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Making the Connexions European Telecommunications Law in the 1990s

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Abstract: The paper discusses the main strategies for the development of European telecommunications, both at a European and an international level. After elaborating the main threads of the Commission's strategy, the paper focuses on the methods by, and the extent to which those strategies are being implemented, and with what consequences.

Introduction

There is no European telecommunications system: there are the often disparate networks of the member states of the EC. Not only are there technical differences between the various jurisdictions of the PTTs, but there is great diversity in the degree of competition allowed with the PTT, in the extent and nature of access for competitors to the network and in the extent to which restrictive procurement policies are restricted. Great regulatory and structural (Huntley and Pitt, 1989) impediments therefore exist to free trade within the EC in telecommunications markets, whether voice telephony, computerized telecommunications or procurement of equipment. The actual and potential size and importance of these markets (Ungerer and Costello, 1988) made it imperative that the internal barriers became a main element in the 1992 drive towards the single internal market. The institutional framework established by the Single European Act has relaxed the procedural formalities necessary for the approval of internal market measures and the resolution of disputes. Central amongst the approximately 280 market measures in the form of directives are several concerning deregulation of the telecommunications industries of the EC.

The Search for a European Telecommunications Strategy

The European Commission's concerns about the internal aspects of the telecommunications market and the competitiveness of European undertakings in the increasingly important international telecommunications market are of longer preoccupation than the recent drive towards 1992. The Commission's drive for a common strategy in telecommunications goes back to the Dublin Report (Dublin Report, 1979). The report stressed that, unless a coordinated strategy could be created, the EC would damage its competitive position, both within and outside the Common Market, to the extent that it would lose control over an increasingly important field, with serious consequences for employment and independence.

Nonetheless, the major element of the Commission's strategy was the creation of a single market in telecommunications equipment and services. In pursuing this, it was influenced by the example of the homogeneous US market (Huntley and Pitt, 1990), with an apparently centralised regulatory authority (the FCC) and standardised systems and networks operated by dominant, large firms (notably AT&T and IBM). The divestiture of AT&T irrevocably changed that structure, but did not alter the attraction of a harmonised, EC-wide telecommunications framework with the European Commission in a central co-ordinating role. What it did mean, however, was that as in the US a far greater stress would come to be placed on competition within the industry. One has the impression that, whereas developments in the United States and Japan have undoubtedly inspired European developments, there has been no direct influence. The drive behind telecommunications liberalization is the need to establish a single internal market. Further investigation, however, leads to the inescapable conclusion that, certain priorities and objectives in the Community strategy are clearly driven by pressures from the US, whether in international fora, bilateral or through the sheer scale of US corporations' activities in the value-added services market.

Although the Commission had achieved a high degree of cooperation amongst the EC PTTs by establishing a Working Group on Future Networks in 1977 (it is this group which instigated the development of the Integrated Services Digital Network (ISDN) which is about to bear fruit), the Commission issued three Draft Recommendations and a Draft Declaration to the Council of Ministers in September 1980. The gist of the Commission's proposals was to establish cooperation and harmonisation amongst the EC PTTs; to establish a Communitywide market for terminal equipment; to liberalise public procurement of equipment; and to establish a Coordinating Committee to achieve those objectives. Little came of the proposals until the Telecommunications Directorate of the Commission took the initiative in the early 80s, spurred into action by the deregulatory developments in the US. If the EC was not to face the difficulties identified in the Dublin Report, immediate and careful action was necessary.

A Task Force for Information Technology and Telecommunications was set up in 1983 and a Senior Officials Group on Telecommunications (SOG-T) in 1984. On the basis of SOG-T submissions, the Council of the European Communities issued its Recommendation concerning the Implementation of a Common Approach in the Field of Telecommunications and its Recommendation concerning the First Phase of Opening up Access to Public Telecommunications Contracts. Even so, a separate Directorate of the Commission dealing with telecommunications issues was not established until the two Task Forces were merged in 1986 to form the Directorate-General for Telecommunications, Information Industries and Innovation (D-G XIII).

A truly coordinated strategy was not fully formulated until the Commission issued its Green Paper on the Development of the Common Market for Telecommunications Services and Equipment (Green Paper 1987). In its Presentation of the Green Paper the Commission stated:

"Telecommunications is the most critical area for influencing the 'nervous system' of modern society. To flourish it has to have optimum environmental conditions... The traditional form of organisation of the sector does not allow the full development of the potential of these new services. In order to create an open and dynamic market in this area it therefore seems necessary to introduce regulatory changes to improve the sector's environment."

The Commission highlighted the following deregulatory criteria:

1. creation of a competitive market in terminal equipment;
2. complete freedom of access to the network by telecommunications services providers;
3. the complete separation of the regulatory function from the operational function of the PTTs;
4. close consultation on assessment of the social impact of telecommunications changes;
5. the development of the outlying regions of the Community through the development of new

telecommunications services;

6. the strict application of the competition rules of the treaty to telecommunications; and
7. the establishment of a common, Community position to be advanced in negotiations within international telecommunications organisations (GATT, ITU, CEPT etc).

The introduction also clearly acknowledged that "Under pressure from the measures already adopted by the United States and Japan, and under pressure from users, anxious to reduce state dominance and give a freer reign(sic) to competition several Community governments are now defining their deregulation / reregulation policies." (Green Paper 1987). The statement indicates the Commission's concern at the consequences of deregulation in the internationalised telecommunications market. It is the same concern which is evident in Proposed Position J (Appendix 1) and in Section IX of the Green Paper itself.

International disagreements, particularly over access to and tariffing of leased lines had already brought Member States into conflict with the US internationally (Markoski, 1981). The Commission's initial recommendations and the strategy put forward in the Green Paper must therefore be seen in the light of such international developments.

The Main Elements of the Commission's Telecommunications Strategy.

In accordance with the Proposed Positions of the Green Paper, the main elements of the Commission policy strategy are:

1. Continued exclusive provision by the national PTTs of network infrastructure provision and operation;
2. Continued exclusive provision of voice telephone service by the national PTTs;
3. Unrestricted, competitive provision of all other telecommunications services;
4. Standardisation of the infrastructure and services to maintain or create Community-wide interoperability;
5. Equal interconnect and access facilities to all providers of telecommunications services through common standards, frequencies and tariff principles established by Open Network Provision;
6. Unrestricted provision of terminal equipment;
7. Separation of regulatory and operational activities of PTTs;
8. Application of the competition rules to the PTTs, particularly in relation to cross-subsidisation and the prevention of abuses of dominant positions.

Within the Commission, Directorate D.2 of Directorate-General XII is responsible for regulatory aspects of telecommunications policy. In a recent publication (Implementation Report 1989), the Directorate suggested that the cost of "non-Europe" in telecommunications had been high and restated the action lines of the Green Paper as:

1. Creation of the European Telecommunications Standards Institute;
2. ONP;
3. Common development of Europe-wide services;
4. Common European position on future development of satellite communications;
5. Common definition of telecommunications services and equipment with regard to relations with non-EC countries;
6. Common analysis of social impact.

The Commission submitted its programme for implementing the Green Paper in February 1988 (Implementation Programme). Despite shifts in emphasis, therefore, the main elements of the Commission's strategy are now firmly established and, as can be seen from the Implementation

Programme, an ambitious programme of speedy progress is envisaged. To the extent that it introduces competition in conditions of equal access in most telecommunications sectors, moves towards the separation of regulatory and operational activities, displays a preoccupation with cost-based tariffing, encourages standardisation and interchangeability and opens up procurement of telecommunications equipment, the Commission programme has aims similar to the those of the US model. The extent to which and the speed at which so many of those aims have been achieved is remarkable.

The Establishment of Common Standards

Most notably, a European Telecommunications Standards Institute (ETSI) was founded in April 1988. With the likely approval of a Draft Directive on approximation of laws concerning telecommunications terminal equipment, the Community is on course for standardisation in the early 1990s. To this end, the recent approval by the Council of the ONP Directive (ONP Directive, 1989) is of great significance.

The Development of a Harmonised Network

Open Network Provision (ONP) is a concept greatly influenced by developments in the US Federal Communications Commission on Open Network Architecture. ONA is a direct result of and was anticipated by the MFJ, although progress towards achieving it has been difficult. The key feature of ONA is the creation of a level playing field for telecommunications competitors through standardisation of all network features. Like the ONA programme in the United States, the ONP Directive attempts to lay down a programme for national telecommunications organizations "for the harmonization of conditions for open and efficient access to and use of public telecommunications networks and ... public telecommunications services (and to ensure that such)conditions are designed to facilitate the provision of such services using public telecommunications networks and/or public telecommunications services, within or between Member States." (ONP Directive, 1989). Such "open network provisions" are widely defined in Article 10 of the Directive to include technical interfaces, usage conditions and tariff principles, thus closely resembling the US approach to ONA. The permissible restrictions to access to networks and services are closely defined in Article 3 which otherwise stipulates that access must be unrestricted, non-discriminatory, transparent and based on objective criteria. Even after ONP is attained, access will be based on national licensing procedures.

The procedures and timetable for implementing ONP conditions are laid down in Articles 4 to 9 of the Directive. Implementation is designed to be coordinated with the implementation of the Competition Directives on Terminal Equipment and on Services, both of which have encountered serious opposition and are considered below. The key feature of the Directive, however, is Annex II, "Areas for which Open Network conditions may be drawn up in accordance with Article 4.2" (reproduced as Appendix 3). Prominent amongst those targeted areas is that of leased lines, the very issue which in the 1970s created significant conflicts between the Community and the United States. Leased lines are a priority for Community action under ONP because the very issues in contention in the 1970s have yet to be resolved. To what extent it will be possible to introduce open provision in leased lines without exacerbating the lionine share which US corporations have of Community value-added services remains to be seen (the Commission has already published a report on leased lines and is preparing a report on public data networks). Only the framework for ONP has therefore been established. It will be several years before the basic principles are agreed in all areas covered by Annex II and it will be even longer before implementing legislation is in force in all Member States.

Tariffs

The Commission is currently studying tariff structures throughout the Community with the objective of moving towards cost-orientation by 1992. A Council Resolution of 30 June 1988 clearly established the objective of moving towards cost-based tariffs, but there is such disparity amongst Member States on cost orientation that it will be long after 1992 before anything like the position in the US or the UK is achieved throughout Europe. This is exacerbated by the fact that, although progress towards separation of regulatory and operational activities was implemented in the UK in 1984, no other Community state has achieved anything like separation.

Public Procurement in Telecommunications

Progress on public procurement in telecommunications has been substantial. There seems to be a marked degree of agreement amongst the Member States on the matter and the Draft Directive on the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors (Public Procurement Directive 1990) is likely to be approved early in the Irish presidency. The very title indicates that procurement liberalization is far wider than telecommunications and the draft directive has been piloted by DG III, with significant inputs on telecommunications aspects from DG XIII. Procurement has been a generally contentious issue between the US and the Community for some time and is likely to remain a matter of dispute. In essence, the new proposals from DG III close the loopholes in already existing directives on public procurement, notably by including previously "excluded sectors" (including telecommunications equipment), by conferring to the Commission wide supervisory powers and by proposing amendments in national laws to provide remedies for infringement of open tendering procedures. The detailed provisions of the directive are complex and beyond the scope of this paper. They represent a major effort to liberalise a significant section of the internal market for 1992 and reflect a large input from the United Kingdom which, in Europe, has been prominent in liberalisation of public procurement. The contentious issue in the directive, however, is the "third country" clause which is considered below.

The Competitive Telecommunications Environment

In some aspects of the telecommunications strategy, however, movement has been sluggish. Thus, whereas the MFJ and the FCC have gone a long way to introducing competition in most aspects of telecommunications outside the local loop in the United States, the European Commission has had great difficulty in coordinating and introducing competition. The enforcement of the Competition rules of the Community is the responsibility of Directorate-General IV of the Commission. A separate Directorate within DG IV deals with competition in the telecommunications markets. DG IV had had several successes in litigating the application of the competition rules to telecommunications, although it faced difficulties in so doing. Not least of these was the fact that telecommunications is seen by most Member States as an executive function usually administered by the PTT as a government department or at least as a state owned corporation (**Italy V Commission** [1985] ECT 873, [1985] 2 CMLR 368). The case law indicates that DG IV will apply the competition rules vigorously to introduce competition into telecommunications markets, but such piecemeal, case by case enforcement could not create the competitive environment with adequate speed. There was little scope for dealing with competition in telecommunications through regulations approved by Council. The Commission has power to issue directives to prevent infringement of the competition rules by public undertakings. On 16 May 1988, the Commission issued a Directive on Competition in the Markets in Telecommunications Terminal Equipment, (83/301/EEC), the effect of which would be to liberalise the Community's terminal equipment market to the level achieved by the United States in the early 1970s. Even though there is general agreement on the need for extensive liberalisation, the Directive is currently on appeal to the Court. Several Member States contend that the Commission has no power to issue directly applicable directives under Art 90. Thus, although there is apparent agreement on the substantive content on the

Directive, the appeal on the serious procedural issues is bringing into question the overdue elimination of restrictions on competition in terminal equipment. Since the directive is definitive on terminal equipment and is not connected with ONP, it is anticipated that the provision dealing with first telephone sets will come into effect on 30 June 1990.

The Commission, in the Green Paper, indicated that it would not adopt the distinction between "basic" and "enhanced" telecommunications services which has plagued US regulation of the fast-moving telecommunications environment. Instead, the Commission has planned to introduce competition in all sectors other than voice telephony. The technical environment for access to the networks is to be achieved through the gradual introduction of ONP; the competitive environment is to be achieved through a Commission Directive on Competition in the Markets for Telecommunications Services. This Directive raises the same procedural issues as the Directive on Terminal Equipment, since it is also based on Article 90(3). In addition, however, it has raised many contentious issues which make it unacceptable to several States and their PTTs. There is, however, a sense of urgency in DG IV which has led it to compromise some of the issues. The objective is to phase in the Services Directive at the same time as ONP since, as has been stated, they are aspects of the same issue. As one important Commission official pointed out, any harmonisation of quality which might be achieved through ONP might be robbed of substance unless anticompetitive behaviour in the services market can be suppressed. Since the ONP Directive is a Council Directive under Article 100A of the Treaty, it could not deal with the enforcement issues addressed by the Commission directive.

Nevertheless, in drafting the Directive the Commission has had to confront issues similar to those confronted by the FCC in Computer II and III over the distinction between basic and enhanced service. The Directive accepts that voice telephony will not be opened to competition because of the threat to the financial stability of the PTTs. The first objective of the Directive will be to phase out differences in tariffs for leased lines by 31 December 1992. Until then, Member States will be permitted to operate a declaration system through which private operators would undertake not to indulge in simple resale of leased capacity. Beyond this, the licensing procedures of Member States must ensure by 31 December 1990 that the grant of licences in competitive services is objective, non-discriminatory and transparent, that reasons are given for refusal and that procedures for appeal against refusal are adequate. Restrictions on the processing of signals before or after transmission, another contentious issue with non-EC processors since the 1970s, must be legislated for by the same date.

There is no attempt to prohibit European PTTs from entering certain markets, a key feature of the MFJ, or to force them to compete in competitive services through separate subsidiaries, the technique deployed in Computer II. There is certainly no attempt to suggest that PTTs should provide competitive services other than as public bodies. Instead, the Directive will require that there be no discrimination in conditions of use or charges payable and that conditions governing access to the networks will be public, objective and non-discriminatory. There is therefore no attempt to achieve the kind of structural change which resulted from the MFJ. The intention is that the Competition rules will be strictly applied to ensure compliance and prevent anti-competitive behaviour, not only by the PTTs, but also by any other network or service providers. To this end, the Commission will issue guidelines on the application of the competition rules to telecommunications "in order to ensure fair and reasonable conditions for all market participants."

The Commission's Search for a Common External Dimension to Telecommunications policy

The Commission has, in the Green Paper, indicated that deregulation in the EC cannot be done "in a manner which would insulate the Community market from the outside world." It accepts that advantages could well flow from opening of the markets in telecommunications services and

equipment. Inevitably, therefore, the Telecommunications strategy reflects the fact that trade in telecommunications equipment and services are now internationalised and firmly a part of the Uruguay round.

The impact of bilateral(US)/multilateral(USIGATT) issues on formulation of EC telecommunications policy.

The significance of GATT has waned over recent years as the liberalised trade in goods shrank, in proportion to trade in services. The US has been the prime mover to include services in the Uruguay round. The fact that the OECD had already established Codes on services and that the US had negotiated services bilaterally in its Free Trade Agreement with Canada made it difficult to resist inclusion in the Uruguay Round (USITC Report 1989).

Trade in Services

Negotiations on telecommunications within GATT began in June 1989 in Geneva. The US pressed at Punta del Este in 1986 for the creation of a group on the negotiation of services (GNS) and the GNS mandate, or "Montreal Principles" established at the 1988 Uruguay Round Midterm Review in Montreal, clearly envisages progressive liberalisation of trade in services with market access on an mfn/non-discrimination basis ensuring national treatment. Differences over what services can be traded and, more importantly, the meaning of and difference between basic and enhanced services, are likely to delay agreement in telecommunications. There can be no doubt that divergences in regulatory structures will prove the greatest impediment. The pressures from the US are likely therefore to be great upon the Community and the individual Member States to adapt their regulatory structures to curb the monopoly powers of the PTTs beyond the telephonic network and to permit access to service providers on an equal basis.

Procurement

The scale of public procurement in the Community is of such dimensions that for a long time the United States has pressed that public authorities in Europe open up their tendering and procurement practices to permit entry by US suppliers. This has been particularly so with "buy national" procurement policies of EEC PTTs (USITC Report 1989). Most signatories to the Government Procurement Code negotiated under the GATT specifically exclude their PTTs from coverage by the Code. A main element in the US negotiating stance on the GNS is to extend the Code to services. The proposals for expanding the EC public procurement rules have been considered above; the main contention, however, is the 50% "value-added" rule for products not of Community origin. This will have serious repercussions for the US manufacturers and service suppliers and this ought to be seen as a bargaining strategy by the EC to obtain bargaining leverage in multi-lateral and bilateral negotiations, particularly with the US. It is a starting point to encourage reciprocity and when there is movement, particularly from the US on opening up of the US market, the process of waivers anticipated in the directive will operate. The truth is that the US will be as careful as the EC in extending the GATT Code in fear of opening floodgates with unforeseeable consequences.

Standards

Closely allied to this issue is the fact that Standards are also part of the multilateral trade process, with serious consequences for telecommunications. Again, it is difficult to see whether bilateral pressure from the US or US pressure at a multilateral level has spurred the EC changes referred to

above; but the use of standards as technical barriers to trade has become a key US issue at bilateral and multilateral level (USITC Report 1989). Similarly, the negotiation of tariffs has become a bilateral/multilateral issue between the US and EC.

Right of Establishment

Closely allied to the 50% value-added rule on procurement and the restricted obligations under GATT for a PTT to offer reciprocity to foreign corporations where it has no domestic competitors under its internal rules is the concern in the US that actual and proposed changes in EC competition rules and disclosure requirements for foreign-owned corporations are likely to make it more difficult for long-established US firms to continue as before and for US corporations to enter the EC anew. The result has been much posturing by the USTR on the matter, but the reality is that US companies are already restructuring in anticipation. Furthermore, despite whatever restrictions there might be, US telecommunications firms are now firmly established in the EC. Notable are AT&T's joint venture with Italtel and their apparent interest at one time in the takeover of Plessey, but far more significant in the long run will be the vast network of manufacturing and service operations now being established by the Bell Operating Companies in Europe.

Impact of Bilateral Relations between the US and EC

In the context of the multilateral negotiations on telecommunications and in an increasingly internationalised environment, the EC telecommunications strategy has come under the scrutiny of the US Trade Representative. The decision to place the EC on the priority listing under the telecommunications chapter of the US Omnibus Trade Act has not adversely affected the willingness of the Commission to continue negotiations with the US. Whether intended as such or not, it appears at least that the function of the listing is to exert pressure on the EC to liberalise, bearing in mind the fact that the Community is in overall trade deficit with the US in telecommunications services and equipment. The Report of the USTR to Congress on telecommunications is imminent. Undoubtedly a major overall preoccupation will be the extent to which the EC is entitled to impose restrictions on the use of "screwdriver" assemblers in the EC to avoid restrictions on non-EC tariffs.

Conclusion

There is much that the US should welcome in the liberalisation moves of the EC, particularly the directives on introducing competition in terminal equipment and services and in the general thrust of the ONP. Even so, the pressures from US corporations on Congress, the USTR and the Department of Commerce will persistently be that the European market needs to liberalise more quickly than it is. Despite the burgeoning expansion into the EC, the US equipment and service suppliers regard with unease and consternation the completion of the internal market as 1992 approaches. The fear must be that they must look at the rich pickings from the wrong side of the tariff wall. In that context, it is hardly surprising that they are investing and restructuring with such great haste in Europe and that bilateral and multilateral US pressure is being vigorously exerted to extend the US deregulatory model to EC telecommunications. Whatever the scale of the international dimension, the European Commission has its work cut out simply to make the connexions across Europe.

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