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## Telecommunications Law and Policy in the European Community

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# Telecommunications Law and Policy in the European Community

Reinhard Schulte-Braucks

## **Abstract**

This Article discusses the proposals of the Green Paper and the implementation of its principles with regard to the provision of telecommunications services and equipment throughout the Community.

# TELECOMMUNICATIONS LAW AND POLICY IN THE EUROPEAN COMMUNITY

*Reinhard Schulte-Braucks\**

## INTRODUCTION

Over the last two years, there has been a considerable advance in the thinking behind the organization of telecommunications in Europe. This move has been partly the result of economic growth and technological change in the industry and partly the result of public debate on the institutional and regulatory consequences to be drawn by the European Communities (the "EC" or the "Community")<sup>1</sup> and the Member States from this development.

Several factors seem to be determining the trend in telecommunications. In most European countries, discussion on reforming the context and conditions in which activities are being carried out in this sector is in full swing. Since 1987, there has been a general move toward liberalization in the industry throughout Europe.<sup>2</sup> In June 1987, the Commission of the European Communities (the "Commission") published its Green Paper on the Development of the Common Market for Telecommunications Services and Equipment (the "Green Paper")<sup>3</sup> in which it devised a European framework for future de-

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1. Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 11 [hereinafter EEC Treaty]. Member States in 1989 included the following twelve countries: Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands, United Kingdom, Ireland, Denmark, Greece, Spain, and Portugal.

2. See H. UNGERER, TELECOMMUNICATIONS IN EUROPE 186-92 (1988). For an in-depth study of the situation in certain Member States and in the United States, Canada, and Japan, see R. BRUCE, J. CUNARD, & M. DIRECTOR, FROM TELECOMMUNICATIONS TO ELECTRONIC SERVICES (1986).

3. COM(87) 290 final (1987) [hereinafter Green Paper]. For analysis of the Green Paper, see Schulte-Braucks, *Europäisches Telekommunikationsrecht für den gemeinsamen Telematikmarkt: Das Grünbuch der EG-Kommission*, in TELEKOMMUNIKATION UND WIRTSCHAFTSRECHT I (J. Scherer ed. 1988); Narjes, *Telecom Policy Reform and Interna-*

velopment in this area.

This Article discusses the proposals of the Green Paper and the implementation of its principles with regard to the provision of telecommunications services and equipment throughout the Community.

### I. THE NEED FOR COMMUNITY ACTION

The rapid evolution of the telecommunications industry in Europe and the developments taking place within Member States have created an urgent need for action by the Commission. Since 1987, national reform drafts have come to maturity in most of the Member States. For instance, Spain adopted a new law on telecommunications in June 1987.<sup>4</sup> In the Netherlands, the law on the reorganization of the telecommunications sector entered into force on January 1, 1989.<sup>5</sup> The United Kingdom has systematically pursued liberalization of telecommunications regulation with a major, recent development allowing for the simple resale of the free capacity of leased lines.<sup>6</sup> In June 1989, the Federal Republic of Germany en-

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*tional Trade*, TRANSNAT'L DATA & COMM. REP., Jan. 1988, at 21; Scherer, *European Community Opens its Telecommunications Network: Legal Aspects of the "Green Paper,"* INT'L COMPUTER L. ADVISER, Sept. 1987, at 4. For an analysis of the legal bases of European Community telecommunications law, see Schulte-Braucks, *Telecommunications and Freedom of Trade in Goods and Services Under the EEC Treaty*, in 1 LAW AND ECONOMICS OF INTERNATIONAL TELECOMMUNICATIONS 295 (E.-J. Mestmäcker ed. 1987). For a comparison of the telecommunications industry in the European Community with the U.S. situation, see Spaeth, *A Comparative Study of the Regulatory Treatment of Enhanced Services in the United States and the European Community*, 9 NW. J. INT'L L. & BUS. 415 (1988).

4. Ley 31/1987, de 18 de diciembre, de Ordenación de las Telecomunicaciones, BULETÍN OFICIAL DEL ESTADO, No. 303, at 37409 (Spain) (Dec. 19, 1987) (also available as a bilingual text in Spanish and English published by the Ministry of Transport, Tourism and Communications in Madrid).

5. Wet van 26 oktober 1988, houdende regels met betrekking tot voorzieningen voor telecommunicatie (Wet op de telecommunicatievoorzieningen), STAATSBLAD VAN HET KONINKRIJK DER NEDERLANDEN [S.] 520 (Neth.) (Jan. 1988) (law concerning facilities for telecommunications); Wet van 26 oktober 1988, houdende regels met betrekking tot de oprichting van de naamloze vennootschap PTT Nederland NV (Machtigingswet PTT Nederland NV), S. 521 (Neth.) (Jan. 1988) (law changing Dutch postal, telephone, and telegraph administration to a corporation); see 't Hoen, *The New Face of the Dutch PTT*, in EUROCOMM 88: PROCEEDINGS OF THE INTERNATIONAL CONGRESS ON BUSINESS, PUBLIC AND HOME COMMUNICATIONS, AMSTERDAM, 6-9 DECEMBER 1988, at 67 (T. Schuringa ed. 1989); Queck, *Pays-Bas: un nouveau régime des télécommunications, aperçu général*, 1 REVUE DE DROIT DE L'INFORMATIQUE & DES TÉLÉCOMS 91 (1989) (overview of administrative and policy content of reform legislation).

6. See Further Liberalisation in Telecommunications, Press Notice 18/89 (Office

acted a law for a new structure of postal and telecommunication services and opened this market to a large extent to the private sector.<sup>7</sup> Similarly, in other Member States of the Community, and especially in France,<sup>8</sup> Italy,<sup>9</sup> Belgium,<sup>10</sup> and Portugal,<sup>11</sup> a number of important measures have been taken or are in the process of being adopted with a view toward a fundamental structural reform.<sup>12</sup>

Important reform projects also have been undertaken in several European countries that are not Member States of the Community. These states are basically moving in the same direction—liberalization of the telecommunications industry.

The developments outlined above in the Member States provided the impetus for the Council of Ministers of the European Communities (the "Council") to adopt formally the prin-

of Telecommunications, London, U.K., June 15, 1989); *Class Licence for the Running of Branch Telecommunication Systems Granted by the Secretary of State for Trade and Industry Under Section 7 of the Telecommunications Act 1984*, Dep't. of Trade and Industry (London Nov. 8, 1989).

7. Gesetz zur Neustrukturierung des Post- und Fernmeldewesens und der Deutschen Bundespost (Poststrukturgesetz-PostStruktG), 1989 BUNDESGESETZBLATT [BGB1] I, No. 25, at 1026 (W. Ger.) (June 14, 1989); see Gebhardt, *Le virage allemand*, 01 INFORMATIQUE, Sept. 25, 1989, at 7.

8. Décret n° 89-327 du 19 mai 1989 modifiant le décret n° 86-129 du 28 janvier 1986 modifié portant organisation de l'administration centrale du ministère des P.T.T., JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] 6412 (Fr.) (May 21, 1989) (first step in separating the regulatory function from commercial activities); Décret n° 87-775 du 24 septembre 1987 relatif aux liaisons spécialisées et aux réseaux télématiques ouverts à des tiers, J.O. (Sept. 25, 1987) (amending articles D 369 to D 385 of the Posts and Telecommunications Code).

9. See Disposizioni per la riforma del Ministero delle poste e delle telecomunicazioni, Camera dei Deputati 3805, X Legislatura (Italy) (Apr. 11, 1989); Disposizioni per la riforma del settore delle telecomunicazioni, Senato della Repubblica 1685, X Legislatura (Italy) (Apr. 10, 1989) (draft law concerning the reform of the telecommunications sector).

10. See *RTT gesplitst in Belgacom en BIT*, De Morgen, June 16, 1989, at 7, col. 5 (Brussels) (noting that Belgian government agreement separates the Belgian telecommunications administration into two entities); *Regering akkoord over "Telecomwet"*, De Morgen, June 15, 1989, at 7, col. 1 (Brussels) (reporting that Belgian government reaches agreement on principles of new telecommunications law).

11. Lei de Bases do Estabelecimento, Gestão e Exploração das Infra-Estruturas e Serviços de Telecomunicações, Lei 88/89, DIÁRIO DA REPÚBLICA, I SÉRIE, No. 209, at 3954 (Port.) (Sept. 11, 1989) (basic law concerning the establishment, management, and operation of telecommunications infrastructures and services).

12. For an analysis of the regulatory situation in all Member States, see H. Gebhardt, *Analysis of Present Situation and Future Trends in Telecommunications Regulation in the Member States in the Light of EC Policy*, DG XIII.D.2, Document XIII/239(89)-EN, version 3 (Commission of the European Communities, Sept. 1989).

ciples of the Green Paper in a resolution on June 30, 1988, and the Council did this during the first official meeting held by those ministers with responsibility for telecommunications.<sup>13</sup>

This very rapid evolution confirms the principles on which the Commission relied in preparing the Green Paper. First, reform is unavoidable and cannot be postponed. Without it, it would be impossible to make the fundamental changes that are necessitated by the rapid advance of technology. It is primarily the markets for terminals and services that should be opened further to competition.<sup>14</sup> If this reform fails, the result will be serious damage on the macroeconomic level, because opportunities for growth and employment will slip away.<sup>15</sup>

Second, reform is already under way in almost all of the Member States. The challenge the Community faces is to ensure that these reforms become part of a Community approach. Third, on December 31, 1992, the completion of the internal market is to take place in the European Community. This is the date originally adopted by the heads of state and government at the European Council in Milan and later ratified by the national parliaments of all the Member States.<sup>16</sup> In order to meet this deadline, the Member States must adopt a common approach to telecommunications and implement it in accordance with a detailed timetable.

The proposals made in the Green Paper during the summer of 1987 have since then been recognized throughout Europe as an adequate framework for discussion and for preparing concrete reform measures in the Member States.<sup>17</sup> Thus, before examining the actions undertaken or proposed at the Community level, the Green Paper deserves more detailed analysis.

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13. Council Resolution of 30 June 1988 on the Development of the Common Market for Telecommunications Services and Equipment Up to 1992, O.J. C 257/1 (1988); 21 BULL. EUR. COMM., No. 6, at 42, ¶¶ 2.1.76-2.1.77 (1988).

14. Green Paper, *supra* note 3, at 73-74, ¶ VI.4.3.2.

15. For more details see H. UNGERER, *supra* note 2, at 83-100.

16. See Single European Act, art. 13, O.J. L 169/1, at 7, 3 Common Mkt. Rep. (CCH) ¶ 21,000, ¶ 21,120, at 9,662 (1987) (amending the EEC Treaty to include Article 8A); see also COMMISSION OF THE EUROPEAN COMMUNITIES, NINETEENTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 1985, at 89-90, ¶ 162 (1986).

17. See H. UNGERER, *supra* note 2, at 185-226.

## II. THE GREEN PAPER'S APPROACH

The approach taken in the Green Paper reflects the main problems that are the subject of on-going debates in the Member States with a view toward reform of telecommunications in Europe.

At the Community and indeed the world level, all countries must realize that the enormous opportunities offered by new technologies present new potential for both the end users and the postal, telegraph, and telecommunications administrations (the "PTTs") in the terminal equipment and services fields. This situation presents a problem in that the traditional demarcation lines between providing equipment and services are becoming increasingly more indefinite.

Before undertaking measures to reform the telecommunications sector, every country had two options before it. The first option was to *extend* the application of the established regulations on telecommunications to cover the computer terminals sector, which would have resulted in the introduction of more and more restrictions. This solution would have applied to both switching functions and intelligent functions of private equipment such as digital telephone exchanges and to personal computers connected to a network. With this option, it would have been virtually impossible to check compliance with such regulations. Moreover, such an extension of the monopolistic structure, to the detriment of the private sector, would have tended to deprive the new emerging technologies of the creative impetus of a competitive market.<sup>18</sup>

The second possibility facing each country consisted of *restricting* the scope of the monopolies in the telecommunications field so as to make it possible to exploit all the advantages of technical progress in a competitive environment. This is the solution that has been chosen at the pan-European and the world level.<sup>19</sup> Following the general trend in Europe, the Green Paper adopts a clear standpoint. It advocates expanding the new possibilities of use, which means liberalizing the terminal equipment market<sup>20</sup> and broadly liberalizing the

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18. Green Paper, *supra* note 3, at 48-49, ¶ V.3.

19. See H. UNGERER, *supra* note 2, at 82.

20. See Green Paper, *supra* note 3, at 61-63, ¶ VI.3; H. UNGERER, *supra* note 2, at 196.

telecommunications services market.<sup>21</sup>

For the Commission, the liberalization of regulations governing the terminals and services market is a fundamental objective. Any other position would conflict with the principles of the Treaty Establishing the European Economic Community (the "EEC Treaty")<sup>22</sup> and the judgments of the European Court of Justice (the "Court of Justice" or the "Court") on the matter. In particular, the Court's judgment in *Italy v. Commission* ("*British Telecom*")<sup>23</sup> showed that the Court takes a narrow view of monopoly rights<sup>24</sup> and would not be in favor of extending a services monopoly as and when new technologies appear.<sup>25</sup> On the contrary, the Court has recognized the user's

21. See Green Paper, *supra* note 3, at 63, ¶ VI.4; H. UNGERER, *supra* note 2, at 201.

22. EEC Treaty, *supra* note 1, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 11.

23. Case 41/83, 1985 E.C.R. 873, Common Mkt. Rep. (CCH) ¶ 14,168; see Amory, *Les monopoles de télécommunications face au droit européen (Telecommunications Monopolies vs. European Community Law)*, 2 REVUE DE DROIT DES AFFAIRES INTERNATIONALES 117 (1986); Schulte-Braucks, *European Telecommunications Law in the Light of the British Telecom Judgment*, 23 COMMON MKT. L. REV. 39 (1986).

24. See *France, Italy and United Kingdom v. Commission*, Joined Cases 188-190/80, 1982 E.C.R. 2545, 2575, ¶ 12, Common Mkt. Rep. (CCH) ¶ 8852, at 8047-8048; *INNO v. ATAB*, Case 13/77, 1977 E.C.R. 2115, 2144-45, ¶¶ 30-34, Common Mkt. Rep. (CCH) ¶ 8442, at 7989; *BRT v. SABAM and NV Fonior*, Case 127/73, 1974 E.C.R. 313, 318, ¶ 19, Common Mkt. Rep. (CCH) ¶ 8269, at 9185-9187; *Costa v. ENEL*, Case 6/64, 1964 E.C.R. 585, 597-98, Common Mkt. Rep. (CCH) ¶ 8023, at 7392-7393.

25. Green Paper, *supra* note 3, at 122-24, ¶ VII.3.1; *CBEM v. CLT and IPB*, Case 311/84, 1985 E.C.R. 3261, 3278, ¶ 26, Common Mkt. Rep. (CCH) ¶ 14,246, at 16,459; *Italy v. Commission* ("*British Telecom*"), Case 41/83, 1985 E.C.R. 873, 886, ¶¶ 21-22, Common Mkt. Rep. (CCH) ¶ 14,168, at 16,018; see Schulte-Braucks, *supra* note 23, at 52-55. In *Commission v. Italy*, Case C-3/88, 1989 E.C.R. \_\_\_, the Court rejected Italy's defense against claims of discriminatory treatment of other Member States' companies in the public procurement of data processing systems based on the "exercise of official authority" or on "grounds of public policy" under Articles 55(1), 56(1), and 66 of the EEC Treaty. *Id.* at \_\_\_, ¶¶ 12-16; see *L'Ufficio distrettuale delle imposte dirette di Fiorenzuola d'Arda v. La commune de Carpaneto Piacentino*, Joined Cases 231/87 & 129/88, 1989 E.C.R. \_\_\_, ¶¶ 15-19 (defining notion of *autorité publique* based on whether authority acting as regulator or market participant); *Commission v. Hellenic Republic*, Case 226/87, 1988 E.C.R. \_\_ (confirming Commission decision based on Article 90(3) of the EEC Treaty). In *Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.*, Case 66/86, 1989 E.C.R. \_\_\_, [1989] 2 CEC 654, the Court also noted that Article 5 of the EEC Treaty obliges the Member States not to take or to maintain in force any measures that are likely to negate the useful effect of the competition rules of Articles 85 and 86. See *id.* at \_\_\_, ¶¶ 48-58, [1989] 2 CEC at 671-74; see also *VVR v. Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*, Case 311/85, 1987 E.C.R. 3821, 3826, 3828-29, ¶¶



right to make use of the new possibilities offered by technological progress in the telecommunications field.<sup>26</sup>

As an enormous new potential is opening up to users and to the telecommunications administrations, clear positions need to be taken by the Community both for the new service providers and for the telecommunications administrations with regard to access to the new markets.

The Green Paper advocates competition in an open market both for telecommunications administrations and for the competing service providers. In this respect, the Green Paper aims to provide users and telecommunications administrations with a wider field of action.<sup>27</sup> Here, there also is a broad consensus at the Community level.<sup>28</sup>

This wider field of action has three consequences. First, there has to be a clear separation of regulatory functions from operational functions. In a more competitive environment the administrations cannot continue to be both referee and player at the same time.<sup>29</sup>

Second, the principles of Open Network Provision ("ONP"), which provide open access to the public network, have to be adopted.<sup>30</sup> In other words, the conditions allowing service providers to benefit not only from open access to, but also from efficient utilization of, public networks have to be clearly defined. In particular, this applies to the future conditions of access to leased lines, the public data transmission net-

10, 20-24, *Common Mkt. Rep. (CCH)* ¶ 14,499, at 18,707, 18,708; *Ministère Public v. Asjes*, *Joined Cases 209-13/84*, 1986 E.C.R. 1425, 1465-66, ¶¶ 40-41, 70-77, *Common Mkt. Rep. (CCH)* ¶ 14,287, at 16,793, 16,780-16,781. In *Commission v. Council*, *Case 16/88*, 1989 E.C.R. \_\_, the Court of Justice reiterated its view that Article 90(3) of the EEC Treaty grants the Commission the power to adopt acts of a general nature. *Id.* at \_\_, ¶ 9.

26. *British Telecom*, 1985 E.C.R. at 887, ¶ 26, *Common Mkt. Rep. (CCH)* ¶ 14,168, at 16,019.

27. Green Paper, *supra* note 3, at 65-67, ¶ VI.4.1.3.

28. The author, however, notes that this standpoint of the Green Paper differs fundamentally from the traditional situation in the United States where the network operator has been prevented from entering into certain areas of the market. See R. BRUCE, J. CUNARD, & M. DIRECTOR, *supra* note 2, at 176-291; M. BOTEIN & E. NOAM, *Regulation of Common Carriers*, in 4 *LAW AND ECONOMICS OF INTERNATIONAL TELECOMMUNICATIONS* 23, 23-26 (E.-J. Mestmäcker ed. 1988); Huntley & Pitt, *Divestiture and Market Structure: Competition and Deregulation in US Telecommunications*, 10 *EUR. COMPETITION L. REV.* 407 (1989); Spaeth, *supra* note 3.

29. Green Paper, *supra* note 3, at 73-74, ¶ VI.4.3.2(3).

30. See *infra* notes 68-75 and accompanying text.

works, and the integrated services digital network (the "ISDN").<sup>31</sup>

Third, tariffs should be designed to promote the rapid acceptance of the new services by users and to facilitate their access to the network. Therefore, these tariffs should follow certain principles, which include observing cost trends, establishing greater transparency, avoiding distortion of competition, and unbundling tariffs.<sup>32</sup>

As regards the problem of the future organization of the telecommunications administrations, the Green Paper states that this problem should be left primarily to the Member States to resolve.<sup>33</sup> This approach also applies to the problem of competition between network providers such as the question of whether more than one supplier should be admitted to offer a network infrastructure.<sup>34</sup> The Green Paper accepts the continuation of monopolies for public network infrastructures and for public voice telephone service.<sup>35</sup>

The continuation of monopolies in the fields of public network infrastructure and of public voice telephone service, however, implies that related infrastructures have to be considered separately. For example, the separate consideration of the areas of satellite communications, mobile radio communications, and cable television networks may expose such existing network operators to a certain degree of competition. In addition, it will be necessary, however, to guarantee the convergence and the long-term integrity of the network infrastructure. One of the fundamental objectives of the Community's telecommunications policy since 1984 has been the installation of a strong network infrastructure<sup>36</sup> that will ensure efficient communication throughout the Community to include full in-

31. Green Paper, *supra* note 3, at 69-70, ¶ VI.4.2.3.

32. *Id.* at 69-70, 76-82, ¶¶ VI.4.2.3, VI.4.3.4 - VI.4.3.5; see Council Recommendation of 22 December 1986 on the Coordinated Introduction of the Integrated Services Digital Network (ISDN) in the European Community (86/659/EEC), O.J. L 382/36, annex ¶ 6 (1986) [hereinafter ISDN Recommendation].

33. Green Paper, *supra* note 3, at 71, 78, 95.

34. *Id.* at 71.

35. *Id.* at 67, 94; H. UNGERER, *supra* note 2, at 213.

36. See Council Resolution of 18 July 1989 on the Strengthening of the Coordination for the Introduction of the Integrated Services Digital Network (ISDN) in the European Community up to 1992, O.J. C 196/4 (1989); ISDN Recommendation, *supra* note 32.

tegration of its peripheral regions.<sup>37</sup>

While the publication of the Green Paper provided the spark for debate among all those concerned, it is obvious that at the end of such a debate the Community must move on to the stage of implementing the measures recommended.<sup>38</sup>

### III. COMMUNITY ACTION IN THE AREA OF TELECOMMUNICATIONS

Some of the actions that are envisaged in the Green Paper already have been implemented. Others are the subject of Commission proposals and are in the process of being examined or adopted by the Council of Ministers. In particular, the following five main actions deserve special mention.<sup>39</sup>

#### A. *Opening the Terminal Equipment Market*

On May 16, 1988, the Commission adopted a directive intended to open the terminal equipment market to competition.<sup>40</sup> This liberalization covers all terminal equipment including the first telephone set and receive-only satellite stations.

The legal basis chosen by the Commission for adopting this directive is Article 90(3) of the EEC Treaty. At present, the directive is the subject of an action before the European Court of Justice in which France, supported by other Member

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37. See Council Regulation (EEC) No. 3300/86 of 27 October 1986 Instituting a Community Programme for the Development of Certain Less-Favoured Regions of the Community by Improving Access to Advanced Telecommunications Services (STAR Programme), O.J. L 305/1 (1986) [hereinafter STAR Programme Regulation].

38. See COM(88) 48 final (1988) (setting out a program of action in light of comments received on the Green Paper).

39. The following review does not cover the Council Directive of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities (89/552/EEC), O.J. L 298/23 (1989); the Council Directive of 14 June 1989 on the Approximation of the Laws of the Member States Relating to Machinery (89/392/EEC), O.J. L 183/9 (1989); nor the Council Directive of 3 May 1989 on the Approximation of the Laws of the Member States Relating to Electromagnetic Compatibility (89/336/EEC), O.J. L 139/19 (1989).

40. Commission Directive of 16 May 1988 on Competition in the Markets in Telecommunications Terminal Equipment (88/301/EEC), O.J. L 131/73 (1988) [hereinafter Terminal Equipment Directive].

States, is disputing its legal basis.<sup>41</sup> Accordingly, the matter is *sub judice* and questions concerning the legal basis of this directive will not be examined here.

Nevertheless, not too much importance should be attached to the dispute between the Commission and certain Member States on this point because there is still a consensus as to the *content* of the directive of May 16, 1988. Thus, in its resolution of June 30, 1988, the Council unanimously stressed that the development of an open, Community-wide market for terminal equipment is one of the major goals of telecommunications policy.<sup>42</sup>

### B. Opening the Public Procurement Markets

The problem of public procurement in the telecommunications sector is the subject of a proposal for a directive that was sent to the Council in October 1988.<sup>43</sup> The main aim of this proposal is to assure that public procurement procedures will be non-discriminatory, free from any unlawful influences, and based exclusively on commercial criteria.

This proposal for a directive followed a Council recommendation made approximately four years earlier on November 12, 1984.<sup>44</sup> The Council recommendation provided for Member State telecommunications administrations to give

41. See *France v. Commission*, Case 202/88, \_\_ E.C.R. \_\_ (report of Judge Rapporteur).

42. Council Resolution of 30 June 1988 on the Development of the Common Market for Telecommunications Services and Equipment Up to 1992, O.J. C 257/1, at 2, ¶ 4 (1988).

43. Proposal for a Council Directive on the Procurement Procedures of Entities Operating in the Telecommunications Sector, COM(88) 378 final, O.J. C 40/5 (1989) [hereinafter Procurement Procedures Directive]. This proposal refers to the Proposal for a Council Directive on the Procurement Procedures of Entities Providing Water, Energy, and Transport Services, COM(88) 377 final, O.J. C 319/2 (1988). Procurement Procedures Directive, *supra*, O.J. C 40/5, at 6-7. Pursuant to the *Herman Report*, EUR. PARL. DOC. No. A2-75/89 (1989) (English ed.), a report from the European Parliament's Committee on Economic and Monetary Affairs and Industrial Policy, the Commission decided to merge these two proposals into one directive. O.J. C 158/271, at 271-72 (1989). The merged proposals appear in the Amended Proposal for a Council Directive on the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors, COM(89) 380 final, O.J. C 264/22 (1989). This Article, however, will refer to the two texts separately.

44. Council Recommendation of 12 November 1984 Concerning the First Phase of Opening Up Access to Public Telecommunications Contracts (84/550/EEC), O.J. L 298/51 (1984).

firms established in the other Community countries opportunities to provide telecommunications equipment in that state. Because little notice was taken of this Council recommendation in practice,<sup>45</sup> the Commission thought it necessary to propose a directive—a more effective legal instrument—in order to open this market by 1992.

The Commission, however, took into account the fact that the market for telecommunications equipment was more sensitive and more compartmentalized than others and proposed that this market be opened gradually.<sup>46</sup> In addition, the Commission proposed that the obligations arising from the directive concerning supplies and software services contracts apply to only seventy percent of the estimated value of the procurement procedures carried out in 1990 and in 1991.<sup>47</sup> From 1992 onward, all procurements will be covered by the directive.

In this regard, one question of fundamental importance remains: How does the Commission ensure that the principle of fair and open decisions on public contracts is respected? Four instruments are at the Commission's disposal to enforce the law on public procurement. First, the Commission may avail itself of the procedure provided under Article 169 of the EEC Treaty and bring the matter before the Court of Justice if a Member State has failed to fulfill any of its obligations under

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45. See Communication from the Commission on a Community Regime for Procurement in the Excluded Sectors: Water, Energy, Transport and Telecommunications, COM(88) 376 final (1988), at 72-119 [hereinafter Excluded Sectors Communication]. In particular, this Communication addressed the implementation of the Council recommendation of November 12, 1984 and concluded that

[t]he results . . . are disappointing as to the amount of tenders published, as to the level of response from suppliers in other Member States, as to the number of contracts awarded to suppliers in other Member States and even as to the information made available by Member States on their implementation of the Recommendation.

*Id.* at 113. See BULL. EUR. COMM., Supp. No. 6 (1988), for the joint publication of COM(88) 376 final and the two proposals on procurement procedures discussed in *supra* note 43.

46. Excluded Sectors Communication, *supra* note 45, at 75, ¶ 305. The Excluded Sectors Communication notes that the telecommunications agencies have awarded 70% to 90% of contracts to national producers. *Id.*

47. See Procurement Procedures Directive, *supra* note 43, art. 10(1), O.J. C 40/5, at 7.

the pertinent Community legislation.<sup>48</sup> For example, in a case involving Italy's discriminatory treatment of companies from other Member States in the public procurement of data processing systems, the Commission won a stunning victory as the Court denied Italy's defenses based on the "exercise of official authority" or on "grounds of public policy" under Articles 55(1), 56(1), and 66 of the EEC Treaty.<sup>49</sup>

Second, the Commission may request interim orders from the President of the Court of Justice under Article 186 of the EEC Treaty, which requires a Member State to take all necessary steps to suspend the procurement procedure of a public contract.<sup>50</sup> In this way, the Commission may act swiftly enough to counter effectively the unlawful award of a contract.<sup>51</sup>

Third, with the same aim in view, the Commission proposed a directive on the application of rules on procedures for the award of public contracts.<sup>52</sup> This directive will allow the administrative or judicial bodies of the Member States to take interim measures aimed at suspending the procedure for

48. See, e.g., *Commission v. Italy*, Case 199/85, 1987 E.C.R. 1039, Common Mkt. Rep. (CCH) ¶ 14,428.

49. *Commission v. Italy*, Case C-3/88, 1989 E.C.R. \_\_; see *supra* note 25.

50. See *Commission v. Italy*, Case 194/88 R, 1988 E.C.R. \_\_ (orders of the President of the Court of Nov. 15, 1989, Sept. 27, 1988, Sept. 13, 1988, and July 20, 1988).

51. Unfortunately, this method of countering unlawful contract awards was deemed inappropriate in *Commission v. Ireland*, Case 45/87, 1988 E.C.R. \_\_, Common Mkt. Rep. (CCH) ¶ 14,509. In this case, Ireland had invited contract bids for the construction of a water pipeline. The Commission intervened at an early point in time, when suspension of the public contract in question still could have been ordered. See *Commission v. Ireland*, Case 45/87 R, 1987 E.C.R. 783. Consequently, in an order dated February 16, 1987, the President of the Court granted interim measures to delay the award of the contract. *Id.* On March 13, 1987, however, the President of the Court cancelled the previous order and rejected interim measures against Ireland. *Commission v. Ireland*, Case 45/87 R, 1987 E.C.R. 1369, 1379. The Court found that the objective of the contract to supply water and the existing safety and health hazards that would result from the failure to complete this contract weighed against an interim measure to stop Ireland from completing the project. *Id.*

52. See Amended Proposal for a Council Directive on the Coordination of the Laws, Regulations and Administrative Provisions Relating to the Application of Community Rules on Procedures for the Award of Public Supply and Public Works Contracts, COM(88) 733 final, O.J. C 15/8 (1989). This directive has already been the subject of a common position of the Council and was adopted recently. See Council Directive of 21 December 1989 on the Coordination of the Laws, Regulations and Administrative Provisions Relating to the Application of Review Procedures to the Award of Public Supply and Public Works Contracts, O.J. L 395/33 (1989).

awarding a public contract and to set aside decisions taken unlawfully.<sup>53</sup>

A fourth instrument that the Commission may use to ensure compliance with Community rules on public contracts concerns the administration of the Commission's Structural Funds and other Community financial instruments. The Commission has decided to implement a system whereby it can check whether projects or programs funded by these financial instruments are being carried out by the Member States with due respect for Community law on public procurement.<sup>54</sup> In the event of non-compliance with Community rules, the Commission may refuse a request for assistance, suspend payments, and, if necessary, recover payments already granted. Therefore, potential recipients of Community financial assistance will have to undertake scrupulously their obligations with regard to public procurement rules.

Finally, this same system of enforcement may be applied a little less stringently to public contracts falling under sectors not yet covered by the Commission directives, such as the telecommunications sector.<sup>55</sup> At present, this method of enforcement is being applied with respect to financial assistance requested in the framework of the special telecommunications action for regional development ("STAR Programme"),<sup>56</sup> even though the directive on public procurement in the telecommunications sector has not yet entered into force.

While it might appear that the various rules and legal instruments for monitoring the behavior of the actors in the field of public procurement are unusually strict, it should be remembered that the public contract sector has been frag-

53. This proposed directive does not yet cover the telecommunications sector. However, it is expected that the Commission will propose another directive on the application of Community rules on procurement procedures in order to cover the excluded sectors.

54. See Comm'n Press Release, IP(88) 268 (May 4, 1988); see also Notice C(88) 2510 to the Member States on Monitoring Compliance with Public Procurement Rules in the Case of Projects and Programmes Financed by the Structural Funds and Financial Instruments, O.J. C 22/3 (1989) [hereinafter Commission Notice on Procurement Rules].

55. See Commission Notice on Procurement Rules, *supra* note 54, O.J. C 22/3, at 5, ¶ 12. The Commission will give priority to those requesting assistance who will undertake to open up contracts to Community competition. *Id.*

56. See STAR Programme Regulation, *supra* note 37.

mented for decades due to nationalist purchasing practices.<sup>57</sup> Consequently, a number of firm measures seem to be necessary to open this sector to competition. The Commission's uncompromising attitude can best be described by the words of U.S. Supreme Court Justice Rutledge, who once said, "if this is drastic, it is because the violation was drastic."<sup>58</sup>

The effort to inject a sizeable portion of competition into the public contract sector has to be made with determination. This explains why the Commission is using every means at its disposal to complete the large unified market in this area.<sup>59</sup>

### C. Opening the Services Market

In the Member States, the provision of telecommunications services falls under monopolies of greater or lesser size. The effect of these monopolies is that potential service providers are often unable to offer cross-border, let alone pan-European, services. These services are being demanded by users who are preparing their firms for the large unified market of 1992 in which a need will exist to communicate quickly and efficiently with their banks, suppliers, subcontractors, and customers throughout the Community. Therefore, the completion of the internal market by 1992 necessitates a broad liberalization of telecommunications services in order to permit Community undertakings to derive maximum benefit from the growth of the European economy and the opportunities of-

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57. This fragmentation has continued despite the Community directives on the subject because the directives have not always been complied with, and the exceptions provided for in the directives have become the rule. The directives have been amended recently in order to ensure that they are applied more strictly in practice. See Council Directive of 18 July 1989 Amending Directive 71/305/EEC Concerning Coordination of Procedures for the Award of Public Works Contracts (89/440/EEC), O.J. L 210/1 (1989); Council Directive of 22 March 1988 Amending Directive 77/62/EEC Relating to the Coordination of Procedures on the Award of Public Supply Contracts and Repealing Certain Provisions of Directive 80/767/EEC (88/295/EEC), O.J. L 127/1 (1988); Boncompagni, "Les nouvelles directives 'Marchés publics,'" in *Les marchés publics européens*, 1989 REVUE FRANÇAISE D'ADMINISTRATION PUBLIQUE 17 (special issue); Flamme & Flamme, *Vers l'Europe des marchés publics?*, REVUE DU MARCHÉ COMMUN, Sept.-Oct. 1988, No. 320, at 455.

58. *Hartford-Empire Co. v. United States*, 323 U.S. 386, 450 (1945) (Rutledge, J., dissenting).

59. See Guide to the Community Rules on Open Government Procurement, O.J. C 358/1 (1987). In this document, the Commission notes that it intends to find ways of "radically improving the anachronistic situation in this sector." *Id.* at 2.



ferred by the creation of a single market.<sup>60</sup> Consequently, in June 1989, the Commission adopted the Directive on Competition in the Markets for Telecommunications Services (the "Services Directive").<sup>61</sup> This directive is based on Article 90(3) of the EEC Treaty, as is the directive on terminal equipment.<sup>62</sup>

In order to consider the reservations some of the Member States have with the Services Directive, the Commission postponed its entry into force so that the Council would have sufficient time to adopt the Revised Proposal for Council Directive on the Establishment of the Internal Market for Telecommunications Services Through the Implementation of Open Network Provision (ONP) (the "ONP Directive").<sup>63</sup> The Commission would like to provide for a parallel development between the liberalization and the harmonization of telecommunications regulation. Therefore, the Services Directive and the ONP Directive should enter into force simultaneously. Similarly, the Commission also would like to acknowledge a certain sharing of responsibility with the Council in regard to opening up the services market, but without foregoing the prerogatives accorded it by Article 90(3) of the EEC Treaty.

The Services Directive abolishes the exclusive or special rights of the postal, telephone, and telegraph administrations in the general field of telecommunications services, but not in the specific areas of voice telephone service and the network infrastructure.<sup>64</sup> The directive does not apply to telex service and allows Member States to prohibit the simple resale of capacity of leased lines for a transitional period ending in princi-

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60. See P. CECCHINI, *THE EUROPEAN CHALLENGE 1992: THE BENEFITS OF A SINGLE MARKET* 81-85 (1988). The economic advantage, or welfare gains, resulting from the internal market to the Community have been estimated at about ECU 216 billion and a resulting medium term growth in gross domestic product of 4.5%. *Id.* at 84, 97-98.

61. See Commission Directive of 28 June 1989 on Competition in the Markets for Telecommunications Services, C(89) 671 final (1989) [hereinafter *Services Directive*]; 22 BULL. EUR. COMM., No. 6, at 51, ¶ 2.1.95 (1989); Comm'n Information Memo P-36 (June 28, 1989).

62. See *Services Directive*, *supra*, note 61; *Terminal Equipment Directive*, *supra* note 40.

63. COM(89) 325 final, O.J. C 236/5 (1989) [hereinafter *ONP Directive*].

64. See *Services Directive*, *supra* note 61; 22 BULL. EUR. COMM., No. 6, at 51, ¶ 2.1.95 (1989); Comm'n Information Memo P-36 (June 28, 1989).

ple on December 31, 1992.<sup>65</sup>

As soon as this directive enters into force, private companies will be able to offer value-added telecommunications services in competition with the PTTs throughout the European Community. As of January 1, 1993, the private companies also will be able to offer basic services by way of the simple resale of capacity of leased lines.<sup>66</sup>

By the means of the Services Directive based on Article 90(3) of the EEC Treaty, the Commission has carried out its intention, as declared in the Green Paper, to open the market to competing service providers.<sup>67</sup> While Member States still hold certain reservations with respect to basing this directive on Article 90(3) of the EEC Treaty, a large majority of the Member States accepted *the content* of the Services Directive during a Council meeting on December 7, 1989.

#### D. *The Open Network Provision*

At the same time as it adopted the Services Directive,<sup>68</sup> the Commission adopted the revised proposal for the ONP Directive.<sup>69</sup> This proposal, based on Article 100A of the EEC

65. See Services Directive, *supra* note 61, at 3, ¶ 6; 22 BULL. EUR. COMM., No. 6, at 51, ¶ 2.1.95 (1989); Comm'n Information Memo P-36 (June 28, 1989).

66. See Services Directive, *supra* note 61, arts. 1(1), 2, at 13-14, 15; 22 BULL. EUR. COMM., No. 6, at 51, ¶ 2.1.95 (1989); Comm'n Information Memo P-36 (June 28, 1989). The Commission, however, may decide to change this date in the framework of the general evaluation provided for under article 10 of the Commission Directive of June 1989 on Competition in the Markets for Telecommunication Services. See Services Directive, *supra* note 61.

Under this directive, if a Member State meets the conditions imposed by Article 90(2) of the EEC Treaty, it may request an extension of the period during which it may prohibit the simple resale of capacity. Moreover, a Member State may impose certain obligations on the providers of basic telecommunications services, if necessary to safeguard the postal, telegraph, and telecommunication administration's public service obligation. The Commission, however, will approve the imposition of these obligations only after it has examined the Member State's request as to their proportionality and compatibility with Article 90(2).

67. See Green Paper, *supra* note 3, at 69-70, ¶ VI.4.2.3. As noted in the Green Paper, the Commission envisaged "Community Directives on Open Network Provision (ONP), based on articles 100A and 90(3) for technical specifications and network access respectively." *Id.* (emphasis added); see *supra* notes 25, 49 and accompanying text (discussing Commission's powers under Article 90(3) of EEC Treaty and Member States' defenses based on grounds of exercise of official authority and public policy).

68. See *supra* note 61 and accompanying text.

69. ONP Directive, *supra* note 63.

Treaty, is intended to facilitate access for competing service providers to public networks and to certain public telecommunications services as far as is necessary for the provision of telecommunications services to the general public.<sup>70</sup>

In drawing up this proposal, the Commission was aware that pan-European services may be made difficult or even impossible by the absence of harmonized technical interfaces and by divergent conditions of use or discriminatory tariff principles, even after the abolition of exclusive or special rights.<sup>71</sup>

Accordingly, the ONP Directive provides a framework in which this gap will be filled. Of course, the harmonization advocated will be implemented in close collaboration with the European Telecommunications Standards Institute ("ETSI")<sup>72</sup> and will necessitate a number of implementing directives in order to establish the details of the conditions of open network provision for each area covered.<sup>73</sup>

The ONP Directive also aims to set up a system of mutual recognition of declaration or authorization procedures for the provision of telecommunications services when such a declaration or authorization is required by the Member States.<sup>74</sup> By this means, the Commission wishes to achieve its aim of making available to service providers a single authorization procedure that will apply to the European Community as a whole, such as will occur in the banking sector.<sup>75</sup>

#### *E. The Mutual Recognition of Type Approval Procedures for Terminal Equipment*

As in the field of telecommunications services, the Commission is making every effort to prevent a terminal equipment manufacturer from having to go through twelve different type approval procedures for the same device. But, at present, this is still necessary before a terminal device is approved for con-

70. ONP Directive, *supra* note 63, arts. 6-7, O.J. C 236/5, at 9-10.

71. *See id.* art. 4, at 9; Green Paper, *supra* note 3, at 69-70, ¶ VI.4.2.3.

72. *See* Council Resolution of 27 April 1989 on Standardization in the Field of Information Technology and Telecommunications, O.J. C 117/1 (1989).

73. ONP Directive, *supra* note 63, art. 6, annex II, O.J. C 236/5, at 9, 11.

74. *Id.* art. 7, at 10.

75. *See* Second Council Directive of 15 December 1989 on the Coordination of Laws, Regulations and Administrative Provisions Relating to the Taking Up and Pursuit of the Business of Credit Institutions and Amending Directive 77/780/EEC (89/646/EEC), O.J. L 386/1 (1989).

nection to the networks of all the Member States. All these parallel procedures consume a large amount of time and make it relatively expensive to market a product. Therefore, there is a broad consensus between the Commission and the Member States that all these different approval procedures must be replaced by a single procedure.

A first step has been taken already in the form of a directive that provides for the mutual recognition by the Member States of the tests carried out for the approval of terminal equipment.<sup>76</sup> As soon as a certificate of conformity has been issued by a Member State on the basis of such a test, the other Member States may no longer require new tests to be carried out for the same type of terminal equipment.<sup>77</sup>

Nevertheless, a manufacturer wishing to market his product throughout the Community still must go through the *administrative procedures* of all Member States in order to obtain approval of his device. This situation will change only when the Proposal for a Council Directive on the Approximation of the Laws of the Member States Concerning Telecommunications Terminal Equipment, Including the Mutual Recognition of Their Conformity (the "Mutual Recognition Directive")<sup>78</sup> enters into force. This directive is intended to regulate the marketing of terminal equipment and its connection to public networks at the same time and by the same procedure. It provides that the manufacturer may choose between two procedures for evaluating the conformity of its device with harmonized standards.<sup>79</sup> On the one hand, a manufacturer may opt for an "EC type examination," which subjects the device in question to the examinations required and the tests necessary for determining whether it is in conformity with the relevant technical regulations.<sup>80</sup> Alternatively, the manufacturer may choose the "EC declaration of conformity," which comes close to the principle of self-certification.<sup>81</sup> The other side of the

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76. See Council Directive of 24 July 1986 on the Initial Stage of the Mutual Recognition of Type Approval for Telecommunications Terminal Equipment (86/361/EEC), O.J. L 217/21 (1986).

77. *Id.* art. 6(2), at 23.

78. COM(89) 289 final, O.J. C 211/12 (1989).

79. *Id.* art. 8, at 15.

80. *Id.*

81. *Id.* annex 4, at 20-22.

coin with regard to this more flexible procedure is that the manufacturer must implement an approved quality control system and place itself under "EC surveillance," which provides for a periodic examination and even unexpected spot checks in order to verify that the quality control system is being properly applied.<sup>82</sup>

This is how the Commission intends to set up a system that will allow manufacturers to market terminal equipment after satisfying the requirements of a single procedure applying throughout the Community. Thus, the manufacturers will benefit from a true single market by producing their terminal equipment in accordance with harmonized standards that apply throughout the Community and by marketing their products without any barriers in a vast market of 325 million people.

### CONCLUSION

Substantial progress already has been made toward carrying out the action envisaged in the Green Paper. The regulation of the terminals market already has been extensively liberalized despite the legal actions brought by certain Member States against the directive of May 16, 1988.<sup>83</sup> The proposal on opening up the public procurement market is before the Council, and, at the same time, the Commission is using every means at its command to open up this market even before the relevant directives are adopted.

As regards opening up the market in services, the Services Directive of June 28, 1989 has not yet entered into force. Nevertheless, a growing number of Member States are in the process of liberalizing their value-added services on their own initiative. When this directive and the ONP Directive enter into force, the Community will have a competitive environment with beneficial effects extending far beyond the telecommunications sector and supporting the growth of the European economy as a whole. Finally, the terminal equipment sector

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82. *Id.* annex 4, at 20-22. In regard to the different conformity assessment procedures, see the Proposal for a Council Decision Concerning the Modules for the Various Phases of Conformity Assessment Procedures Which Are Intended to Be Used in the Technical Harmonization Directives, O.J. C 231/3 (1989), and A Global Approach to Certification and Testing, O.J. C 267/3 (1989).

83. See Terminal Equipment Directive, *supra* note 40.

also will benefit from the potential of a large unified market with the implementation of the Mutual Recognition Directive.