Telephone directories

Amory, Bernard; SANDLER, Peter

Published in:
Competition law and information based services = Droit de la concurrence et services d'information

Publication date:
1994

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

Telephone directories: the role of competition

Bernard AMORY
Adjunct Professor, University of Namur;
Partner, Dechert, Price & Rhoads, Brussels

and

Peter SANDLER
Formerly Resident Solicitor, Bird & Bird, Brussels;
Currently awaiting appointment to the Commission of the European Communities, DG XIII

TELEPHONE DIRECTORIES : COMPETITION ISSUES 1. The overall scene: Community drive opens up the markets for the provision of telecom services throughout the EC. As liberalisation takes hold, consumers and businesses face increasing variety and choice. Each new entrant will want, and may be bound by the terms of its operating licence, to provide its subscribers with both a directory and a directory enquiry

I. INTRODUCTION

Directories and directory enquiry services ("directory services") encompass at least three separate types of information: basic subscriber information, found in the "white" pages; subscriber information classified according to business type and usually accompanied by substantial advertising, found in the yellow pages; and more specialized trade specific directories prepared on a more selective basis than the "yellow" pages. The information is available through hard copy phone books, by a directory enquiry service operated by the local telecommunications company, and, increasingly by means of access to electronic data bases either 'on line' or through CD-ROM copies (1).

The provision of directory services is big business, particularly in relation to "yellow" pages publishing. A recent EC Commission study established the potential for continuing and substantial growth in this market (2), with Spain having experienced an increase per annum in "yellow" pages revenue of 26% during the last three years.

This market provides a perfect example of the competition issues inherent in the information market. To the extent that the provision of such directory services continues under national regulation to be restricted to a single telecommunications organization (TO) (3), usually the national public monopoly, it cuts against the pattern

---

(1) In France, France Telecom markets its directory information as through services such as Téladresses. The information concerns around 18 million addresses, of which two million relate to the hands of telemarketeers. At the same time concern over access to this information has led to the development of a rainbow-like series of lists (See, for example, Decret 89-738, 12 October 1989) covering France Telecom's subscribers. The 'liste orange' covers subscribers who wish to remain entirely ex-directory and who details cannot hterefore be included in lists marketed to third parties. The 'liste saffran' on the other hand, lists subscribers who do not wish to receive unsolicited telemarketing by fax or telex. Their details would therefore be supplied to third parties, who would then commit an offense were they to carry out marketing to them.

(2) This European Commission study, carried out by Coopers & Lyhrand Deloitte and entitled Study on the Regulatory and Commercial Aspects related to Telecommunications Directories and related to Telecommunications Directories and related publications and services, identified the potential for growth, measured in terms of advertising revenue, in the business to consumer market ie "yellow pages" of between 12 and 26% depending on the market concerned. See supplementary material 4-13.

(3) Telecommunications organizations is the terms now used in EC terminology to designate the so-called 'PTTs', which were referred to as "telecommunications administrations" in the Commission's 1987 Green Paper on telecommunications. It encompasses PTTs, both in public and private ownership, though not all private telecommunications network and service providers are PTTs. The term is defined in the Commission's Services Directive, as well as the general framework directive for ONP (See note 12 below).

of change promoted by the European Community's liberalizing legislation (4), which has been concerned with opening up all telecommunication services to competition, with temporary exceptions for voice telephony and network infrastructure.

To the extent that directory services have been opened to competition, the TO retains a strong market position. Competition issues arise as to the access the TO is prepared to grant its competitors to its directory information. In some cases these will be issues for national telecommunications regulation, though in others it would involve the application of both domestic and European competition rules.

In simple terms, taking the example of British Telecommunications in the United Kingdom, Mercury Communications, (the UK's second provider of national fixed network services), cannot offer its customers useful directory services if its "white" and "yellow" pages information is confined to subscribers to its own network alone. Indeed, it is not simply a question of access by other telecommunications service providers, as the provision of both "white" and "yellow" page directory services is a line of business in its own right, which has already proved attractive to a number of non-telecoms businesses, such as publishers.

Furthermore with the increasing use of a diversity of telecommunications systems, such as facsimile, mobile and private radio, consumers and advertisers are likely to seek directories combining details of all the numbers belonging to a specific individual or business. Furthermore, with the opening of the Single Market, pan-European directory services, particularly "yellow" pages, are lacking.

On the other hand, the TOs, who for the foreseeable future will remain the main, if not exclusive, network and voice service providers, would themselves be placed at a disadvantage if a competitor simply has a right to obtain directory information which the TO has collected and updated at some expense and effort.

The aim of this paper is to tackle these issues, by considering the regulatory regimes in selected European countries and the USA; the legitimate protection that directory information enjoys and the manner in which the competition issues outlined above are likely to be tackled, primarily at a European level.

II. THE REGULATORY ENVIRONMENT

It would appear that directory services have been traditionally seen as an adjunct to the provision of basic voice services, and for this reason their provision has traditionally remained in the hands of the PTT. Currently within the EC, Belgium, Greece, Italy, Portugal and Spain all prevent the competitive supply of directory enquiry services, and "white" and "yellow" pages. Belgium and Greece also clearly restricting the provision of electronic retrieval systems (5). In contrast the markets in Denmark, France, Germany, Ireland, Luxembourg, the Netherlands and the United Kingdom are at least potentially open to competition. However, whilst not restricted to one particular provider, an obligation on all voice service providers to provide directories or directory

(4) See Commission Directive 88/301 on competition in the markets for telecommunications terminal equipment, OJ L131, 27.5.88; Commission Directive 90/388 on competition in the market for telecommunications services, OJ L192, 24.7.90 and Council Directive 90/387 on the establishment of the internal market for telecommunications services through the implementation of open network provision, OJ L192, 24.7.90.

(5) Source: Commission Study, op cit note 2.

enquiry service is common to the regulatory regimes of most of these States. It is also worth noting that only Denmark obliges publication of a classified business directory, even though the right to provide such a service in the six Member States outlined above is maintained as a monopoly right.

A few of these markets can be considered in more detail along with the regulatory position in the United States.

1. Belgium

A mandatory obligation is placed on Belgacom to provide directory services under Article 113 of the law of 21 March 1991 concerning certain public services as part of the exclusive rights granted over voice telephony (6). Whilst there is no obligation to produce "yellow pages", the right to do so lies exclusively with Belgacom. In practice the publication is contracted out to a third party, so that it rather than Belgacom might eventually determine further licensing decisions.

2. France

The French law on telecommunications (7), amended Article L33-4 of the Post and Telecommunications Code to provide that the publication of directories is not restricted, though it remains subject to prior notification to the Minister of Telecommunications. However, the provision of directory services is described in Article 4 of the *Cahiers des Charges*, 29 December 1990 (which defines France Telecom's rights and obligations) as an obligatory service open to competition. Article 7 permits these services to be provided by electronic means in combination with terminals (i.e. the minitel system). According to Article 33(2) of the *Cahier des Charges* a separate tariff can be applied to the services, providing it complies with the rules of fair competition and is pre-notified to the Ministers of Telecommunications and Finance.

3. Germany

In Germany, following the transfer to DBP Telekom of the voice telephony monopoly by the administrative rule of 27 November 1990, the German telecommunications ministry spelt out the scope of DBP Telekom's monopoly in a publication of 18 February 1991: "Key Elements of the Government's Telephone Service Monopoly". Section 3.8 indicates that the provision of directory services does not form part of that monopoly. However, the Key Elements indicate that the Government may include directory services as part of the process of defining mandatory services which DBP Telekom must provide in the public interest. They also indicate that a rule is likely to be introduced requiring DBP Telekom to maintain a regularly updated list of all its subscriber numbers and to make this available (subject to data protection rules) in an appropriate manner to anyone wishing to provide directory services, subject to a separate cost-based tariff approved by the Minister.

4. United Kingdom

The operating licenses of both British Telecommunications and Mercury Communications (Conditions 3 and 2 respectively) issued under Section 7 of the Telecommunications Act 1984 require both operators to provide subscribers with a directory information service by telephone. There is no strict requirement for either "white" or "yellow" page printed directories, although these are produced.

(6) Similar obligations are placed on the PTT's in Greece, Italy, Portugal and Spain.

(7) Decrees 89-738 of 12.10.89 and 90-1213 of 29 12.90.

Furthermore, obligations are placed on both operators to supply directory information to any interconnected UK network operator on a reciprocal basis. The question of the inclusion of each operator's subscribers in the other's directories was regulated by the intervention of the Director General of the Office of Telecommunications (OFTEL), requiring the details to be included, subject to a cost related charge.

5. USA

Local telecoms operating companies in the USA are subject to regulation at a State level. Generally, this regulation requires both directories and a directory assistance service to be provided, based on a distinct tariff. The trend in the United States has been to eliminate the free provision of such services, with the exception of public call box enquiries. In many States the provision of "white" page directory services is treated as a basic service and therefore part of the monopoly reserved to the local operating companies. In contrast, however, inter-State directory services have been liberalized, whilst the provision of classified listings is treated as an enhanced service and therefore open to competition (8). Where a local carrier provided enhanced services, such provision had until recently required it to be done through the means of a separate subsidiary.

The introduction of competitive supply of directory services into a number of Member States, as well as the trend towards separate cost-based tariffing for them (9), moves away from the traditional view of directory services as an adjunct to the provision of voice telephony and establishes them as a market in their own right.
On one view it might be argued that if there is only one provider of directory services in a Member State, there is no competition to be distorted and hence no competition problem. However, under EC law the question arises as to whether the continued exclusion of competition in providing directory services can be maintained.

EC telecommunications liberalization seeks as full competition as possible in the provision of all telecommunications services. As part of a political compromise reached in 1989, exceptions from liberalization were provided for voice telephony and simple data resale, and were implied for the provision of network infrastructure (10).

Whilst directory services were not explicitly referred to in the Services Directive, such services clearly do not fall within the limited definition of voice telephony in the

(8) See United States v. AT&T, 552 F. Supp (1982) and the resulting Modified Final Judgement. The initial distinction between basic and enhanced services was identified in the Federal Communications Commission's Computer II enquiry, 77 F.C.C. 2d.

(9) The Commission's Study, op cit. note 2, suggests that "white" page directory enquiry services are moving towards cost based tariffing in the EC and away from free provision. However, it does not provide details. (See Supplementary Material 4-3). In 1991 British Telecommynications introduced a flate rate 50 pence charge for directory enquiries, with the exception of those originating from public telephone boxes. A separate charge was introduced by Mercury soon afterwards. Over the French minitel system, directory enquiries are charged only after an initial three minutes.

(10) See the Services Directive Article 2, op cit at note 4.

directive (11), it probably falls entirely outside its the scope. It is questionable whether Member States could rely on the reservation by arguing that directory services were in some way ancillary to the provision of voice telephony. It should also be recalled that the justification for reservations over certain telecommunications services in the directive is the need to ensure the TO's sufficient revenue to allow them to carry out the particular public service task assigned to them by the State. This public service task was identified in the Services Directive as the provision of a universal network.

Finally, it is understood that there are currently no EC Commission initiatives to tackle these exclusive rights although the EC Commission might publish a Communication on this subject.

So far, the legislative activity that there has been at a European level has concentrated not on continuing exclusive rights, but on the regulatory question of access to directory services and the availability of directory information to third parties. This is in part dealt with in a proposed directive on voice telephony, forming part of a series seeking to ensure Open Network Provision (ONP) within the EC. The general framework directive and the sector specific measures (such as ONP for leased lines, data services and for ISDN) set out, amongst other things, the type of services and facilities that TOs must offer to competitors wishing to interconnect with their networks. The proposed ONP directive for voice telephony (12) includes in Article 15(c) an obligation placed on TOs to:

> "in accordance with Community law, make directory information concerning the voice telepbony service available on request, on published terms which are fair, reasonable and non-discriminatory".

Certain issues remain unclear, for example, whether the obligation is restricted to third parties outside that Member State; how copyright would be assured and whether information must be provided to someone wishing to commercially exploit that information or only to someone wanting the information for his/her own use, for example, a company buying a directory on CD-ROM to avoid paying enquiry charges.

Additionally, advanced features to be provided by TOs should include direct access to directory enquiry services in other Member States. The eventual evolution of a single European directory enquiry number is also foreseen.

III. THE LEGAL ISSUES

Three key legal issues arise:

1. Data Protection

The question of data protection and the rights of individuals to keep their names and/or businesses out of a particular directory or to prevent the transfer of that information to third parties is significant, but arguably does not have a direct bearing on competition

(11) Voice Telephony is defined as "the commercial provision for the public of 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"..

(12) Proposal for a Council Directive on the application of ONP to voice telephony, OJ C263, 12.10.92.

and so falls outside the scope of this paper. The EC Commissio.. ..as proposed two directives attempting to harmonize the disparate data protection rules around a common minimum of level of protection (13).

2. Copyright

If a telephone directory, whether in hard copy or electronic form, enjoys copyright protection, the owner of that copyright has a powerful weapon with which to control its competitor's activities. At the same time, the very existence of that copyright places the owner in a special position which may limit its ability to exercise that right vis-a-vis its competitors, either under domestic competition rules or under the EEC Treaty (See 3 below).

There is considerable divergence in the degree of protection afforded to telephone directories and other data bases in each Member State, even though it is clear that the Berne Convention (14), which forms the basis of national copyright legislation in each Member State, accepts the application of copyright to "compilations" and "collective works". In most cases national law requires a degree of originality, both in the selection or arrangement of the information, or in the information itself, before copyright protection is granted. This is often a threshold which simple phone listings are unable to pass. Examples of this divergence (15) include:

(a) Denmark

Denmark grants a specific type of protection in the form of a 'catalogue right', which applies to catalogues, tables and other compilations containing mainly factual information (16). The right lasts for years from the date of first publication, and is in addition to any copyright protection which may be available, based on a test of originality. The catalogue right only provides protection against the copying of the whole or a substantial part of the directory, rather than protecting the information itself, so that in many cases the information could be reused in the compilation of a competing directory.

(b) France

Copyright protection is available to directories as compilations under the Copyright Act of 11 March 1957, subject to originality of the arrangement. This position has been confirmed in relation to trade directories by the French courts (17). Where originality is shown, reproduction of the information in the compilation will breach copyright. Furthermore, French competition law also provides protection against copying information, which through not copyrightable, is not in the public domain and which has required effort in collecting.

(13) Proposal for a Council directive concerning the protection of individuals in relation to the processing of personal data, COM(90) 314 final - SYN 287, 13.9.90 and proposal for a Council directive on the protection of personal privacy in the context of public digital telecommunications networks, COM(90) 314 final - SYN 288, 13.9.90. These two proposals were heavily criticized in their original drafts and are currently undergoing substantial amendment.

(14) Berne Convention for the Protection of Literary and Artistic Works.

(15) Source: Commission Report, op cit note 2.

(16) Section 49 of Law 188/61.

(17) Decision of Cour d'Appel, Paris, 19 June 1984.

(c) ...any

Copyright protection is available to directories under the general copyright rules contained in the Copyright Act 1965, as amended in 1985. Once again, the arrangement of the information must show a sufficient degree of creativity in its selection, collection, organization and categorization. Unless these elements are established, directory information is likely to be considered as in the public domain. In one case concerning copyright protection given to electronic databases, the German Courts indicated that protection would only be available if the selection had been the subject of know-how beyond that of an average programmer (18).

(d) United Kingdom

Copyright in the UK is available under the Copyright, Designs and Patent Act 1988 to original literary works which includes compilations. The test for originality is very low, requiring only evidence of sufficient "skill and effort" having been put into the compilation. It is uncertain to what extent the individual information must also show originality, but it is unlikely that individual phone listings based on a name, address and number would do so. The substantial copying of the information in a directory is also likely to breach copyright, even if the information is not copyrightable, because the UK law protects the 'expression' of the work, which in the case of a directory is considered to be the information itself.

(e) USA

The availability of copyright protection for telephone directories has been decisively rejected by the US Supreme Court in *Feist v. Rural Telephone* (19). The action formed part of a series of claims and counter-claims relating to the use by Feist in its trade directories of entries copied from Rural's "white pages" directory. Rural sued for copyright infringement, whilst Feist counterclaimed for an anti-competitive refusal to deal in refusing to licence the listings to it.

The Supreme Court distinguished between pure factual information which would not always attract copyright protection and the manner in which such information was presented which might do so, even if the facts themselves were not copyright. In the latter case the right holder could not stop the copying of the factual information providing its format was not also copied.

The Court, overturning the decisions of the lower courts, held that the factual information i.e. names, addresses and numbers of subscribers lacked the necessary level of originality to be protected by copyright, whilst Rural's arrangement of that information (listed in alphabetical order) was insufficiently original to allow the manner in which it was compiled to attract copyright. It would therefore be unable to stop Feist using its "white" page information. Feist's real motivation was that it used the "white" page information to compile a "yellow" pages directory. Furthermore, the Court wondered whether the fact that Rural was obliged by regulation to provide directories meant that it did not truly 'select' the information, which is a requirement of obtaining copyright protection for a compilation.

(18) Inkassoprogramm decision, Federal Supreme Court, 9.5.85.

(19) Feist Publications v. Rural Telephone Service Co., 111S. Ct 1282 (1991).

Even the proposed EC directive on the legal protection of data bases (20) will only partially remedy these discrepancies. As currently drafted it will require Member States to extend national copyright protection to databases showing a sufficient degree of originality, but not to the contents of the data base which would remain a question for national law. A database would be original where its selection or arrangement constitutes the author's own intellectual creation. However not all directories, particularly "white pages" information, might meet that standard. Furthermore, the scope of the protection is limited to electronic databases and therefore would not affect the confused position in relation to hard copy directories.

The proposal also introduces a new 10 year *sui generis* right to prevent unauthorized extraction of the contents or lay out of a database not otherwise protected by copyright. This clearly turns away from the US jurisprudence outlined above which has rejected IPR protection for such information. However, a requirement of compulsory licensing to third parties applies to information if the information "which is made publicly available cannot be independently created, collected or obtained from any other source" (21). Ironically, the availability of the information elsewhere may depend on the copyright protection attaching to the hard directories, which remains outside the scope of the proposed directive.

3. Competition Issues

A number of competition concerns arise in relation to directory services. Firstly, a PTT may refuse to grant competitors access to its directory information or may do so only for an excessive royalty or on unfair terms. This may be linked to a claim that the action is justified by the copyright attaching to the material. Secondly, the provision of the service by the PTT may not be cost-based. Indeed, it may be entirely free, undermining the ability of any competitors to make a profit on competing activities. Finally, the PTT may turn to its licence conditions to argue that it is simply required to provide a directory service relating to its own subscriber network and need go no further.

These issues may be tackled at both a national and Community level.

(a) Domestic competition rules

Competitive safeguards have often been introduced into basic regulatory structure for telecommunications in each Member State, whilst not excluding the subsequent application of domestic competition laws. For example, in the French competition rules, which prevent France Telecom from refusing to supply directory information to the recently liberalized market for directories, because of its role as the single source of such information. The law permits France Telecom to charge a fee for this information, with the fairness of the fee being judged in relation to the administrative costs involved.

French competition law regulating the abuse of a dominant position has also been applied to the terms upon which advertisements were accepted by the ODA (22), an agency under France Telecom responsible for the production of the 'pages jaunes', for inclusion in its "yellow" pages. The Conseil de la Concurrence found that a clause limiting the ODA's liability for the failure to print an advertisement, to the cost of that advertising space, was an abuse of the dominant position it enjoyed over the "yellow"

(20) Proposal for a Council Directive on the legal protection of data bases, COM(92) 24 final - SYN 393, OJ L156, 24.6.92.

(21) See Article 8 of the draft proposal.

(22) Decision 90-D-31 du Conseil de la concurrence, 18 September 1990.

pages. The argument that this was simply part of a wider directory market was rejected. The abuse consisted in the imposition of an unfair term which the ODA would not have been able to impose but for the existence of its dominant position.

In the United Kingdom, whilst there has not yet been a direct application of its competition legislation, any such application would involve the Director General of OFTEL in place of the Director General of Fair Trading, who would intervene in most other sectors of the economy. It is worth recalling that OFTEL made a formal determination (23) under Condition 13 of British Telecommunications ("BT") operating Licence in relation to BT`s interconnection terms with Mercury. Section 14.3 of the determination required BT and Mercury to allow the numbers of the other's customers to be included in their printed or electronic directories, on payment of a reasonable fee relating to the cost of preparing and distributing any such directory. Furthermore, both parties had to allow access by the other to any computerized directory enquiry system run by the other party. This was done even though the terms of both BT's and Mercury's licenses only required them to provide directory services relating to their own systems.

(b) EC competition rules

Competition within the EC is governed by two Articles of the EEC Treaty (24). Article 85 regulates anti-competitive agreements, whilst Article 86 prohibits the abusive use of monopoly power. In the case of both provisions it is necessary to establish that the agreement or behaviour in question had the object or effect of restricting, distorting or preventing competition in a substantial part of the common market and that there was an effect on trade between Member States.

A breach of the competition rules not only opens the companies concerned to the risk of substantial fines imposed by the EC Commission and/or actions for damages and other remedies by competitors in their national courts, but also in the case of Article 85, renders the offending provisions of any agreement void and unenforceable, unless benefitting from an individual or group exemption under Article 85(3). The EC Commission enjoys wide investigatory powers in relation to the competition rules.

The fact that the PTT's operate under special or exclusive rights granted by their government will not usually protect them from the competition rules. Article 90 of the EEC Treaty clearly indicates that undertakings enjoying special and exclusive rights are fully subject to the rules of the Treaty, except where the application of those rules would make it virtually impossible for them to carry out their public service tasks (25).

(23) OFTEL Determination of October 1985 on Terms and Conditions for interconnection of BT and Mercury under BT Licence Condition 13.

(24) Under European Economic Area Agreement, signed this year by the Community and the EFTA countries, it should be recalled that from the start of 1993 almost inditical competition provisions to those found in Articles 85 and 86, (and in certain cases those Articles themselves) will apply in relation to competitive behaviour in EFTA countries. These will be applied in certain cases by a new EFTA Surveillance Authority and in other cases where there is an effect on trade between both the Community and EFTA, by the EC Commission.

(25) See Article 90(2) EEC. Article 90(1) places an obligation on the Member States themselves to ensure that any special or exclusive rights granted by them (for example, in the form of of discretionary operating licenses), do not allow the undertakings benefitting from such rights to avoid the application of the Treaty. Such action allows competitors to raise with the EC Commiasion breaches of that Article resulting from national legislation.

As discussed above, the Services Directive defines this task as the provision of a universal network and it would not appear to be undermined by the application of the competition rules to their directory services business.

Furthermore, the fact that a TO is part of the public sector does not necessarily prevent the application of the competition rules to it, as the term 'undertaking' is widely defined to include organizations, which although in public ownership are engaged in economic activity (26).

A number of recent EC Commission decisions and ECJ judgements have focussed on refusals to supply, or behaviour designed to restrict new market entrants.

Intellectual Property Issues and Refusals to Deal

Traditionally, the enforcement of valid intellectual property rights has not led to an abuse of a dominant position, providing the manner in which those rights were exercised did not go beyond the 'specific subject matter' of the right concerned. Essentially, by defining the specific subject matter the ECJ could establish limits to the use of IPR's concerned to restrict competition or to partition off national markets (27). In *Volvo* (28) the ECJ said the refusal by Volvo to licence its design rights to third party spare parts manufacturers did not constitute an abuse of a dominant position. It would only do so in limited circumstances, such as where Volvo agreed to licence on payment of an excessive royalty, or where it had itself stopped manufacturing spare parts for which there was still consumer demand.

However, the recent decision in ***Magill*** (29), found that a refusal to licence copyright could be an abuse of a dominant position and effectively ordered the copyright holders to grant a licence to a competitor who wanted to bring a new product on to the market. The case related to television programme listings owned by the BBC, RTE (in Ireland) and ITP, - the publishing arm of the independent television stations in the United Kingdom. Each of the parties had refused to licence their programme listings more than a day in advance (generally for use by newspapers), whilst themselves producing weekly programme guides for their own stations. They were approached by Magill who wished to produce a comprehensive programme guide covering all channels available in Northern and Southern Ireland. Each of the broadcasters refused to licence their listings, which in contrast to the situation in many continental jurisdictions, benefitted from copyright protection. Magill complained to the EC Commission, who ordered the three companies to supply their listings. On appeal to the Court of First Instance, the EC Commission's order was upheld.

The Court considered it to be an abuse of the dominant position which each company enjoyed over its own listings to use its copyright to prevent the production of a new product (a comprehensive guide) on a market neighbouring that in which the right owners were active, namely broadcasting, for which there was consumer demand.

(26) Case 41/83, Italy v. Commission, (1985] ECR 873.

(27) See, for example, Case 15/74, Centrapharm BV v. Sterling Drug, [1974] ECR 1147, and Case 78/70, Deutsche Grammophon Gesellschaft GmbH v. Metro-SB-Grossmärkte GmbH, [1971] ECR 487.See, for example, Case 15/74, Centrapharm BV v. Sterling Drug, [1974] ECR 1147, and Case 78/70, Deutsche Grammophon Gesellschaft GmbH v. Metro-SB-Grossmärkte GmbH, [1971] ECR 487.

(28) Case 238/87, Volvo AB v. Eric Veng (UK) Ltd. [1988] ECR 6211.

(29) Cases T-76/89, ITP v. Commission, T-69/89 RTE v. Commission, and T-70/89 BBC v. Commission (1990) not yet reported.

Parallels with telephone directories and directory services can clearly be seen, where competing providers of directory services want access to the TO's directory information in order to meet demand for a comprehensive set of directory information, which will often be unavailable from any source. Secondly, the case shows that a company is dominant in its own directory information, though it is not entirely clear whether that requires the information to be copyright.

More recently, a case concerning a different type of exclusive right (not involving IPRs) found that an attempt by the exclusive right holder to prevent a third party from providing those services would be an abuse of a dominant position where the right holder did not or was unable to meet consumer demand for the product in question (30).

Essential Facilities

A different line of reasoning arises through a recent EC Commission decision granting interim measures relating to the ferry link between the UK and the Irish Republic (31). A complaint was made to the EC Commission by B&I, one of the two ferry operators on the route, against its competitor, Sealink, who owned and operated Holyhead harbour, in which both companies had berths. B&I complained that certain changes made by Sealink to its operating timetable placed B&I at a serious disadvantage. The EC Commission accepted this argument and stated that a company which both owns and uses an essential facility would breach Article 86 if it grants its competitor's access on less favourable terms than those which it gives its own services.

The case represents the firsr appearance of an 'essential facilities' argument as such, though it will be recalled that IBM's refusal to supply proprietary technical specifications for third parties wishing to manufacture IBM compatible equipment was investigated by the EC Commission (32). Eventually, IBM settled the action on the basis of an undertaking given to the EC Commission to improve third party access. In the United States a number of cases have applied the essential facilities doctrine to both the telecommunications sector in general and to the question of access to directory information. However, the 'essential facility' argument failed on appeal, in Feist's anti-trust action against Rural Telephone (33), because of Feist's failure to establish, as required under US law, that the resource (the directory information) was vital to Feist's competitive viability. This will not be the case where the information is available from other sources, even if only through expensive options such as a house to house survey. On the facts Feist did not make out a case, though in another action (34) a US Court recognized the possibility that the failure to supply business classifications and updates to a telephone company's subscriber list to an independent publisher might allow the essential facilities argument to be run. It is not certain to what extent these US style arguments were taken on board by the ECJ in determining that Sealink owned an essential facility. The EC Commission's decision appears not to have taken as rigourous approach as in the US.

(30) Case C-41/90, Hoeffner & Elsner v. Macrotron, (1992).

(31) Sealink, Commission Press Release IP (92) 478, June 1992.

(32) IBM v. Commission , (1981) ECT 1857.

(33) Rural Telephone Service Co, Inc v. Feist Publications, Inc, 957 F.2d 765 (10th Cir 1992).

(34) Advertising & Publishing Corp. v. Donnelly Information Publishing, Inc, 719 F. Supp. 1551.

Extending dominance to a neighbouring market

One further competition issue encountered in *Feist* should be considered, namely attempts by the owner of directory information to refuse access in order to protect its position in the "yellow" pages market. In the US this is often the motivation behind refusals to supply directory information. Under EC law any attempt to use market power in one market to maintain or to expand its position in a neighbouring market could be an abuse under Article 86 EEC (35).

IV. CONCLUSIONS

The issues raised here in relation to telephone directory services are of more general concern to all those intending to do business in the burgeoning information services industry. Anyone who possesses information has a valuable commodity, often with a much shorter shelf life than the phone book.

It would appear from the case law that the owner of such information will often be considered to enjoy a strong market position. Once that situation has been identified circumspection must be exercised over the manner in which that information is commercialized, and in particular, the way in which it is provided to third parties. The question will have to be viewed in the light of both domestic and EC competition rules.

At the same time, regulators should realize that information providers should be allowed sufficient protection to ensure that they gain a fair return on the time and energy taken in preparing and distributing their information. In part this situation appears to be recognized by the EC Commission's proposal on the legal protection of databases.

Additionally, competition rules must balance two issues. Firstly, the need to prevent information providers from using their power in one market to attempt to dominate a neighbouring market or from controlling competition through refusals to supply. Secondly, the need to protect those who bave invested in information from competitors seeking to use that information without incurring the same costs as the owner.

It is over the next few years that we will see where the balance is struck and I imagine many of you will be at the forefront of setting those limits.

(35) See case C-18/88, RTT v. GB-INNO-SA, 13 December 1991, where the Belgian RTT's prosecution of GB-Inno for supplying unapproved telephones, (under Belgian law which placed the role of approving such equipment on the RTT), was in breach of Article 86 EEC. The rationale was that this represented an attempt by the RTT to use its dominant position over telecommunications services to maintain a strong position in the terminal equipment market.

Les annuaires téléphoniques : le rôle de la concurrence

Bernard AMORY et Peter SANDLER

Résumé

Les services d'information que représentent les annuaires téléphoniques - que ce soit les pages "blanches" ou "jaunes" - constituent un marché de plus en plus important. Ce marché est caractéristique des questions du droit de la concurrence inhérentes aux services d'information, surtout en raison du fait que les prestations de services d'annuaires téléphoniques restent, pour la plupart, du ressort d'une seule organisation de télécommunications qui dépend en général du monopole public national, ce qui va à l'encontre de la démarche de libéralisation de la législation européenne.

Il s'agit donc de réglementer l'accès des tiers aux informations contenues dans les annuaires de ces organisations qui bénéficient d'une position prédominante sur le marché. Traditionnellement, la prestation de services d'annuaires est considérée comme une prestation auxiliaire de la prestation d'informations téléphoniques orales devant donc rester du ressort de l'organisation publique des télécommunications. La prestation libre de services d'annuaires serait donc exclue, ce qui reste en effet le cas dans plusieurs des pays de l'Union Européenne (Belgique, Grèce, Italie, Portugal et Espagne). En revanche, les marchés du Danemark, de la France, de l'Allemagne, de l'Irlande, du Luxembourg, des Pays-Bas et de l'Angleterre sont, pour le moins, ouverts en principe à la concurrence; et la présentation libre de ces services est déjà une réalité pour certains pays (en Angleterre, par exemple).

La législation européenne cherche à libéraliser autant que possible la prestation des services de télécommunications, à l'exception de la télépbonie vocale, afin de permettre à l'organisme public des télécommunications de se réserver des revenus suffisants pour assurer son devoir de service.

Ces services soulèvent des questions juridiques, d'une part en ce qui concerne la protection des données et, d'autre part au regard du droit d'auteur et de la concurrence.

La législation interne des pays de la CE varie substantiellement en ce qui concerne le droit d'auteur. Cependant, en général, pour bénéficier de la protection, il faut démontrer que les informations dont fait l'objet une compilation telle qu'un annuaire téléphonique sont disposées d'une façon originale : Il est à noter qu'aux Etats-Unis, le droit d'auteur n'existe plus pour les annuaires téléphoniques depuis l'arrêt Feist de 1991.

En ce qui concerne le droit de la concurrence, il s'agit de réglementer l'accès aux données des annuaires, et ce compris le prix et les autres conditions d'accès. Dans l'Union Européenne, il y a des règlements au niveau national ainsi qu'au niveau européen - Articles 85 et 86 du Traité de Rome auxquels des organismes tels que les PTT doivent se soumettre.

Des décisions récentes de la Commission ainsi que de la Cour de Justice Européenne indiquent une évolution, d'une part vers l'idée que le refus d'accorder des licences d'exploitation d'un droit d'auteur pourrait constituer un abus de position dominante (l'Affaire Magill) et, d'autre part, vers la reconnaissance que l'accès à des "facilités essentielles" ne peut pas être refusé.

Ces développements pourraient être importants dans un proche avenir pour les questions relatives aux services des annuaires téléphoniques. Il reste à considérer la façon dont peut être établi l'équilibre entre le risque d'un abus de position dominante par les PTT et la protection des intérêts de ceux qui ont investi pour établir un service de données tel qu'un annuaire téléphonique.