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Published in:
Legal and Economic Aspects of Telecommunications

Publication date:
1990

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

LEGAL AND ECONOMIC ASPECTS
OF TELECOMMUNICATIONS
S. Schaff (Editor)

Monopoly and Competition

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Introduction

Our session today is entitled in the Conference program "Synthesis". It is a very difficult task to synthesise and summarize in a couple of minutes what has been said about the economics, policy and legal aspects of competition in the telecommunications sector during the session devoted to that subject on January 20.
I am not going to attempt to make such a comprehensive synthesis not because it is difficult but because each of the speakers on that session in January delivered an excellent written hand-out that each of us has or can read.
What I would like to do today is to report (the subtitle of today's session on the program is "Final Reports") on what stroke me as the most important points and to give you if you allow me, my own views as a lawyer on these matters.

1. The Major Role of the EC Commission

Every single speaker (American or European) during our session, told us about the EC Commission's actions towards liberalization : the Green Paper, the Terminal Equipment Directive, the Draft Services Directive, Open Network Provision, etc. This raises the question **why is the Commission so active in this area** ? The reasons are , in my view, the following : the Treaty of Rome rules on competition have been in existence for more than 30 years and they were (and are still) applicable to the telecommunications sector. But nobody sought to enforce those rules for a very long time. Why ? First, until maybe the late 70's, nobody was interested in that business. People were very happy that the governments and the PTTs were taking care of telecommunications and it was felt that it was their duty to do so quite naturally. Then occurred a technological event : the merging of telecommunications technology and computer technology. At that moment, on the one hand the computer industry started to be interested in that business. On the other hand, the PTTs had some problems (because of their structure as public undertakings) to cope with the terribly rapid technological changes and the users started to look for features that PTTs were not yet

providing but that potential competitors were willing to offer. At that time, computer companies and users could have had recourse to the Treaty of Rome in order to have the rules of competition enforced and applied to the PTTs. Some adventourous people did that and succeded (I refer to Telespeed in the well-known **British Telecom** case). But they were very few of them. Fortunately, the EC Commission realized that if Europe did not want to find itself miles behind Japan and the U.S., the opening of the telecommunications markets could not be left to a slow case-by-case approach. An extensive action should be taken otherwise the rules of the Treaty would not be fully applied to the telecommunications sector before some decades. That has triggered the Green Paper and all its implementation measures. Let me now look at one of the most important of those measures.

The Draft Services Directive

M. WATERSCHOOT of the D.G. IV in the EC Commission gave us an overview of the content of the Draft Commission Directive on the liberalization of telecommunocations services. There are very good things in the Directive and points which , at least in my view, need to be improved. In the overall, it is an excellent document. But the very purpose of the Commission in circulating the draft directive was to collect the views of the Member States and interested parties on the necessary improvements to the Directive. I think that everybody which has an interest in the libaralization of the telecommunications services should support the Directive and suggest possible improvements. This should be done by writing to D.G. IV in the EC Commission.
Now, there is a big debate on whether the Directive should be a Commission Directive under Art. 90 or a Council Directive under Art. 100A. This is often presented as a legal debate. let me be clear on that : it might be an interesting legal debate but it is primarily a poliey debate which has been started by those who want to postpone services liberalization and limit its scope.
But if the opponents to the Commission Directive succeed in having the Art. 90 route abandoned for the Art. 100A route, those who will file individual complaints at the Commission under Art. 85 and 86 for telecommunications services matters can reasonably anticipate, from the content of the draft Directive, what will be the Commission decision on their case. Practieally, unless they want the Commission to rule that they can provide voice telephony, they have quite a lot of chances of success.

3. Lessons from Abroad

We have been slow in this country in reviewing our telecommunications rules. Our delay presents a number of drawbacks (the most important one is that because of the legal uncertainty many investors do not set up in Belgium or leave our country). This delay has at least one advantage : it allows us to see what has been

done abroad and to take advantage of foreign experiences. In this respects the papers which were presented at the January 20 session were very instructive. One point that I noted from M. LAKE, the American lawyer chairing the panel that day, is that here in Europe we seem to tend to authorize from the outset the telecom administration to compete on the non-reserved services front with private suppliers although in the U.S., AT&T was initially prohibited from competing with private suppliers for the provision of non-reserved services. PTTs, because of their teehnical resources and knowledge of the sector, are very well placed to offer non-reserved services and it is in the interest of the users that they can continue to offer such services; competition will just encourage them to be even better and they are ideal partners for private companies in joint venture arrangements. I think we have lessons to learn from the U.K. also where liberalization started almost a decade ago. One of the most important points in my view we should learn from the U.K. experiences is that licensing regimes are very difficult to monitor and it is useless to ereate regulatory regime which are so complicated to monitor that they are not complied with.

4. Open Network Provision

I just said that we learn from the Americans that PTTs should be allowed to compete with private suppliers for the provision of non-reserved services. This is subject to a very important proviso : it is the establishment of Open Network Provision. This is a very important concept which is currently debated and the EC Commission has asked for the views of interested parties on this issue and will organize hearings next week on that. It seems to me that some people in these discussions forget exactly what ONP is all about. Let me repeat what is the basic concept of ONP.
ONP is and should only be a regulatory framework established to ensure that the PTTs which will provide both reserved (monopoly) and non-reserved services do not abuse their priviledged situation in the reserved area to reduce or eliminate competition in the non-reserved area. That is all ONP and again this regulatory framework is only an elaboration of the competition rules of the Treaty issued in advance by the Community institutions rather than on a case-by-case basis by the Courts.

5. Separation of Regulatory and Operational Powers

One of the most important points in the new regulatory framework in order to ensure a real eompetitive telecommunications environment is a clear separation between the regulatory and operational activities of the PTTs. One cannot be judge and party in the same case. This is a leitmotiv in the EEC policy (cf. Green Paper, Terminal Equipment Directive and Draft Services Directive). Although it is a leitmotiv, it is not clear what is meant by "clear" separation. We learned from M. WATERSCHOOT of D.G. IV that the Commission had some concerns in this

respect concerning the new Dutch regulatory regime. It seems to me that it certainly means that whether there is an institute of telecommunications, or a commission, or whatever, one cannot have one single Minister ultimately in charge of both the regulatory functions and the operational functions in the telecommunications sector if such Minister is substantially involved in the management of the public operator.

6. Belgium

This brings me to Belgium. Professor POULLET has made an extensive report on January 20 on the current situation in Belgium with regard to competition and the prospects for changes. M. POULLET pointed out that the draft telecommunications bill at the time contained some provisions which actually extend the scope of the current monopoly. The point I would like to make in this respect is that such an extension of monopoly would be contrary to the Treaty of Rome and more particularly to Art. 90, 59 and 62 which provide that the Member States shall not take any measure with regard to public undertakings which would prevent the free provision of services throughout the Community. The point I would like to make here is that the new rules on telecommunications which are now under preparation in the various Member States should be prepared so that at least they comply with the EEC requirements. But also one should not forget that national rules can be even more liberal than the EEC standards and clearly we will see more and more competition between the **legislators** of some countries in order to have the most attractive regime.

7. Competition and Standardization

I would like to adress an issue which is closely related to the one M. CULLEN will tell us about : it is the relationship between competition rules and standardization. Standardization is very important in telecommunications. Telecommunications does not make sense if there is no agreement on standards. Standardization can be achieved through agreements or de factoby a company which has a dominant position on the market. In both cases, the rules of the Treaty on competition are applicable (Art. 85 and Art. 86). But since standardization is critical for telecommunications (it has a lot of benefits for the users) standardization agreeements can be exempted from prohibition. On the other hand, companies which are in a dominant position and which impose de facto standards, are constantly on the verge of committing abuses of dominant positions if they do not disclose their standards in order to eliminate competitors.