Telecommunications in the European communities

Amory, Bernard

Published in:
Europäische Zeitschrift für Wirtschaftsrecht

Publication date:
1992

Document Version
Publisher's PDF, also known as Version of record

Aufsätze und Berichte

Telecommunications in the European Communities

The new regulatory framework

*By Bernard Amory, Bruxelles**

Die Zielvorgabe des Binnenmarktes bestimmt auch die Aktivitäten der Gemeinschaft auf dem Gebiet der Telekommunikation. Angesichts der überragenden Bedeutung, die der Telekommunikationssektor für die technologische Weiterentwicklung der europäischen Industrie hat, überrascht es nicht, daß das Regelwerk der Gemeinschaft Schritt für Schritt in immer weitere Zonen dieses Bereichs vordringt. Der folgende Beitrag beschreibt die einzelnen Phasen der Regelungsbemühungen. Schwerpunkte dieses Prozesses sind die Telekommunikationsendgeräte (Marktöffnung für die Geräte, gegenseitige Typenanerkennung, Harmonisierung der Normung), die Telekommunikationsdienstleistungen (Aufbrechen nationaler Dienstleistungsmonopole) sowie die Schaffung einer gemeinschaftsweiten „interoperablen" Telekommunikationsinfrastruktur. Außerhalb des Regelwerks stehen noch der Satelliten- und der Mobilfunk.

I. Introduction

In 1984, the European Economic Community (the EEC) began a vast programme of action in the telecommunications sector[1]. The operation was intensified when, in 1987 the Commission of the European Communities (EC Commission) published a Green Paper on telecommunications[2]. Several reasons prompted the intervention of the EEC in the telecommunications sector. The convergence of telecommunications and computer technology brought a very old and highly regulated industry face to face with one that is new and little regulated. For this merger to be fully achieved it was necessary to adapt the legal framework within which its partners are developing. In other parts of the world, this reform had already taken place in the early 1980's. Europe had, therefore, to take action if it did not want its telecommunications industry to lag behind its competitors, notably the Americans and the Japanese. To be left behind would be fatal to Europe's economy, for which telecommunications have become an essential tool (it is estimated that, by the end of the century, more than 60% of jobs in the EEC will be strongly information related and will therefore be directly or indirectly dependent on telecommunications[3]). At a time when huge efforts are being deployed to create the European internal market, reforms of the regulatory framework applying to telecommunications had to take place immediately and harmoniously at European Community level as a key element for the achievement of a single European Community market in 1993.

This article contains a general and comprehensive overview of the measures already adopted or proposed by the European Communities (EC) institutions for the regulatory reform of European telecommunications[4] as well as commentaries on certain important new legal provisions. Before presenting them, and by way of a reminder, these measures originate from the Green Paper. The latter, published in 1987, contains proposals for regulatory reforms that are the fruit of a thorough analysis of the technological, economic and regulatory aspects of the telecommunications industry in Europe, the USA and Japan. The Green Paper provoked a wide debate in which all interested parties participated (notably the Telecommunications Organizations[5], the suppliers in the private sector of services and equipment for information technology and telecommunications, users and trade unions). The debate produced a consensus on the majority of the proposals contained in the Green Paper, on the basis of which, in February 1988, the Commission presented a programme of action that was generally in line with its initial proposals[6]. This programme of action was itself supported by the other insitutions of the EC, i. e. the Council of Ministers[7], the European Parliament[8] and the Economic and Social Committee[9]. The new regulatory framework proposed in the programme aimed at both liberalization and harmonization of the telecommunications industry and ir covered the three elements of which this technology is made up: terminals, services and infrastructure. The liberalization and harmonization measures relating to each of these elements will be examined successively below in Sections II, III and IV. In Section V, measures of general application will be discussed.

---

* The author (Licencié en droit, Louvain and LL. M, Exeter) is a partner with Dechert Price & Rhoads in Brussels and an adjunct professor at the Faculty of Law of Namur.

1) Communication of the Commission to the Council on telecommunications, COM (84) 277 of 15/5/1984 containing the action programme approved by the Council of Ministers of 17/12/1984.

2) Communication of the Commission, Towards a dynamic European economy, Green Paper on the development of the common market for telecommunications services and equipment, COM (87) 290 of 30/6/1987, hereafter referred to as the "Green Paper".

3) *Ungerer-Costello*, Telecommunications in Europe, 1988, p. 89.

4) Measures of industrial policy such as aid to research and development are not covered in this article. Also, the application of the EC foreign policy in the telecommunications sector has not been included in this article.

5) Telecommunications Organizations is now the term used in EC terminology to designate the so-called "PTTs" which were referred to in the Green Paper as Telecommunications Administrations. The term is legally defined in Articles 1 and 2 of, respectively, the Commission Directive of 28/6/1990 on the liberalization of telecommunications services markets and the Council Directive of the same date on the establishment of the internal market for telecommunications services through the implementation of open network provision, O.J. No. L 192 of 24/7/1990.

6) EC Commission, 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, Communication from the Commission COM (88) 48 final of 9/2/1988.

7) Council Resolution of 30/6/1988 on the development of the common market for telecommunications services and equipment up to 1992, O.J. No. C 257 of 4/10/1988

8) Resolution of 14/12/1988.

9) Opinion on the Communication from the Commission, "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", O.J No C 175 of 4/7/1988.

II. Telecommunications Terminal Equipment

The measures relating to telecommunications terminal equipment revolve around three inseparable themes: the opening of markets to competition, the mutual recognition of type approval and standardization. In addition to the regulatory measures described below, the EC Commission is also enforcing the competition rules of the EEC Treaty on a case by case basis. The policy of the EC Commission in this respect is explained in its Guidelines on the application of EEC competition rules in the telecommunications sector discussed below in Section V.

A. The opening of the telecommunications equipment markets to competition

In May 1988, the EC Commission adopted a Directive on the opening to competition of the telecommunications terminal equipment markets[10].

From a procedural point of view, this Directive stands out as having been adopted by virtue of Article 90 of the EEC Treaty. According to this Article, the EC Commission. (rather than the Council of Ministers pursuant to the usual procedures under Articles 100 or 100a of the EEC Treaty) may address Directives to the Member States, as part of its duty to ensure that the rules of the EEC Treaty are abided by the Member States in their relations with public undertakings, or undertakings benefiting from special or exclusive rights, such as the Telecommunications Organizations. The use of this procedure by the EC Commission for the opening of terminal equipment markets to competition has been criticised. Consequently, the Directive has been challenged before the *European Court of Justice* under Article 173 of the EEC Treaty for annulment of several of its provisions[11]. The *Court* rendered a judgment on March 19, 1991[12] almost three years after the application was made. This lenght of time to reach a decision is indicative of the difficulty and the importance of the issues brought before the *Court*, not only for the telecommunications sector. but for all regulated industries. The judgment generally confirmed the position of the Commission, i.e. that the commission had the authority under Article 90 of the EEC Treaty to require the Member States to abolish monopolies on the provision of terminal equipment. The *Court* held that the Commission had regulatory powers under which it could adopt rules precising the obligations contained in the Treaty. It should be noted, however, that the *Court* annulled certain provisions of the Directive. In particular, the Court annulled the provision which required the abolition of "special rights" (as opposed to "exclusive rights") and the related obligations imposed on the Member States in this respect. The reason for the annulment of these provisions is the lack of justification in the Directive. According to the *Court*, the Commission did not define what special rights were and why they should be abolished. The description of the contents of the Directive in the following paragraph takes into account the ruling of the *Court*. The implications of this judgment for other areas of telecommunications such as telecommunications services and satellites are discussed in the paragraphs dealing with these issues.

For a long time, the supply of terminal equipment has been subject to State monopolies. Already, the rapid innovations in technology in recent years have led monopoly holders to relinquish their grasp on the most sophisticated equipments such as large private automatic branch exchanges (known as PABX). The objective of the aforementioned Directive was, by 1990, to gradually ensure the complete opening of this market (including the telephone sets supplied for domestic use) in the EEC. To achieve this objective, rhe Directive required the Member States to abolish all special or exclusive rights to market terminals in the broadest sense (i.e. sale, lease, importation, connection to the telecommunications network. maintenance. etc.). As indicated above, the *European Court of Justice* annulled the requirement to abolish special rights (as opposed to exclusive rights). However, since the appeal to the *Court* had no suspensive effect, Member States have in the meantime abolished virtually all special and exclusive rights and there is no indication that they would reintroduce special rights.

This general obligation to abolish special and exclusive rights was supplemented by several specific measures that aimed to guarantee the effective opening of the market. Thus, Member States must make the technical characteristics of the termination points of public telecommunications networks available (so that terminals may be manufactured accordingly), and provide access to the latter (so that terminals may be connected to them). Similarly, the effect of the Directive would have been limited if users, bound by long term lease or maintenance contracts, were not able to terminate them with a short period of notice and acquire terminals from new suppliers. The Directive had unblocked the market by requiring that the Member States permit the termination of such contracts with a maximum period of notice of one year. That provision, however, has been annulled by the *European Court of Justice* on the basis that such contractual practices were not state measures but rather undertakings behaviour and therefore they were not subject to Art. 90 but only to Art. 85 and 86 of the EEC Treaty. A genuine opening of the market could not be achieved without transparency and, therefore, Member States have been required to publish the technical specifications and type approval procedures of the terminals.

To avoid conflict of interests, the Directive also required that, as of July 1, 1989, the regulatory functions relating to terminals (i.e. drawing up technical specifications, monitoring their application and the granting of type approval) be entrusted to a body independent of the telecommunications operators. The regulatory and operational functions, that were still carried out in many Member States by a single body, must now be handed over to separate and independent bodies. Combining these functions within the same entity puts such an entity in the uncomfortable position of being both player and referee, which inevitably leads to violations of competition law as experience has shown in the past[13].

Most Member States have adopted the relevant measures to apply the Directive. However, some Member States are late or have not entirely complied with the Directive. That is why the EC Commission hat initiated the infringement procedures pursuant to Article 169 of the EEC Treaty against Belgium. Denmark, Germany, Ireland and Spain. The actions against Ireland and Denmark have been recently withdrawn by the EC Commission since rules in those countries have now been put in conformity with the Directive[14].

---

10) Commission Directive of 16/5/1988 on competition in the markets in telecommunications terminal equipment, O.J. No. L 131 of 27/5/1988.

11) Action brought on 22/7/1988 by the French Republic against the EC Commission, case 202/88, O.J. No. C 216 of 18/8/1988.

12) *European Court of Justice*, EuZW 1991, 345 – French Republic and others vs. Commission of the European Communities. For a very interesting discussion of the issues involved, see *Ravaioli*, article to be published in the Revue Internationale de Droit Economique; *de Cockborne*, Revue de droit des affaires internationales 1990, 287; *Pappalardo*, European Competition Law Review, March 1991, 55.

13) See case FIT/RTT, Comm. Brussels, 31/7/1986, JT 23/5/1987, p. 345 and the "British Telecom" case, Italy vs. Commission, case 41/83, 20/3/1985, 2 CMLR, 36. This problem is also the object of a case pending before the *European Court of Justice*, RTT/GB-INNO-BM SA, case 18/88, O.J. No. C 34 of 16/2/1988.

14) See EC Commission, Nineteenth Report on Competiton Policy, p. 197. See also EC Commission Press Relase IP (90) 896 of 8/11/1990. Article 169 of the EEC Treaty provides for a procedure under which the EC Commission may bring before the *European Court of Justice*. Member States it considers as failing to fulfil an obligation under the Treaty, for example to implement a Directive.

2. The mutual recognition of type approval for terminal equipment

The development of a European market for telecommunications terminal equipment would be hindered, if, to be marketed in the EC, it had to be subjected to as many procedural tests for conformity and type approval as there are Member States. These costly and burdensome national procedures contribute to the fragmentation of the market and have served to protect the so-called "national champions" from competition from equipment manufacturers in other countries.

To eliminate these barriers to trade, a two-phase programme was set up in 1986. The first phase aimed to ensure the mutual recognition by each Member State of conformity tests carried out in another Member State in relation to common technological specifications[15]. This Directive avoids the need for a terminal that has undergone conformity tests in one Member State to undergo similar tests in another Member State before being authorized for connection to the public telecommunications network in that other Member State. However, this Directive does not yet provide a system of full mutual recognition. Administrative procedures for type approval may still be repeated in different Member States, whilst the technical tests do not need to be repeated.

The second phase of the mutual recognition of terminal approval is the subject of a Directive of April 29, 1991[16]. The aim of the Directive is to ensure the full mutual recognition of approval for terminal equipment for the purposes of marketing such equipment and its connection to the public telecommunications networks. This means that a terminal that has successfully undergone a test for type approval in a Member State, in line with the procedures in the Directive, may be freely commercialized and connected to public telecommunications networks in other Member States, without being subjected to further technical tests or administrative procedures. To benefit from these advantages, terminals must comply with "essential requirements" (safety of the user and of the personnel of the network operators, protection of the network, interoperability of the network's equipment, and, possibly, that of other terminals). Compliance with the essential requirements is presumed in respect of terminal equipment which is in conformity with the national standards implementing EC harmonized standards. In order to establish such conformity, a manufacturer may choose between two procedures: the EC type examination or the EC declaration of conformity. The latter procedure is a self-certification system whereby the manufacturer itself performs the test. A regime of "EC surveillance" will ensure that the manufacturer duly fulfils its obligations. Under the other procedure (the EC type examination), the tests will be carried out, and the certificates issued by bodies designated by the Member States. Terminals benefiting from the system established in the proposed Directive will be recognisable by the "CE" label. This system is in line with the EC Commission's general policy in respect of certification and testing of industrial products defined in its Communication entitled „A global approach to certification and testing"[17].

3. Standardization

The mutual recognition of type approval of terminal equipment goes hand in hand with a policy of standardization at the European level. In 1983, a Directive was adopted[18] establishing a procedure for the provision of information in the field of standards and regulations. This Directive, which is, among others, applicable to the telecommunications sector, sets up a system whereby Member States' individual standardization programmes, draft standards and draft technical regulations should be communicated to the Commission so that the latter may intervene at an early stage if it finds that these projects could affect trade within the EC. The Commission hoped in this way to prevent the proliferation of new standards and regulations of a protectionist nature. However, this Directive was not entirely implemented by the Member States at the outset and, therefore, it did not fully achieve its objectives initially. The EC Commission has brought infringement procedures under Article 169 of the EEC Treaty[19] in order to ensure the implementation of the Directive and compliance has now considerably improved.

The Directive on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment discussed earlier[20], defines works programmes on common technical specifications (known as NETs – Normes Européennes de Télécommunications) for telecommunications terminal equipment for the European Conference of Postal and Telecommunications Administrations (Conférence européenne des administrations des postes et des télécommunications – CEPT) in collaboration with the European Committee for Standardization (Comité européen de normalisation – CEN) and the Committee for Electronical Standardization (Comité européen de normalisation électrotechnique – CENELEC).

For the areas not covered by that Directive and more particularly in respect of functional specifications for the services offered over public telecommunications networks for exchange of data between information technology systems, a Decision made by the Council of Ministers on December 22, 1986 on standardization in the field of information technology and telecommunications, establishes various measures to encourage standardization in the EC. Among these is included the determination on a regular basis of priority standardization requirements, with a view to the preparation of works programmes and the elaboration of European standards[21].

The Commission also intervened at the institutional level and, in the Green Paper, recommended the creation of a European standardization body in the telecommunications sector. The EC Council of Ministers invited the EC Commission to support the development of such a body[22]. In 1988, in Sophia-Antipolis, France, the European Telecommunications Standards Institute ("ETSI") was established by the European Conference of Postal and Telecommunications Administrations. The task of the ETSI

15) Council Directive of 24/7/1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment, O.J. No. L 217 of 5/8/1986.

16) Council Directive of 29/4/1991 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity, O.J. No. L 128 of 23/5/1991, p. 1. See also *Fangmann*, EuZW 1991, 585.

17) A global approach to certification and testing – quality measures for industrial products – Communication from the Commission to the Council, O.J. No. C 267 of 19/10/1989 and Council Resolution of 21/12/1989 on a grobal approach to conformity assessment, O.J. No. C 10 of 16/1/1990.

18) Council Directive of 28/3/1983 laying down a procedure for the provision of information in the field of technical standards and regulations, O.J. No. L 109 of 24/4/1983, amended by the Council Directive of 22/3/1988, O.J. No. L 81 of 26/3/1988.

19) See note 14 about Article 169 of the EEC Treaty.

20) See note 15 above.

21) Council Decision of 22/12/1986 on standardization in the field of information technology and telecommunications, O.J. No. L 36 of 7.2.1987.

22) Council Resolution of 27/4/1989 on standardization in the field of information technology and telecommunications, O.J. No. C 117 of 11.5.1989.

is to esrablish common European standards including the above-mentioned "NETs" (Normes européennes de télécommunications) in the telecommunications sector with the participation of representatives of all interested parties (Telecommunications Organizations, regulatory authorities, manufacturers and users). ETSI also prepares voluntary standards known as European Telecommunications Standards (ETS).

Finally, it should be mentioned that the EC Commission has adopted in October 1990 a Green Paper on the development of European standardization[23] in which it proposed measures to be taken in order to make standardization more efficient for the achievement of the European market. It is also recommended to consider the restructuring of the European standardization process and to create a European standardization authority which would be responsible for strategic issues.

III. Telecommunications Services

In order to create a competitive market in telecommunications services, the EC Commission has addressed a Directive to the Member States requiring them to take appropriate legislative measures to eliminate monopolies on the provision of such services. The EC Commission is also actively applying the competition rules of the EEC Treaty on a case by case basis in order to prevent anticompetitive conduct by the Telecommunications Organizations or other undertakings in this sector. The most significant cases are discussed below.

1. The Directive on the liberalization of telecommunications services

In June 1990, the EC Commission adopted a Directive on competition in the markets for telecommunications services[24]. The objective of the Directive, concurrent with the measures relative to the open provision of the public networks infrastructures adopted simultaneously (see Section IV infra), is to create a competitive Community-wide market in telecommunications services.

Like the Directive on competition in the markets for telecommunications terminal equipment (see Section II. 1. above), this Directive was adopted by the Commission pursuant to Article 90 of the EEC Treaty. From a procedural point of view, therefore, it raised the same criticism and three Member States (Belgium, Italy and Spain)[25] have challenged the Directive before the *European Court of Justice*. Again the complainants have not applied for suspension of the Directive and therefore Member States have to implement the Directive immediately. The *Court* has not yet rendered its decision on this case. Although the *Court* will have to refer to substantive rules of the EEC Treaty which are different from those it referred to in the terminal equipment case (i. e. the rules on the free provision of services rather than the rules on free circulation of goods), it can reasonably be expected that the *Court* will not annul the Directive on telecommunications services[26].

The justification for the adoption of this Directive is found in the many restrictions (e. g. the prohibition from interconnecting leased lines with the public telecommunications network and from carrying third-parry traffic on leased lines) on the use of the telecommunications infrastructure imposed by Member States and their Telecommunications Organizations on other existing or potential suppliers of telecommunications services. Since there is a strong user demand for sophisticated and cross-border telecommunications services, the elimination of these restrictions will make way for a rapid development of the market for telecommunications services and, in particular, data transmission services for which an annual growth of 15 to 20% is forecast for the next few years. The liberalization of certain voice services is also expected to bring many new services on the market and to increase the use of the network infrastructure of the Telecommunications Organizations[27].

Certain telecommunications services are not included in the scope of the Directive. These services are: telex, mobile radiotelephony, paging and satellite services. Nor does the Directive concern radio-broadcasting and television which are not considered as "telecommunications services" as definded in the Directive. Though these services are not covered by the Directive, they are not excluded from the application of the EEC Treaty rules, in particular those relative to competition, that may be applied to them on an individual basis.

The principal provision of the Directive is the requirement that Member States abolish all exclusive or special rights for the provision of telecommunications services other than voice telephony. The latter is, therefore, considered as a "reserved service", according to the terminology of the Green Paper. The possibility for the Member States to maintain a monopoly on voice telephony is based on Article 90 II of the EEC Treaty given that it constitutes the main source of revenues for public telecommunications networks operators. The application of competition rules in this field could, therefore, threaten the financial viability of these operators and, as a consequence, obstruct the performance of the particular tasks entrusted to them, i. e. the provision of a telecommunications network on a universal basis.

Temporary regulatory measures have been provided for circuit- or packet-switched data services, given the recent large investments made by certain Telecommunications Organizations for the development of such services and the necessity to progressively rebalance the relative tariffs of these services and those applicable to leased lines. Until December 31, 1992, Member States may prohibit the simple resale of circuit capacity connected to the public telecommunications network for the provision of data transmission services. So, until that date simple data transmission on leased lines is also a reserved service. However, the Commission might further defer the liberalization of such services until January 1, 1996 in the Member States where the public data networks are not yet sufficiently developed. Although no Member State has so far applied for such deferment, Portugal, Spain and Greece are likely candidates.

All other existing or potential telecommunications services (the "non-reserved" ones) may be offered in open competition by any suppliers including non-EC companies. It should be emphasized that the liberalization is far-reaching because the definitions of the reserved voice[28] and

23) EC Commission, Green Paper on the development of European standardization: action for faster technological integration in Europe, COM (90) 456 final, 8/10/1990.

24) Commission Directive of 28/6/1990 on competition in the markets for telecommunications services, O. J. No. L 192 of 24/7/1990.

25) Action brought on 7/9/1990 by the Kingdom of Spain against the EC Commission, case C-271/90, action brought on 14/9/1990 by the Belgian State against the EC Commission, case C-281/90 and action brought by the Italian Republic against the EC Commission, case C-289/90, O. J. No. C 274 of 31/10/1990.

26) Another recent decision of the *Court*, although not relating to telecommunications but to employment agencies, gives some guidance on the applicability of the provisions of the EEC Treaty on services to legal monopolies. See *European Court of Justice*, EuZW 1991, 349 – Höfner and Elser/Macrotron GmbH.

27) See *Nera*, Study of the application of the DNP concept to voice telephony services, Report for CEE DG XIII, July 1991.

28) "Voice telephony" is defined in Article 1 of the Directive as "the commercial provision for the public of the direct transport and switching of speech in real-time between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point".

data[29] services are of a very limited scope and, moreover, as exceptions to the general rule of competition, they have to be interpreted strictly. Also, the burden of proof that a service falls within the reserved category is on the Telecommunications Organizations or the Member States. This means that in relation to voice services, voice messaging services, voice telephony offered to a closed user group, voice refiling/least-cost routing and intelligent network functions (e.g. call barring) should in principle be non-reserved because these services are, respectively, not in real time, not offered to the public, not a direct transport and not enabling any user to communicate, as required by the Directive in order for a service to fall within the definition of "voice telephony". Similarly value-added services using the voice telephony service such as audiotex[30] should be non-reserved because they do not fall within the strict definition of the Directive[31]. In relation to data services, simple data transmission offered to a closed user group, transmission complemented by network management facilities, and store-and-forward or store-and-retrieve services (e.g. electronic mail) would not be reserved services because they would no involve the simple resale of capacity as defined in the Directive[32]. In respect of both voice and data services, the definitions make it clear that it is only those services offered on a circuit which is interconnected at both ends, which fall within the reserved category. It should also be emphasized rhat no restrictions can be imposed if a service is provided on a non-commercial basis i.e. without profit making purpose.

In case of difficulty of interpretation of the scope of reserved services, one should bear in mind the justification for the reservation of certain services under special or exclusive rights, i.e. the safeguard of the financial viability of the Telecommunications Organizations necessary for the provision of a universal network. In case of controversy, it will be for the EC Commission to decide on the reserved or non-reserved nature of a service under the control of the European Courts[33]. A concept which may give rise to such controversies is the notion of "provision to the public". Public has to be understood in its general meaning i.e. "the people as a whole". If there is any objective criteria excluding a category of people from those eligible to subscribe to a service, it should not be considered as a service provided to the public[34].

However, the Directive allows Member States to maintain a certain amount of control of the market. Indeed, the provision of non-reserved services by private suppliers may be subjected to licensing or declaration procedures but these procedures must be limited in their aims at compliance with the "essential requirements" (i.e. restrictions to ensure security and integrity of the public network and, in justified cases, interoperability of the services and data protecrion) and must be objective. Licences must be granted according to objective, non-discriminatory and transparent criteria; possible refusals must be motivated and accompanied by the possibility of appeal. Again, special rules have been provided for switched data services. In respect of these services, the licensing or declaration procedures may also impose obligations concerning the permanence, availability and quality of the service or other conditions including geographical coverage, intended to safeguard the performance of the tasks of general economic interest of the Telecommunications Organizations.

In order to allow users who are currently bound by existing contracts with the Telecommunications Organizations to benefit immediately from the new competive offerings, the Member States should ensure that contracts for services which are liberalized can be terminated at six month's notice provided they had a term of at least one year. From July 1, 1991, the procedures described in the above paragraphs (as well as other regulatory functions) must come under the jurisdiction of bodies that are independent of the network operators, in line with the principle of separation of the regulatory and operational functions of the telecommunications administrations. Finally, the Directive imposes many obligations in respect of reporting and the need to obtain prior approval on the Member States to enable the EC Commission to closely supervise the compliance with the Directive. For example, the licensing schemes for the provision of data switched services are subject to prior approval from the EC Commission.

2. Enforcement of the competition rules on a case-by-case basis

The Directive on the liberalization of telecommunications services discussed in the preceding Section is intended to eliminate the anti-competitive provisions of the laws of the Member States (more particularly those establishing monopoly rights). However, some restrictions of competition in the telecommunications sector, in relation to the provision of telecommunications services, do not derive directly from legislation but rather from the independent behaviour of the Telecommunications Organizations. Therefore, the EC Commission also started in the late 80's[35] a very active policy of enforcement of Articles 85 and 86 of the EEC Treaty in the telecommunications sector[36]. Although many cases are still currently pending and cannot be discussed at this stage, the following are worth mentioning:

a) *The Belgian leased lines case*[37]. Further to an action taken by the EC Commission under Article 86 of the EEC Treaty[38], the use of leased circuits was liberalized in Belgium in January 1990. In September 1988, a private sup-

29) "Packet- and circuit-switched data services" are defined in Article 1 of the Directive as "the commercial provision for the public of direct transport of data between public switched network termination points, enabling any user to use equipment connected to such a network termination point in order to communicate with another termination point".

30) Audiotex are defined as "systems which store a range of voice announcements and are accessed by callers via the public telephone network" (see *Nera*, Study of the application of the ONP concept to voice telephony services, Report for CEC DG XIII, July 1991, p. 59). Audiotex services include recorded messages (e.g. weather information, chatline services).

31) There is currently a case pending before the EC Commission concerning the qualification of credit card phone services. See *Ravaioli*, to be published in the Revue Internationale de Droit Economique.

32) "Simple resale of capacity" is defined in Article 1 of the Directive as "the commercial provision on leased lines for the pubic of data transmission as a separate service, including only such switching, processing, data storage or protocol conversion as is necessary for transmission in real time to and from the public switched network".

33) The benefit of the non-application of the competition rules pursuant to Article 90 para 2 of the EEC Treaty is subject to an EC Commission act just as an exemption from the prohibition contained in Article 85 para. 1 of the EEC Treaty is subject to an EC Commission decision pursuant to Article 85 para 3 of the EEC Treaty.

34) See *Ravaioli*, to be published in the Revue Internationale de Droit Economique.

35) This does not mean that the rules of competition were not applied in the telecommunications sector earlier but they were applied in a less systematic way. Indeed, the EC Commission dealt with two important cases in the 70's: the SWIFT case (unreported) and the British Telecommunications case (O.J. No. L 360 of 21/12/1982) which led to a landmark decision by the *European Court of Justice (European Court of Justice* Reports 1985, 873 – Italian Republic vs. Commission). For a discussion of these cases, see *Overbury-Ravaioli*, in. *Hawk* (ed.) Annual Proceedings of the Fordham Corporate Law Institute 1992 and EEC/US Competition and Trade Law, 1990, p. 271.

36) Articles 85 and 86 prohibit, respectively, agreements restrictive of competition and abuses of dominant position.

37) Bull EC 1-2-1990, p. 19. EC Commission Press Release IP (90) 67 of 29 1 1990 and EC Commission, Guidelines on the application of EEC competition rules in the telecommunications sector, O.J. No. C 233 of 6 9 1991, paragraph 93 See also EuZW 1991, 611

38. See note 36

plier of value-added telecommunications services filed a complaint with the EC commission alleging that the Régie des télégraphes et téléphones (the Belgian Telecommunications Organization, hereafter the RTT) abused its dominant position (deriving from its monopoly on the network operation and the provision of most telecommunications services) because it refused to lease to such private supplier international telecommunications circuits for the transmission of third-parties data traffic. In other words, the private supplier was prevented from using international leased lines to carry its customers data to its processing center in a neighbouring country and to return the processed data to its customers over a such leased lines.

Under the Belgian rules[39], a lessee could not carry third-party traffic on a leased circuit without the prior authorization from the RTT. Such prohibition was also contained in the RTT standard contractual terms for the lease of international telecommunications circuits. There was no published criteria for the granting of such authorizations.

The EC Commission indicated to the RTT that its refusal to grant leased lines to the complainant could amount to an abuse of dominant position. Subsequently, the RTT granted the international leased circuits to the complainant with no other usage restrictions than the prohibition of simple resale of capacity. Accordingly, the complainant withdrew its complaint. However, the EC Commission, using its own powers to enforce Article 86 of the EEC Treaty in the absence of a complaint[40] asked the RTT to ensure that all its customers be entitled to the same rights as the above-mentioned complainant. As a result, the RTT undertook that from January 1990, international leased circuits could be used to carry third-party data traffic without any restrictions or particular conditions apart from the requirement that the circuit should not be used for simple data transmission[41]. Although the undertaking from the RTT relates only to international leased lines since only those were at stake in that case, the same reasoning could in principle apply to national leased lines as long as there would also be an effect on trade between Member States. Therefore, any restriction other than the prohibition of simple data transmission, on the use of national leased lines for data transmission in Belgium would also very likely be deemed as a violation of Article 86 of the EEC Treaty. The effect on trade between Member States could result from the impossibility for a foreign value-added telecommunications supplier to penetrate the Belgian market if there were such restrictions.

A law reforming telecommunications in Belgium has been adopted on March 21, 1991 which gives a statutory confirmation that leased circuits can be used to carry third-party traffic[42].

b) *The CEPT/leased lines case*[43]. Another very important case for the development of value-added telecommunications services in Europe was settled in February 1990. In April 1989, the European Conference of Postal and Telecommunication Administrations (CEPT)[44] revised its Recommendation on tariff and other commercial terms for the lease of international telecommunications circuits[45]. The revision provided for a pricing system based on the application of uniform tariff coefficients combined with the imposition of a 30% surcharge in case of interconnection of a leased circuit with the public telecommunications network or the transmission of third-party traffic. The EC Commission immediately investigated the matter on its own initiative. It also subsequently received two complaints alleging violation of the EEC competition rules by the CEPT and claiming that the Recommendation would substantially increase telecommunications costs for the users of international leased circuits and limit the growth of value-added services. After investigating the matter, the Commission informed the CEPT that the Recommendation could be deemed to constitute an agreement prohibited under Article 85 I of the EEC Treaty[46]. Indeed, the Recommendation had the object of coordinating the conduct of the CEPT members with respect to prices and other commercial terms (e. g. usage conditions, duration of leases) for the lease of international circuits. According to the Commission, such coordination limited the commercial autonomy of the Telecommunications Organizations to the detriment of the users. For example, the Recommendation would have limited competition between the Telecommunications Organizations to attract telecommunications centers (hubs) of multinational users.

Further to the EC Commission intervention and the cooperation of the CEPT, the Recommendation was abolished at the CEPT meeting on February 20/21, 1990. The CEPT decided that the Recommendation had no real significance if it was deprived of the provisions the EC Commission had identified as anti-competitive. However, the EC Commission indicated that it would be prepared to consider to grant an exemption under Article 85 III of the EEC Treaty[47] to a recommendation harmonizing tariff principles without any price fixing agreement insofar as this would bring economic advantages, for example by making tariffs more cost-related and transparent. Finally it should be noted that, in accordance with this case, if notwithstanding the abolition of the Recommendation a Telecommunications Organization were to maintain the imposition of an access charge for the interconnection of a leased circuit with the public network, it could be considered as an abuse of dominant position unless such access charge were properly justified and proportionate to additional direct costs.

---

39) Article 86 of the Ministerial Decree of 20/9/1978 fixing the accessory tariffs for telecommunications and the conditions for connection and use of telecommunications instruments (Moniteur belge of 29/9/1978, p. 11166).

40) Those powers are given to the EC Commission under Article 3 of Regulation 17 of the Council of 6/2/1962 (O.J. No. 13 of 21/2/1962 and special edition 1959–62, p. 87).

41) See letter of 12/1/1990 from the RTT to its customers.

42) Law of March 21, 1991 reforming certain public economic enterprises. (Moniteur belge of 27/3/1991, p. 6155); see more particularly Art. 87 and following.

43) Bull. EC 1/2–1990, p. 19; EC Commission Press Release IP (90) 188 of 6/3/1990 and EC Commission, Guidelines on the application of EEC competition rules in the telecommunications sector, O.J. No. C 233 of 6/9/1991, paragraph 46.

44) The CEPT was formed in 1950 with the essential aims of establishing closer relationships between its members and harmonizing and improving their administration and technical services. It had a Telecommunications Commission and a Postal Commission. The members of the Telecommunications Commission were the Telecommunications Organizations of 26 European countries including the 12 EC Member States. The CEPT adopts recommendations on the technical, supply and usage conditions as well as tariffs of international telecommunications services. The recommendations are not legally binding but the CEPT members have generally complied with them. The CEPT has been recently reorganized to reflect the separation of regulatory and operational functions which is taking place within most of its members. It is now divided into CEPT/Telecom and CEPT/Post. On the telecommunications side, the regulatory activities are carried out by the European Committee for Telecommunications Regulatory Affairs (ECTRA). The operational activities are carried out by several committees such as the Commercial Action Committee (CAC) and the Technical Committee. Its membership has been increased to 31 countries with the addition of several Eastern Europe countries.

45) Recommendation T/PGT 10 on the General principles for the lease of international telecommunications circuits and the establishment of private international networks, revised in Vienna in 1989.

46) Article 85 I of the EEC Treaty prohibits agreements which are restrictive of competition.

47) Article 85 III provides for the possibility to exempt an agreement from the prohibition contained in Article 85 I.

c) *The CCITT Recommendations*[48]. The EC Commission attended the meeting of Study Group III of the International Telegraph and Telephone Consultative Committee (CCITT) in May 1990[49] where the revision of two important recommendations on the usage conditions, tariffs and other commercial terms of international leased circuits were discussed[50]. Those recommendations have many similarities with the CEPT Recommendation on leased lines discussed above although they have a different geographic scope of application. Therefore, it is not surprising that the EC Commission expressed the views that those recommendations and certain proposals for their revision could be deemed as agreements between, or decisions by, associations of undertakings which might be restrictive of competition between the Telecommunications Organizations and between private telecommunications services suppliers. In its statement at the CCITT meeting, the EC Commission said that, should the final revised versions of the recommendations be incompatible with the EEC competition rules, the Commission could intervene pursuant to those rules to bring such infringement to an end[51].

In July 1991, a revised Recommendation was adopted by the CCITT under a written accelerated procedure. The new Recommendation no longer contains most of the restrictive provisions contained in the earlier version. However, according to the EC Commission, some provisions of the new Recommendation could be interpreted in a way which is contrary to the EEC competition rules. For example, Article 4 I could be understood as recommending the prohibition of least-cost routing. The Commission considers that the prohibition of least-cost rouring is anti-competitive and it has therefore indicated to the Telecommunications Organizations and the national telecommunications regulatory authorities of the EC Member States that, in implementing the new Recommendation, they should not prevent least-cost routing.

d) *Inquiry into international telephone charges*[52]. In May 1990, the EC Commission confirmed reports in the press[53] that it was examining the arrangements governing international telephone charges and in July 1991, it announced that it was launching a formal investigation into international telephone charges pursuant to Council Regulation No. 17/62[54]. The purpose of the inquiry is to determine whether such arrangements including the accounting rates mechanism and the "irrational, inexplicable and disturbing discrepancies"[55] in telephone charges are compatible with the EEC competition rules.

The accounting rates system is a complex international settlement mechanism which can be briefly described as follows: In the case of an international phone call, only the Telecommunications Organization in the country where the call originates collects money from the customer; this Telecommunications Organization then compensates its counterpart in the country of destination for delivering the call to the addressee; this payment is made pursuant to the sharing of an agreed accounting rate with periodical settlements. This mechanism is provided for in the International Telecommunications Regulations[56] and the Recommendations of the International Telegraph and Telephone Consultative Committee (CCITT). The rates themselves are agreed bilaterally between the Telecommunications Organizations. These arrangements have been recently criticized for being anti-competitive[57] and for causing "a number of severe distortions to the efficient and effective provision of international telecommunications"[58]. It should be noted that the accounting rate has to be distinguished from the charge actually paid by the end-user known as the "collection charge"[59].

Apart from the EC Commission, other authorities have been giving consideration to the subject of international accounting rates and collection charges. In the United Kingdom, the Office of Telecommunications (Oftel) has investigated the prices charged to customers in the U.K. for international telephone calls. This investigation led to a recommendation that international simple resale should be permitted under certain conditions and that the introduction of price-cap should be considered[60]. In the United States, the Federal Communications Commission (FCC) is examining the issue of international accounting rates and it has proposed to modify U.S. regulation of international accounting rates in order to promote lower, more cost-based international accounting and collection rates[61].

As far as the EC Commission inquiry is concerned, it is worth mentioning that it indicates that the EC Commission is willing to apply the competition rules to reserved services offered directly to the end-users by the Telecommunications Organizations (such as voice telephony) and to achieve more cost-related prices for telecommunications services as announced in the Green Paper[62] and its programme of action of 1988[63].

e) *The MDNS case*[64]. Joint venture agreements between Telecommunications Organizations for the provision of telecommunications services may fall under the prohibition of Article 85 I of the EEC Treaty. However, such agreements may also bring economic benefits which outweigh their harmful effect on competition. They can then be eligible for an exemption of the application of Article 85 I pursuant to Article 85 III[65]. The EC Commission outlined the general conditions under which it could exempt such a joint-venture agreement between Telecom-

48) See EC Commission, Guidelines on the application of EEC competition rules in the telecommunications sector, O.J. No. C 233 of 6/9/1991, paragraph 144.

49) See Financial Times of 25/5/1990: "Brussels warns telephone body".

50) Recommendation D. 1 on the General principles for the lease of international (continental and intercontinental) private telecommunications circuits and Recommendation D. 2 on the Special conditions for the lease of continental telecommunications circuits for private service.

51) See CCITT, Working Party III/1, Geneva 23–25/5/1990, Temp. Doc. No 1003–E, Draft Report of Working Party III–1, Part 1.

52) EC Commission Press Releases IP (90) 775 of 105/1990 and IP (91) 648 of 4/7/1991.

53) See notably Financial Times of 12/4/1990.

54) See note 40.

55) Quotation from *Sir Leon Brittan*, EC Commissioner responsible for competition, reported in Communications Week International, 1510/1990, p. 8.

56) Article 6 II and Appendix 1 to the International Telecommunications Regulations last revised in Melbourne, 1988.

57) See OECD, Working Party on Telecommunications and Information Services Policies, International Telecommunications Practices and Procedures, 16/5/1990. See also a series of articles in the Financial Times by *Hugo Dixon* including on 19/4/1990: "International telephony cartel distorts world economy".

58) *Ergas-Paterson*, The joint provision of international telecommunications services: an economic analysis of alternative settlement arrangements, Paper delivered at the 8th International Telecommunications Society (ITS) Conference, Venice, 18–21/3/1989. This paper also gives an excellent description of the existing system.

59) CCITT Recommendation D. 000.

60) See *Oftel*, Advice submitted by the Director General of Telecommunications to the Secretary of State, International Telephony: Simple Resale and Control of Prices, 1/10/1990.

61) FCC, Notice of Proposed Rulemaking in the Matter of Regulation of International Accounting Rates, adopted 12/7/1990, released 7/8/1990 (CC Docket No. 90–337). Report and Order in the Matter of Regulation of International Accounting Rates, adopted 9/5/1991, released 23/5/1991 (CC Docket No 90–377 Phase I) Further Notice of Proposed Rulemaking in the Matter of International Accounting Rates, adopted 9 5/1991, released 23/5/1991 (CC Docket No 90–337 Phase II).

62) See reference under note 2 above, at Figure 13 H

63) See reference under note 6 above, at p. 21.

64) EC Commission Press Release IP (89) 948 of 14/12 1989 and EC Commission, Guidelines on the application of EEC competition rules in the telecommunications sector, O J. No. C 233 of 6/9/1991, para 62

65) See notes 46 and 47 above.

munications Organizations in relation to a proposed joint-venture by 22 Telecommunications Organizations. The purpose of the joint-venture was to offer standard enhanced data communications services on a pan-European basis with features such as one-stop shopping and network management. The EC Commission took a favorable position about the project (known as MDNS) provided guarantees were given in respect of non-discrimination by the Telecommunications Organizations between their joint-venture company and its competitors and provided there was no cross-subsidization by the Telcommunications Organizations in favour of the joint-venture company. The project was abandoned in October 1989 for other reasons. The EC Commission is currently examining similar ventures involving EC Telecommunications Organizations and is expected to apply the same principles[66].

f) *Eirpage*. The EC Commission also adopted a decision on a joint-venture between a Telecommunications Organization (Irish Telecom) and a company of the private sector (Motorola). The joint venture, known as Eirpage, has the purpose of setting up, promoting and operating a nation-wide paging system interconnected to the public telecommunications network in Ireland. In its decision of October 18, 1991[67], the EC Commission exempted the joint-venture under Article 85 III of the Treaty after having obtained from the parties that they amend their arrangements in a number of aspects. The following considerations justified the position of the EC Commission: i) Irish Telecom agreed to allow equal access for Eirpage's competitors to the facilities necessary for providing a similar service and ii) assurances were given by a chartered accountant of Eirpage that the latter pays full costs and expenses to their parent companies for staff, facilities and services and that the joint venture company operates at arm's length from both its parents.

IV. The Telecommunications Infrastructure

The policy proposed by the EC Commission is aimed at the development of a modern and harmonized pan-European and "interoperable" telecommunications infrastructure to serve the growing needs of end-users and competitive telecommunications service suppliers. Its ultimate aim is the creation of an integrated broad-band European communications network. The measures relating to the provision of an open and harmonized network (known as "Open Network Provision" or ONP) to the users and services suppliers will be described first. Then the measures relating to the improvement of a harmonized European telecommunications infrastructure will be discussed.

One should also mention here that in its Green Paper[68] and its programme of action[69], the EC Commission took the policy position that it was acceptable that the provision and operation of the network infrastructure could remain under exclusive or special rights. This position was justified by the then relatively limited development of the network infrastructure in the Member States, the absence of emerging competition on this front and the need for economies of scale[70]. Accordingly, in its recently adopted legal instruments, and more particularly the Directive on the liberalization of telecommunications services[71], the EC Commission did not require the Member States to eliminate exclusive or special rights on the provision of the network infrastructure. On the other hand in the said Directive, the EC Commission did not deem the provision of the network infrastructure to be a reserved activity. This issue of competition on the network infrastructure is therefore not specifically regulated and, is subject to the general principles contained in the EEC Treaty – more particularly Article 90[72] – until other measures are taken. This could be done in the context of the review of the Directive on the liberalization of telecommunications services in 1992.

1. Open Network Provision (ONP)

ONP has as its objective to ensure that the Telecommunications Organizations on the one hand, and other suppliers of telecommunications services on the other participate in the new telecommunications markets on an equitable basis. It is necessary to adopt a minimum set of rules on the conditions under which the network infrastructure is provided by the Telecommunications Organizations to third parties since the latter hold a monopoly on the infrastructure and at the same time are also the suppliers, in competition with others, of competitive services offered by way of this same infrastructure. According to the Green Paper, such rules should permit the avoidance of a series of long conflicts and contentious cases that should have been resolved by virtue of Articles 52, 59 (on the freedom to provide services), 85, 86 and 90 (on competition) of the EEC Treaty[73]. Those rules should be harmonized at the EC level in order to facilitate the provision of pan-European services and they should cover the technical interfaces, the tariff principles and the usage restrictions due to the existence of reserved services.

Since the introduction of the concept of ONP in 1987, the Commission, in collaboration with the Member States[74] and the users[75], has put in a lot of work to define it more clearly. The fundamental rules of ONP are set forth in a Framework Directive adopted in June 1990[76] and a series of specific Directives and Recommendations which will implement ONP in specific areas (e. g. leased lines, packet- and circuit-switched data services, integrated services digital network, voice telephony, telex, mobile services, as applicable)[77].

a) *The main principles of ONP*. The main principles of ONP are contained in the Framework Directive which may be summarized as follows:

- the harmonized conditions of ONP must be based on objective criteria, be transparent and be published adequately; they must not discriminate between national and citizens of other Member States and must guarantee equal rights of access;
- access to public telecommunications network or services may not be restricted except for reasons based on essential requirements (i. e. security and integrity of the network and, in certain cases, interoperability of services and data protection); there is a presumption of compliance with such requirements when the

66) See Communications Week International of 29/10/1990, p. 4.

67) EC Commission Press Release IP (91) 935 of 21/10/1991.

68) See note 2 above.

69) See note 6 above.

70) See p. 9 of the paper delivered by *Ehlermann*, Director general of Directorate General IV (Competition) of the EC Commission at the IBC-PA Consulting Group conference in London on 1–2/11/1990 entitled "The Telecommunications Duopoly Review".

71) See Section III. above.

72) Article 90 of the EEC Treaty provides that the Member States shall not enact nor maintain in force measures contrary to the rules of the Treaty, in respect of public undertakings and undertakings having special or exclusive rights. It also provides that undertakings entrusted with the operation of services of general economic interest are subject to the rules of the Treaty, in particular the competition rules, insofar as the application of such rules does not obstruct the performance of the tasks assigned to them.

73) See reference under note 2 above, at p. 70.

74) This collaboration took place in the framework of the Senior Officials Group Telecommunications – SOGT, and its sub-group, the Group for Analysis and Forecasting (Groupe d'Analyses et Prévisions – GAP).

75) Several meetings were set up by the EC Commission and the GAP to hear the views of the users on ONP.

76) Council Directive of 28/6/1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision, O.J. No. L 192 of 24/7/1990 (the "Framework Directive").

77) The preparatory work for these specific Directives and Recommendations is currently underway but none have yet been adopted. For a status report, see EC Commission, Directorate General XIII, Open Network Provision – Information Sheet 2 – November 1990.

standards published by the EC Commission in the EC Official Journal are used[78];
- the development and establishment of ONP conditions must be progressive;
- the ONP conditions require the development of open network standards in the framework of an EC Community-wide approach.

As already indicated, the harmonized ONP conditions concern three areas: technical interfaces (the use of existing technical interfaces is preferred, with new standards being established by the ETSI), conditions of use (such as delivery period, contractual period, the quality of service, possibilities of shared use, sub-leasing and network interconnection), and tariff principles (cost adjustments, publication and non-discriminatory application). The Framework Directive also provides for the definition of specific regulations for ONP and the association of interested parties in this work via an advisory committee composed of representatives of the Member States which will itself consult the representatives of the Telecommunications Organizations, the users, the consumers, the manufacturers and the service providers. An ultimate aim of ONP is to allow the mutual recognition of licensing procedures so that an authorization obtained in a Member State enables the licensed service provider to operate throughout the EC without having to go through further procedures. The EC Commission is currently preparing the rules to ensure such mutual recognition regime for telecommunications services licences.

b) *The application of ONP in specific areas.* As already indicated, the establishment of ONP rules is envisaged in several areas, namely leased lines, packet- and circuit-switched data services, ISDN, voice telephony, telex, and mobile services as applicable. The area being dealt with first is leased lines. A Proposal for a Directive on the application of Open Network Provision to leased lines has already been presenred by the Commission in March 1991[79]. There is also a proposed Council Recommendation on ONP for public data networks[80] and an "analysis report" concerning the application of the ONP to voice telephony[81]. It clearly anticipates the rules that the Commission plans to propose in that area. A study commissioned by the EC Commission on ONP for ISDN has been presented and discussed with interested parties in the first half of 1990. Further studies are being carried out on ONP[82].

2. Other measures relative to infrastructure

The achievement of the internal market will rapidly boost the demand for trans-European telecommunications services. It is therefore essential that the telecommunications networks of the EEC be ready as soon as possible both in terms of capacity and quality to serve as the "nervous system" of the single European market[83]. Various measures have been proposed and in some cases already adopted concerning the following fields: satellites, mobile communications and ISDN. The latter are briefly summarized below.

With respect to satellites, the Green Paper contained an analysis of the regulations applicable to satellite telecommunications (seen as part of the network infrastructure but also as a telecommunications service) and suggested various regulatory changes[84]. According to the Commission, the principle of the restrictive definition of infrastructure provided under special or exclusive rights may allow a certain amount of competition in satellite communications, provided that there is no interference with other satellite or radio-communications systems, and that the financial viability of the supplier of network infrastructure is not endangered. Discussions on the Green Paper revealed that further analysis was necessary concerning the question of satellites. The EC Commission has accomplished such further analysis and published a Green Paper on satellite communications in which its proposals were submitted for public comments[85]. This Green Paper proposes farreaching liberalization of satellite communications including the full liberalization of the earth segment including both receive-only and transmit/receive terminals and free access to the space segment capacity subject to appropriate licensing procedures notably in order to preserve the existing reserved services. It is also proposed to ensure full commercial freedom for space segment providers (including direct marketing of satellite capacity to service providers and users) and to adopt harmonization measures necessary to facilitate the provision of Europe-wide services (e. g. mutual recognition of licensing and type-approval procedures and frequency coordination).

The authorities of the EEC favour the development of integrated services digital networks ("ISDN"). In December 1986, the Council of Ministers adopted a Recommendation on the coordinared introduction of ISDN into the European Community[86], in which it requested that the telecommunications administrations implement detailed recommendations (interface specifications, definition of services to be made available Europe-wide, definition of tariff structures, numbering and signalling plans). The Recommendation also establishes objectives for market penetration. In a report submitted to the European Parliament in October 1988, the EC Commission indicated that the ISDN had gained credibility amongst users, industry and telecommunications administrations[87]. Nevertheless, since important problems remained in order to make available by 1992 Europe-wide compatible ISDN services, the Council of Ministers adopted in July 1989 a Resolution on the strengthening of the coordination of the introduction of ISDN. The Resolution invites the Member States, the EC Commission and the telecommunications administrations to promote the definition of the necessary standards in the framework of ETSI[88].

Initiatives have been taken for the creation of pan-Eu-

78) This is provided for in Article 5 of the Framework Directive. Standards in relation to packet switched public data networks and ISDN have been published in O. J. No. C 327 of 29/12/1990.

79) O J. No. C 58 of 7/3/91. A "common position" was adopted by the Council of Ministers on November 4, 1991. Final adoption of this proposal is therefore expected very soon.

80) Proposal for a Concil Recommendation on the harmonized provision of a minimum set of Packet-Switched Data Services in accordance with Open Network Provision (ONP) principles, COM (91) 208 final. See also GAP, Proposal by the "Analysis and Forecasting Group" (GAP on Open Network Provision (ONP) for Public Data Networks in the Community, 28/2/1990.

81) Analysis Report on the Application of ONP to Voice Telephony (Draft) ONP COm 91–43 of 30/5/1991.

82) See note 77 above.

83) See Towards trans-European networks – progress Report, Communication from the Commission to the Council and the European Parliament, COM (90) 310 final of 19/7/1990.

84) Annex 2 of the Green Paper.

85) EC Commission, Towards Europe-wide systems and services, Green Paper on a common approach in the field of satellite communications in the European Community, Communication from the Commission, COM (90) 490 final, 20/11/1990. The public comments period ended on April 30, 1991. The comments received were generally supportive of the Commission's proposals.

86) Council Recommendation of 22/12/1986 on the coordinated introduction of Integrated Services Digital Network (ISDN) in the European Community, O.J. No. L 382 of 31/12/1986.

87) Communication of the Commission concerning the application of the Council Recommendation 85/659/EEC on the coordinated introduction of Integrated Services Digital Network (ISDN) in the European Community, COM (88) final of 31/10/1988

88) Council Resolution of 18/7/1989 on the strengthening of the coordination of the introduction of the Integrated Services Digital Network (ISDN) in the European Community up to 1992, O J No C 196 of 1/8 1989

ropean mobile communications systems, a field whose lack of coordination was obvious which is demonstrated by the existence in 1986 of five incompatible car telephone systems in dhe EEC: In June 1987, a Recommendation was adopted concerning the coordinated introduction of public pan-European cellular digital land-based mobile communications in the EEC. Furthermore, a Directive was also adopted concerning the frequency bands to be reserved accordingly[89]. The services should begin to be available in 1991, the large urban centers should be covered at the latest by 1993 and the main links between these centres should be covered by 1995 at the latest. A similar combination of Directives and Recommendations has also been adopted in view of developing compatible pan-European paging systems (known as ERMES)[90] and digital cordless telecommunications (known as DECT)[91].

Given the increasing importance of radio-communications and the fact that the radio-frequency spectrum is a scarce resource, the EC Council of Ministers has adopted a Resolution to strengthen Europe-wide cooperation in the field of radio freqency allocation. The Resolution supports the creation by the CEPT of a European Radiocommunications Office. The Resolution emphasizes that the planning and allocation of the frequency spectrum for service providers should be subject to objective, transparent and non-discriminatory conditions[92].

In the context of a package of measures proposed in relation to data protection[93], the EC Commission proposed in July 1990 a Directive on data protection in the context of public digital telecommunications networks, in particular ISDN and mobile networks[94]. The EC Commission believes that specific regulatory provisions must be adopted in order to protect personal data and the privacy of users with regard to the increasing risks connected with the computerized storage and processing of personal data on public digital networks. The general principle behind the proposed Directive is that the collection, storage and processing of personal data by the Telecommunications Organizations should be justified for the purposes of the provision of the intended service (e. g. to establish the call, to prepare the bills, to compile directories) only and may not be used for any other purpose (e. g. to establish user profiles) unless it is authorized by law or by the subscriber. The proposed Directive also applies in the telecommunications sector the general data protection law principles that the subscriber has the right to inspect the personal data stored about him, the right to request the rectification or erasure of such data and the right to prevent non-authorized disclosure of such data. Itemized call statements should be provided by the Telecommunications Organizations on request of the subscriber. In respect of calling line identification, it is proposed that the calling subscriber must have the possibility to eliminate the identification of his telephone number on the display of the called subscriber. On the other hand, the proposed Directive also provides for the protection of the privacy of the called subscriber: the calling line identification may be maintained in order to trace malicious calls or, subject to a court order, to prevent or pursue serious criminal offences.

Finally, one should mention here, although it does not only relate to their infrastructures but to all procurement by the Telecommunications Organizations, the actions taken in order to ensure that public procurement becomes open on a EEC-wide basis and non-discriminarory. 70 to 90% of procurement by the Telecommunications Organizarions is made with national suppliers; this represents extra-costs of approximately 4 billion ECUs[95]. In 1984, a Council Recommendation requested the Member States to ensure that in relation to public procurement in the telecommunications sector, firms established in other Member States should not be discriminated against in favour of national suppliers[96]. This Recommendation did not create a trans-European public procurement market in telecommunications. That is why a legally binding measure has been recently adopted, i. e. a directive on procurement procedures in, notably, the telecommunications sector[97]. The Directive provides for the opening up of contracts on January 1, 1993. The Directive applies only to contracts whose estimated value is not less than 600000 ECUs in the case of supply contracts and 5 million ECUs in the case of works contracts. It relates only to procurement for activities for which the Telecommunications Organizations enjoy special or exclusive rights. Contracting entities are required to ensure that there is no discrimination between different suppliers or contractors. The technical specifications should be defined by reference to European specifications where these exist. Minimum time limits for the receipt of tenders are set forth in the Directive in order to ensure real publicity. Tenders comprising products originating in third countries may be rejected if more than 50% of the total value of the products constituting the tender originates from outside the EEC. Moreover, preference can be given to an EEC originating offer if it is up to 3% higher than one originating outside the EEC. These two rules do not apply if the EEC has concluded an agreement with the third country ensuring comparable access for EEC undertakings to such third countries.

V. Measures of General Application

The various measures of liberalization and harmonization of the telecommunications equipment and service markets and those relating to the provision of an appropriate EC-wide network infrasrtucture, described in the

89) Council Recommendation of 25/6/1987 on the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community, O.J. No. L 196 of 17/7/1987, and Council Directive of 25/6/1987 on the frequency bands to be reserved for the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community, O.J. No. L 196 of 17/7/1987. The System is now widely known as "GSM" (Groupe Spécial Mobile) after the working group set up within the CEPT to implement it. On the status of implementation of the system, see EC Commission, Communication from the Commission on the coordinated introduction of the Pan-European Digital Cellular Mobile Communications System. Report on the implementation of Council Recommendation 87/371/EEC and Council Directive 87/372/EEC, COM (90) 565 final of 23/11/1990.

90) Council Recommendation on the coordinated introduction of pan-European land-based public radio-paging in the Community and Council Directive on the frequency bands to be reserved for the coordinated introduction of pan-European land-based public radio-paging in the Community, O.J. No. L 310 of 9/11/1889.

91) Council Recommendation on the coordinated introduction of digital European cordless telecommunications (DECT) in the Community and Council Directive on the frequency bands to be designated for the coordinated introduction of digital European cordless telecommunications (DECT) in the Community, O.J No. L 144 of 8/6/1991.

92) Council Resolution of 28/6/1990 on the strengthening of the Europe-wide cooperation on radio frequencies, in particular with regard to services with a pan-european dimension, O.J. No. C 166 of 7/7/1990.

93) Proposal for a Council Directive concerning the protection of individuals, in relation to the processing of personal data. Proposal for a Council Decision in the field of information security, O.J. No. C 277 of 5/11/1990.

94) Proposal for a Council Directive concerning the protection of personal data and privacy in the context of public digital telecommunications networks, in particular the integrated services digital network (ISDN) and public digital mobile networks, O.J. No. C 277 of 5/11/1990.

95) See *Schulte-Braucks*, Revue du Marché Commun, No. 332, December 1989

96) Council Recommendation of 12/11/1984 on the first of opening up access to public telecommunications contracts, O.J. No. L 298 of 16/11/1984.

97) Council Directive of 17/9/1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, O.J. No. L 297 of 29/10/1990

preceding Section, are changing radically the regulatory framework for the telecommunications industry. However, this regulatory reform would be a failure if the major players in this industry, whether they are public or private companies, were to share markets and enter into other practices restrictive of the competition which the new measures are attempting to introduce. That is why the continuous application of the competition rules of the EEC Treaty to the telecommunications sector is absolutely essential for the success of the EEC telecommunications policy in the long term. In this new regulatory environment, it is also important that interested parties understand how the EC Commission will apply the competition rules in the future. That is why the EC Commission adopted Guidelines on the application of EEC competition rules in the telecommunications sector in July 1991[98].
Although the Guidelines obviously will not be legally binding, they contain a definition of the policy of the EC Commission for the next few years and a explanation for the different market players (the Telecommunications Organizations, the private service suppliers, the equipment manufacturers and the users) of how Articles 85 and 86 of the EEC Treaty apply in the new environment where Telecommunications Organizations have monopolies strictly limited to the reserved areas, but are still dominant in many respects and compete with private suppliers of all sizes including the large multinationals. With regard to the application of Article 85 of the EEC Treaty, the Guidelines deal with the different types of agreements which might be concluded between the Telecommunications Organizations concerning the provision of telecommunications facilities (e. g. leased lines), reserved services and non-reserved services as well as the various types of agreements between Telecommunications Organizations and private suppliers. In each case, it is carefully discussed whether the agreements in question are restrictive of competition and fall under the prohibition of Article 85 I and if, and under what conditions, they may be eligible for an exemption under Article 85 III. Similarly, in respect of Article 86 of the EEC Treaty, the various potential abuses of dominant position are described (e. g. the refusal to supply, tying, cross-subsidization, etc.). The Guidelines also expose the position of the Commission in relation to the competition problems deriving from vertical intergration (within or outside the EEC)[99] and on the issue of conflicts between EEC competition rules and international telecommunications rules (such as those of the International Telecommunications Union).

VI. Conclusion

The present article only provides an overview of the new regulatory framework for telecommunications in the European Communities. Though much work remains to be done to achieve this enormous task, the main body of the new regulations may be considered to have been drawn up. The most important rules which still need to be defined are those on satellite and mobile communications. But the regulatory process seems to be endless, since already new policy challenges are emerging such as competition on the network infrastructure.

98) EC Commission, Guidelines on the application of EEC competition rules in the telecommunications sector. O. J. No. C 233 of 6/9/1991 For further comments of the Guidelines, see *Ravaioli*, article to be published in the Revue Internationale de Droit Economique See also EuZW 1991, 611.

99) On this issue, one should look at the Commission decision of 12 4 1991 in the Alcatel/Telettra case where the Commission required the elimination of vertical integration in Spain in the transmission market (O J L 122 of 17/5/1991). With regard to this case see also EuZW 1991, 322.

Das neue Wirtschaftsrecht in der Tschechoslowakei

Entwicklung und Perspektiven

*Von Rechtsreferendar Arsène Verny, Magister in Europastudien (MES), Köln**

Die friedliche Revolution, die Osteuropa 1989 erschütterte, verändert zusammen mit dem Programm der EG zur Vollendung des Binnemarktes bis zum Jahre 1993 grundlegend die politische und wirtschaftliche Struktur Europas. Die fortschreitende Öffnung der EG für die Reformstaaten Mittel- und Osteuropas sowie die Assoziierung und spätere Aufnahme dieser Länder in die Gemeinschaft sind während dieses Prozesses nicht nur notwendig, um den schwierigen Übergang von der Planwirtschaft in die Marktwirtschaft zu unterstützen, sondern auch um die neuen Demokratien zu stabilisieren und einen Rückfall in alte Nationalismen zu verhindern.

I. Einleitung

Seit dem Beginn der 90er Jahre entwickelt sich in der CSFR nach den revolutionären Veränderungen vom Dezember 1989 ein kontinuierlicher Prozeß der Demokratisierung und Liberalisierung, der auch die Überleitung von der sozialistischen Planwirtschaft in die soziale Marktwirtschaft umfaßt. Dementsprechend ist die Regierung der CSFR seit der Jahreswende 1989/90 bemüht, durch entsprechende gesetzliche Rahmenbedingungen Grundlagen für die Marktwirtschaft und für eine Annäherung an die Europäische Gemeinschaft zu schaffen. Hierbei erzielte die CSFR in den vergangenen eineinhalb Jahren auf der Grundlage von tiefgreifenden Gesetzesnovellierungen erstaunliche Fortschritte bei der Schaffung marktwirtschaftlicher Bedingungen. Unter Berücksichtigung der sehr kurzen Zeit, in der eine Fülle von Gesetzesnovellen behandelt und verabschiedet wurde, ist es verständlich, daß nicht alle relevanten Gebiete in sämtlichen Einzelheiten geregelt werden konnten. Bei einer großen Anzahl von Gesetzen konnte in Anbetracht der gegebenen Eilbedürftigkeit nur eine vorläufige Regelung nach westlichem Vorbild geschaffen werden. Der vorliegende Beitrag soll zunächst einmal einen Überblick über die wichtigsten Gesetzesänderung, ihre Struktur und, soweit bereits feststellbar, auch ihrer Auswirkungen geben.

II. Private Unternehmertätigkeit

Als einer der ersten Schritte wurde am 18. 4. 1990 das Gesetz über die private Unternehmertätigkeit der Bürger (Gesetz Nr. 105/1990) verabschiedet, das am 1. 5. 1990 in Kraft trat[1]. Der wesentliche Inhalt dieses Gesetzes läßt sich wie folgt zusammenfassen:

* Überarbeitete und gekürzte Fassung eines Vortrags, den der Verfasser am 30. 11 1991 vor der Stiftung Europäische Zusammenarbeit EURATION im Rahmen der Konferenz über den „Stand der Annäherung der Länder Zentraleuropas an die Europäische Gemeinschaft" in Budapest gehalten hat.

1) Einen kontinuierlichen Überblick über die aktuelle politische und wirtschaftliche Entwicklung im Inland bietet der seit Januar 1991 von der Presseabteilung der Botschaft der CSFR in Bonn herausgegebene „CSFR-