of Justice.

In its legal battles to liberalise the terminal equipment markets, the Commission has argued that the exclusive provision of terminal equipment by a national Telecommunications Administration will impede imports between Member States and thus infringe upon Article 37 of the Treaty. Furthermore, exclusive provision of terminal equipment by the network provider could constitute an unlawful tying arrangement under the competition rules of the Treaty. The political question faced by European policy makers is whether or not the Commission should continue its case-by-case approach to the liberalisation of the terminal equipment market.

The alternative to this very time-consuming approach would be a directive, defining the technological and legal interfaces between the telecommunications networks and terminal equipment attached to them.

The Commission appears to be willing to take this second approach and preparatory work for a terminal equipment directive has already begun.

Concomitantly, the body of secondary European telecommunications law concerning type approval of terminal equipment is growing. At present, European producers of terminal equipment are faced, in the twelve EEC Member States, with twelve different type approval proceedings for their products. As a consequence, there is hardly a common market for telecommunications terminal equipment.

As a first step for the establishment of such a market, a Council directive has established the principle of mutual recognition of type approval for telecommunications equipment. According to this directive, the Member States are obliged to recognise certificates of conformity issued by another Member State for a certain type of apparatus. Such apparatus must, however, meet "common conformity technical standards" upon

which the Member States have to agree. The Commission's political goal, as announced in the Green Paper, is to replace this cumbersome procedure by the principle of unrestricted mutual recognition of type approvals. As a consequence, a European producer of terminal equipment would have to undergo only just one type approval proceeding in a Member State. Once type approval was granted in one Member State, all other Member States would be obliged to recognise its validity without further ado.

Regulatory Framework

What are the consequences of these policy decisions concerning networks, services, and terminal equipment for the organisational structures of the national Telecommunications Administrations?

Two consequences are prominent:

- the organisational boundary lines of the national Telecommunications Administrations are changing;

- the regulatory system of telecommunications regulation is shifting from an organisationally oriented to a procedurally-oriented system.

With regard to the organisational structures of national Telecommunications Administrations, there is a clear trend, in the EEC Member States, toward separation of regulatory and operational functions. In short, Telecommunications Administrations will no longer be both referee and player in the telecommunications field. It is considered to be a prerequisite for fair competition that regulatory functions, in particular licensing, control of type approval and mandatory specifications, frequency allocation and surveillance of usage restrictions, are organisationally separated from the operational functions of providing telecommunications networks and services. The Commission's powers to enforce such structural separation requirements - which could easily infringe upon the Member State's prerogative to determine their organisational structures of government - are, however, weak. As an additional obstacle there is Article 222 of the Treaty of Rome which provides that the Treaty is not to "prejudice rules in Member States governing the system of property ownership". This provision leaves the determination of the appropriate ownership of Telecommunications Administrations - in particular whether they should be publicly or privately owned enterprises - to the Member States.

The European Commission may wish to deregulate the **de jure** telecommunications monopolies existing in most of the Member States, but it cannot, under the Treaty of Rome, privatise them.

Re-regulation and privatisation are, not only in regulatory theory but also in the real world of Community law, like chalk and cheese.

But structural separation is not the only means to ensure fair competition. The antitrust provisions of the Treaty enable the Commission to screen the behaviour of dominant undertakings including Telecommunications Administrations as far as they may be considered as "undertakings" under Article 86 of the Treaty. The Commission could thus scrutinise the behaviour of Telecommunications Administrations with respect to:

- extensions of the network monopoly

- extensions of the service monopoly;

- regulations of network access;

- tariffing decisions with respect to competing service providers; and

- cross-subsidisation.

The second consequence for public enterprises in the telecommunications field is that the changes within the national regulatory system of telecommunications lead to a more procedural model of regulation.

The traditional model of telecommunications regulation in the EC

Member States was organisationally-oriented. Telecommunications policy was formulated and implemented by public enterprises, the PTTs, which were characterised by a specific organisational structure.

In the European tradition, these Telecommunications Administrations were:

- public entities, that is organisations characterised by public ownership;
- connected to the government by financial, personnel, and organisational ties;
- furnished with a double **de jure** monopoly status concerning both the provision of telecommunications networks and services as a "public service" (service public).

This organisationally-oriented model of telecommunications regulation through public enterprises is being gradually replaced by a procedural model of regulation through regulatory bodies which have been established in the United Kingdom and in France and which may be established in the Netherlands, Belgium, and the Federal Republic of Germany.

Conclusion

The Green Paper contains far-reaching proposals for re-regulation of the European telecommunications sector. It does not present the concept of a supranational telecommunications authority formulating and implementing a supranational European telecommunications policy. Rather it is an attempt to harmonise and to co-ordinate existing national policy approaches and to enhance the integration of the telecommunications sector as a major part of the internal European market.

Footnotes

1 Published as: COM (87) 290 final

2 For a more detailed analysis of the legal framework of European telecommunications policy under the Treaty of Rome see Joachim Scherer: 'European Telecommunications Law' in European Law Review 1987, pp#354-372.

3 For a comparative analysis see Joachim Scherer: 'Nachrichtenubertragung und Datenverarbeitung' in Telekommunikationsrecht, Baden-Baden 1987.

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MICHAEL LAWS RETIRES (Cont'd from p32)

astonishing capacity for new, creative and innovative thought.

That capacity he generously shared with others outside his family. Mind you, he always served to ensure that his family would retain and improve its position in the broadcasting world, to ensure that the climate in which it has to operate would be favourable. But in doing so, he widened the horizons of many others involved in the broadcasting world.

Others have joined him since to help with the care for this growing family, quite a few of its children have grown up and lately Michael's role became much more that of the grandfather, who is always there to impart his wisdom and share his experience and knowledge. It is that wisdom, experience and knowledge that we'll miss. That and his complete and absolute dedication to public broadcasting.

I, and many people with me, will miss his friendship, loyalty and constant support. We all thank him for that.

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