Chapter 9
Asymmetric Re-regulation of Telecommunications Under European Community Law

Joachim Scherer

INTRODUCTION

The regulatory frameworks of the European telecommunications markets are in transition. On the national levels of the member states of the European Community (EC), the traditional regulatory model is organizationally oriented. Telecommunications policy has been, to a large extent, formulated and implemented by dominant public entities (the Telecommunications Administrations), which were regulated by national rather than European Law, and by organizational rather than substantive and procedural rules. In all member states, technological developments and economic pressures have led to considerable re-regulation, or at the very least to discussion about regulatory reforms.[1] The question of *asymmetric regulation* arises from the notion that such reforms are geared toward a more competitive environment for telecommunications.

Asymmetric regulation represents an effort to curtail or control the dominant firm's market power by setting different substantial, procedural, and organizational standards for the dominant firm and its competitors. In general, the dominance of national Telecommunications Administrations in the EC member states is being mitigated by this new regulatory approach.

However, these re-regulatory decisions on the national level require an active Community telecommunications policy if a common telecommunications market is to be established. For this reason, the Commission of the European Communities (the Commission) has launched a supranational telecommunications policy. Concomitantly, and with an eye to developments within the EC, the European Conference of Postal and Telecommunications Administrations (CEPT) is reviewing its organizational structure.

On June 10, 1987, the Commission of the European Communities adopted a Green Paper on the Development of the Common Market for Telecommunications Services and Equipment. This policy paper contains far-reaching proposals for telecommunications policy decisions concerning telecommunications networks and services, terminal equipment, and the regulatory frameworks for telecommunications on both the Community and national levels. The Green Paper contains the following policy proposals[2]:

1. the provision and operation of telecommunications network infrastructures may remain an exclusive right of national telecommunications administrations;
2. the provision of two-way satellite communications systems should be permitted on a case-by-case basis in order to foster the development of transborder telecommunications services, provided that the financial viability of the telecommunications administrations is not substantially affected;
3. the provision and operation of certain telecommunications services considered to be of social relevance may remain an exclusive right of national telecommunications administrations;
4. the provision and operation of telecommunications services not considered to be of social relevance should be opened to competition;
5. standards concerning network provision and definition of network infrastructure will be promulgated by the Commission;
6. network access for providers of competitive services should be governed by a community directive on open network provision containing definitions of network infrastructure provision, interconnect and access obligations for transfrontier service providers, technical standards, frequencies, and tariffing principles;
7. the provision of terminal equipment should be opened to competition;
8. regulatory and operational activities of Telecommunications Administration should be organizationally separated;

9. the operational activities of Telecommunications Administration will be continuously reviewed by the Commission under the antitrust provision (Art. 85, 86, 90) of the EEC Treaty;
10. likewise, the activities of all private providers will be continuously reviewed under Art. 85, 86, in order to avoid abuses of dominant positions.

There appears to be a widespread consensus on the recommendations concerning the provision and operation of network infrastructure and of services of social relevance, as well as the provision of terminal equipment.

Regarding the need for a community directive on open network provision, it was agreed that network access should be governed by European standards based on international standards.

The implementation of these policy goals will have a considerable impact on the respective roles of the national telecommunications administrations and the Commission.

This chapter attempts to give a preliminary answer to the question of whether, and to what extent, re-regulation under European law must and/or should be asymmetric in order to achieve these policy goals.

Part I briefly describes some of the regulatory issues confronting both EC Member states and the Community as a whole, and sketches out some of the emerging regulatory structures.

Parts II and III examine the admissability and scope of the asymmetric re-regulation under European Community law with respect to the provision of networks, services, and terminal equipment. Part IV addresses organizational and procedural aspects of asymmetric re-regulation. Organizationally, the emerging competition between telecommunications administrations and private network and/or service providers seems to require a separation of regulatory and entrepreneurial functions that have traditionally been carried out by the dominant telecommunications administrations. This organizational separation will necessarily lead to procedural consequences. Most importantly, the behavior of network and service providers in the emerging telecommunications marketplace will need to be screened and, if necessary, regulated by administrative bodies on both the national and the European level. This will require new types of administrative proceedings as well as careful consideration of the role of the Commission in the European policy-making process.

THE DOMINANCE OF TELECOMMUNICATIONS ADMINISTRATIONS: REGULATORY ISSUES ON THE NATIONAL AND ON THE EUROPEAN LEVEL

National Regulatory Frameworks in Transition

The traditional regulatory model in the member states of the European Community is organizationally oriented. Telecommunications policy is formulated and implemented by telecommunications administrations, which are characterized by specific organizational structures. In the European tradition, telecommunications administrations are public entities, in that they are characterized by public ownership, but also connected to the government by financial, personnel, organizational, and/or procedural ties. In addition, they are furnished with a double *de jure* monopoly status for provision of networks and of services, and are generally providers of both telecommunications and postal services.[3] According to this model, the European telecommunications administrations provide a public service characterized by the following normative rules:

1. the national telecommunications administration provides both telecommunications networks and services (except broadcasting services) and is obliged to do so at equal conditions (including equal tariffs) nationwide.
2. the telecommunications administration is obliged to guarantee the confidentiality of the information which it transmits.[4]
3. in fulfilling these tasks, the guidelines for decision making are the guarantees of free expression and of access to information.[5]

The traditional European model of telecommunications regulation attempted to achieve these goals predominantly by organizational means, i.e., by formalizing the organizational structure of the telecommunications administrations.

The procedural structures of European telecommunications administrations are clearly underdeveloped in comparison to the high degree of sophistication that characterizes their traditional structures.[6] This becomes evident through comparison with the American regulatory concept (before and after the divestiture of AT&T). The public service concept in the United States model is implemented by means of procedural structures with an independent agency, the Federal Communications Commission. Procedural rules govern the interorganizational relations between this regulatory body and the regulated private telecommunications providers (i.e., network and service).

In contrast, the traditional European regulatory concept is based on organizational structures. The definition of the *public interest*, and its implementation, occur within the organizational structure of the telecommunications administration, and the telecommunications administration itself is considered an instrument of public interest decisions. Consequently, regulatory and entrepreneurial functions are separated within the organizational structure of the telecommunications administration, and not generally entrusted to organizationally separated entities.

The notion of de jure monopolies, with respect to the European telecommunications administrations, is imprecise. These de jure monopolies encompass a multitude of exclusive rights and obligations. Their scope, and consequently the possible targets of deregulation, will become clearer when the monopoly positions are analyzed in terms of decisions and decision-making processes.

The creation of telecommunications networks and services is a highly complex and evolutionary process.[7] As such, it may be divided into several distinguishable procedures that are used to arrive at different decisions.

The traditional de jure monopoly of European telecommunication entities is the sum of these public service-related decisions, or, more precisely, the sum of the exclusive rights to take such decisions. These decisions may be categorized into three groups, including:

1. the planning and standardization of networks and services;
2. the installation of network facilities and telecommunications services; and
3. the provision of facilities and services to potential users.

For the traditional decision-making procedures of the European telecommunications administrations, the distinction between telecommunications facilities and services has traditionally played a minor role. Telecommunications networks were planned, installed, and operated as service-specific networks.

Telecommunications administrations in the EEC member states have been deeply affected by the convergence of telecommunications and data processing into what has become known as telematics (telematique). This convergence has, inter alia, resulted in the erosion of traditional technological boundary lines between telecommunications and computers, networks and terminals, networks and services, and transmission services and processing services. Thus the proliferation of telecommunications services requires changes in network functions, and a higher level of network integration.

The technological option of gradual network integration demands substantive policy decisions on both a national and a European level regarding network standardization and development, competition and access, and network use.[8]

With respect to network integration, the EC member states seem to have reached a consensus on the introduction of integrated services digital network (ISDN).[9] No similar common denominator of national telecommunications policies exists for network competition, standardization, and use.

The proliferation of telecommunications services has led to regulatory problems which may be summed up in the somewhat loaded question: Who should provide what type of telecommunications service, to whom, at what tariffs, and under what competitive conditions? The broad range of options for the location of processing and storage capabilities also necessitates decisions concerning the boundary lines between networks and services, between different categories of services, and between network and service providers. Issues for the near future include the distinction between universal services and non universal services, competition among service providers, and the relations between network and service providers.

As a consequence of telematics, the organizationally oriented model is gradually shifting toward a more procedural model. For this reason, the legal interfaces between the various parts of telecommunications and information systems and their actors will have to be re-defined.

One of the basic policy decisions with respect to the organization of the traditional European Postal and telecommunications administrations—PTTs—is whether or not the organizational and financial ties between postal and telecommunications services should be cut.

The PTTs in many member states provide both postal and telecommunications services and cross-subsidize their postal services with revenues generated from telecommunications services. It may be argued that such cross-subsidization is in the interest of certain user groups of postal services and contributes to the provision of universal postal services at reasonable tariffs. From an economic point of view, it can be argued that the joint provision of postal and telecommunications services does or could create economies of scope. On the other hand, cross-subsidization of postal services may lead to organizational slack. It may prevent cost-oriented pricing of telecommunications services and thus have repercussions on all national telecommunications policies. Moreover, the British experience seems to indicate that a separation of postal and telecommunications services does not necessarily lead to losses due to foregone economies of scope in production and procurement.[10] Those economies of scope may, however, increase with the introduction of new telecommunications services

which combine traditional postal and new telecommunications service features.

Also on the organizational level, telematics has led to a considerable pluralization of actors, who now have a stake in the regulatory process. These include new network and service providers; a multitude of administrative agencies, including ministries of economics and industry; data protection agencies; antitrust authorities; standardization organizations; and various organized user groups.

This diversification of industry structures, and therefore interests in the telecommunications sector, can no longer be managed by the traditional organizational structures of the telecommunications administrations. Therefore, new regulatory bodies have been created on the national levels of the member states for the purpose of establishing a formal process for gathering the information necessary for policy decisions. This new procedural approach has been adopted in the United Kingdom with the installation of OFTEL, a regulatory entity operating on the basis of procedural rules. The French Commission Nationale des Communications et Libertes is another example of this approach. Similar regulatory bodies may be established in the Netherlands, in Belgium, and in the Federal Republic of Germany.

The Evolving Community Law Framework

In the law-making process of the European Community, the Council, which consists of representatives of the member states, is the principal legislator of the Community. The general rule of Community law-making is that the Commission proposes, the Parliament advises, and the Council adopts. The Commission is essentially the Community's executive. It is involved in the preparation and implementation of legislation and may also exercise law-making powers granted by the Council. In some instances, the Commission also has law-making powers of its own; of particular importance in the telecommunications field is the Commission's power under Art. 90 (3) EEC Treaty, to adopt directives in order to ensure that Treaty rules are applied to public enterprises.

As a prelude to adoption of the Green Paper, the European Commission has initiated five activities related to the main policy objective establishing a common telecommunications market:[11]

- to launch a coordinated plan for the networks and telecommunications services development in the Community and common infrastructure projects,

- to create a Community-wide market for telecommunications equipment and terminals,
- to launch a development program for the long-run technologies required for the establishment of future broadband networks,
- to improve access for the less favored regions of the Community to benefit from the development of advanced services and networks, and
- to coordinate the negotiating positions within international organizations dealing with telecommunications.[12]

With respect to the coordination of telecommunications networks, services, and terminal equipment, the Commission has submitted a proposal for a Council recommendation concerning the coordinated introduction of the *integrated services digital network* (ISDN).[13] The recommendation, adopted by the Council on December 22, 1986[14] proposes: (a) the definition of precise interfaces between public networks and private local networks in order to ensure "total compatibility of terminals at a European level"; (b) that EC members take a "coordinated approach towards the introduction, in particular as regards the timing, of ISDN"; and (c) that a critical mass of subscribers be achieved before embarking on a demand-driven policy by 1988.[15] The Council Recommendation contains detailed guidelines for the introduction of ISDN (subscriber access at 144 Kbits/s and 2 MBit/s); the definition of the interface between public and private networks; and the definition and detailed specification of services to be made available in all member states starting in 1988. The recommendation also outlines general considerations to be addressed for setting tariff levels.

A further effort to coordinate services is represented by the "Council Recommendation concerning the implementation of harmonization in the field of telecommunications," which established a consultative procedure between the governments of the member states before the introduction of any new service "so that the necessary innovation takes place under conditions compatible with harmonization." Furthermore, it was recommended that the member states "ensure that all new services that are introduced from 1985 onwards are introduced on the basis of a common harmonized approach, notably with regard to services between member states, so that compatible services are offered throughout Europe, taking into account the progress of work in CEPT, CEN/Cenelec and ISO."[16]

Building upon this general recommendation, the Commission, in a recent Proposal for a Council Recommendation, has suggested the coordinated introduction of a public pan-European digital mobile communications system.[17] In order to implement this mobile communi-

cations system, the Commission has furthermore suggested a Council directive on the required frequency bands.[18] If this directive is approved by the Council, it will be the first binding rule of Community law concerning the introduction of a telecommunications system.

On the organizational level, a new unit—the Directorate General XIII (DG XIII)—has been established within the Commission. The tasks of the Directorate General are loosely described by the terms *telecommunications, information industries*, and *innovation*.

In November 1983, the Council agreed that the Commission would call together a *senior officials group* (SOGT), which has since served as a consultative body in the preparation of the Commission's policy decisions.

The emerging European telecommunications policy is governed by the EEC Treaty and by the fundamental human rights as developed by the European Court of Justice.[19]

The provision of telecommunications networks and services is mainly governed by three sets of treaty provisions: Article 59 et seq. on the freedom to provide services, Article 30 et seq. on the free movements of goods, and Article 85 et seq. on competition. The first set applies mainly to the provision of telecommunications networks and services; the second applies to the production, approval, and sale of telecommunications apparatus, including terminal equipment; and the third applies to both the provision of networks and services and to the provision of telecommunications apparatus.

ASYMMETRIC RE-REGULATION: PROVISION OF NETWORKS AND SERVICES

In the member states of the European Community, the national telecommunications administrations are, in general, the dominant providers of telecommunications networks and services. Consequently, asymmetric re-regulation under Community law would have to focus on the behavior of these administrations. Article 90 (2) of the Treaty of Rome, however, places severe restrictions on asymmetric re-regulation of public undertakings.[20]

This chapter aims to protect enterprises in the public sector in order to resolve conflicts between the member states' interests concerning certain national public interest goals, on one hand, and the Community's interest in creating the Common Market, on the other.[21] Before exploring the scope of the qualified exemption contained in Article 90 (2), this chapter will analyze the general rule concerning the freedom to provide telecommunications networks and services.

The General Rule: Freedom to Provide Telecommunications Networks and Services

Article 59 of the Treaty of Rome guarantees the freedom to provide cross-border services. *Services* are defined, by exclusion, in Article 60 of the Treaty as those which "are normally provided for remuneration in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons."

For analytical purposes and with regard to the "cross-border" requirement, it is appropriate to distinguish between two types of services under Article 59:

1. the provision of telecommunications networks, and
2. the provision of telecommunications services.

The provision of telecommunications networks may constitute a service "within the meaning of Articles 59 and 60 EEC Treaty." Whereas the provision of telecommunications networks within a Member state is not subject to Article 59 et seq. of the Treaty, the provision of telecommunications networks which extend beyond the territory of one Member state fulfills all the requirements of a *service* according to Article 59, 60: Establishing and operating the telecommunications facilities—i.e., providing the hardware and the software to fulfill at least certain transmission and switching functions—is neither an activity covered by Article 30 et seq. nor by Article 52 et seq. of the Treaty. Consequently, Article 59 et seq. are applicable.

The establishment of cross-border telecommunications networks as "services" under Article 59 may be particularly important for a satellite carrier that wants to offer cross-border links, as satellite technology is inherently a cross-border technology. Article 59 of the Treaty could be invoked to limit national restrictions on the freedom to provide such a service.[22]

According to an almost circular definition delivered by the CCITT, a *telecommunications service* is "that which is offered by an administration or a Recognized Private Operating Agency to its customers in order to satisfy a specific telecommunication requirement."[23]

This definition, though vague, suffices for purposes of European law. Because telecommunications services, which are offered via telecommunications networks, do not concern the transportation of or exchange of goods, they must be considered as *services* within the meaning of Article 59, 60 of the Treaty.[24]

The Court of Justice, in its Sacchi decision (ECR 1974 p. 409), which concerned the broadcasting monopoly of the Italian broadcasting corporation RAI, has drawn a boundary line between merchandise,

under Article 30, and services, under Article 59 of the Treaty, with respect to television broadcasting:

> In the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as provision of services."[25]

Television broadcasting being one type of telecommunications service, the Court's decision may be generalized to encompass all types of services which involve the transmission of information by means of telecommunications facilities.

Since Article 59 et seq. are directly applicable, they could arguably be used as legal instruments to create a common market for telecommunications services, forcing member states with a rigid regulatory structure to open their services markets.

The Commission could use the *manquement d'etat* proceedings under Article 169 against any member state that failed to fulfill its obligations under Article 59 of the Treaty.

The Exceptions
Article 90 as a Barrier to Asymmetric Deregulation?

The freedom to provide services, guaranteed in Article 59 of the Treaty, is subject, inter alia, to the following exceptions:

> According to Article 55, the treaty provisions do not apply to activities which are connected with the exercise of official authority in a Member state.
>
> A further exception is stated in Article 56 for provisions of Member states concerning the special treatment of foreign nationals on grounds of public policy, public security or public health.
>
> Pursuant to Article 90 (2), the treaty provisions do not apply to undertakings entrusted with the operation of services of general economic interest, in so far as they obstruct the performance, in law or in fact, of the particular tasks assigned to them.

Again, these exceptions may apply to both the provision of telecommunications networks and to the provision of telecommunications services via these networks.

The major obstacle to asymmetric deregulation seems to be Article 90 (2).[26]

In order to examine the scope of this exemption, which according to the European Court of Justice and legal doctrine must be narrowly construed,[27] three questions must be answered:

1. What are the criteria for considering a national telecommunications administration to be an *undertaking*?
2. What are the criteria for considering the provision of telecommunications networks and services to be a *service of general economic interest*?
3. What are the criteria for considering the undertaking to be *entrusted* with the operation of the service?

If and when a national telecommunications administration can be considered to be an undertaking entrusted with the operation of services of general economic interest, the Treaty requires a complex, prognostic assessment of consequences.

The question which must then be answered with some degree of plausibility is: will the application of competition rules or other rules of the Treaty (i.e., the rules of Article 59 et seq.) obstruct, in law or in fact, the particular task assigned to the undertaking?[28] Only when this judicial assessment of consequences leads to the result that the obstruction of the "particular task" is to be expected will the respective rules of the Treaty be held inapplicable.

The primary question is, however, if and to what extent the applicability of Art. 85 seq. of the Treaty is determined by Art. 222.

Art. 222 states that the Treaty is not to "prejudice rules in a member-State governing the system of property ownership". In the British Telecom case, which was decided by the European Court of Justice, Italy had attacked the Commission's decision ordering British Telecom to refrain from applying certain usage conditions concerning telecommunications services on the grounds that the member states were free under Article 222 of the Treaty to determine the extent of the public sector of their economy. The Court held that the purpose of British Telecom's usage conditions, which prevented message-forwarding agencies from providing certain services, was not "to close down private agencies established in contravention of (BT's) monopoly rights, but merely to modify the conditions under which the agencies carry on their activities."

Consequently, Article 222 of the Treaty did not prevent the Commission from assessing the validity of the regulations in question in relation to Article 86,[29] which prohibits abuse of a dominant position within all or most of the Common Market insofar as it may affect trade between Member states. Abusive behavior may, in particular, consist of the following: imposing unfair prices or trading conditions; limiting production to the detriment of consumers; applying dissimilar, discriminatory conditions to equivalent transactions with different trading parties; and making the approval of contracts subject to other parties' acceptance of unrelated supplemental obligations.

This reasoning provides a sound basis for an analysis of the interdependence between Articles 222 and 86/90 of the Treaty and its repercussions for European telecommunications policy: Art. 222 refers to property positions, whereas Articles 86/90 refer to economic behavior. It follows from the former that the member states are free to establish their own systems of property ownership, which, in the field of telecommunications, may consist of rules concerning the property of network facilities. As far as economic activities that exploit facilities are concerned, each member state is subject, inter alia, to the competition rules of the Treaty, including Article 86 and 90. Article 90 allows the member state to grant the exclusive right for the exploitation of a network upon a public undertaking, making it irrelevant whether or not this undertaking actually owns the network.

There are, however, interdependencies between property ownership under Article 85–90 of the Treaty: A member state's "system of property ownership" has repercussions upon the scope of permissible economic activities. As an example, if a member state defines *land property rights* as not including the use of subsoil water, this property ownership rule will restrict the scope of economic activities for all gravel dredging enterprises.[30]

A similar situation may arise in the telecommunications sector: If a member state defines the extent, the elements, and the interfaces of its national telecommunications network, these rules of (public) property ownership may have repercussions upon the scope of permissible economic activities of telecommunications providers.

In sum, Article 222 enables the member states to determine—within the limits of the evolving European fundamental right to property ownership[31]—the scope of permissible economic behavior, and, consequently, the scope of Article 90 of the Treaty.[32]

Since some member states categorically deny that their respective telecommunications administration could be qualified as an *undertaking*, this question will most probably stir some controversy between these member states and the Commission in the years to come.

Two criteria—one structural, the other functional—appear to qualify an entity as an *undertaking* within the meaning of Articles 85–90:

1. Its organization and/or procedures are tied to the member state, and
2. its activities are those that have to be undertaken in the marketplace.

The criterion of organizational and procedural ties between the undertaking and the member state has long been recognized as a basis

for distinguishing between private and public undertakings. Article 90 (1) of the Treaty, which concerns the admissibility of measures with respect to public undertakings, presupposes the existence of such ties. The Court has determined their function by stating that the member states' ability to influence the decisions of public undertakings imposes a special responsibility upon the member states.[33]

Governmental influence upon public undertakings may be exercised by a variety of organizational and/or procedural mechanisms, including governmental ownership of some or all of the entity's shares, contractual agreements, or statutory ties.[34] Whether or not the decisions or the undertaking are reached according to public or private law is not a factor in determining status in this case. Entities which are structured by private as well as by public law can be *public undertakings* within the meaning of Article 90 (1).

If an entity has some procedural and/or organizational ties with the member state, a second and more difficult question is whether such an entity may be considered an *undertaking* or part of the *government.* Here, the nature of the entity's activities becomes relevant.

Regulatory activities of an entity are necessary, but not sufficient, criteria to qualify an entity as part of the government. This was confirmed by the Court in the British Telecom case. In its decision, the Court did not explicitly qualify British Telecom as a public undertaking. Rather, the Court applied Article 86 on the grounds that British Telecom's activity was of a business nature, since it consisted of providing telecommunications services to the user for a fee. The fact that BT was empowered to issue regulations (or *schemes*) was deemed irrelevant for the application of Article 86, since the *schemes* did no more than lay down tariffs and conditions for the services offered and were determined by BT itself without any parliamentary interference.[35]

Based upon this reasoning, it could be argued that a telecommunications entity, which is governed by usage regulations subject to parliamentary and/or governmental interference, cannot be qualified as a public undertaking.[36] The Court's judgment in the Radio Luxembourg case, however, seems to indicate that legislative influence on a public undertaking does not necessarily lead to the inapplicability of Art. 86.[37]

This case concerned Radio Luxembourg's attempt to provide exclusive rights to use a specific form of TV advertisement to an affiliated company, thus excluding competitive suppliers. The case focused on telemarketing, in which a viewer is asked to dial a certain phone number at the end of a commercial. According to the judgment, this conduct was in violation of Article 86 EEC Treaty.

What, then, is the boundary line between an activity of a business nature and an activity of a nonbusiness, i.e., governmental, nature?

It appears that no clear boundary line exists. The dichotomy of activities "of a business nature," on one side, and of a governmental nature on the other side, even though very popular in European legal doctrine,[38] is based upon the neoliberal distinction of market and government, which is inadequate to describe, analyze, or regulate the economic behavior in a mixed economy. Drawing a sharp boundary line between traditional governmental activities[39] and business activities would be tantamount to petrifying the existing distribution of tasks between the public and the private sectors.

The dynamics of community law, and those of governmental versus nongovernmental functions in a mixed economy, require a less restrictive, democratic view.[40] The boundary lines between governmental and non-governmental or business activities have to be kept open for substantive, organizational, and procedural changes that will first occur in the regulatory frameworks of the member states, and then within the European law framework.

In other words, entities that fulfill governmental tasks today may have to be qualified as *public undertakings* tomorrow (and vice versa) because of changes in society's perception and, consequently, the regulatory framework of their tasks. For some of the traditional activities of telecommunications administrations, this transition has already begun. If it continues, the legal consequence will be that Article 85 seq. of the Treaty will be applicable to every organizationally and/or procedurally separated telecommunications entity that engages in the activities concerned.

This dynamic conception distinguishing governmental and business tasks is in accordance with the Court's case law concerning the subsequent decision on the boundary line between services of general economic interest and services of private interest. Here, the Court has explicitly deferred the determination of the general economic interest to the discretion of the member states—subject to community law scrutiny of abuses of this discretion.[41]

If a national telecommunications administration can qualify as a public undertaking and enjoy an exclusive right to provide a telecommunications network, is the telecommunications administration an undertaking that is entrusted with the operation of "services of general economic interest" within the meaning of Article 90 (2)? The notion of general economic interest does not refer to the general economic interest of the Community. This follows from the objective of Article 90 (2): Since the general economic interest must be one that justifies an exemption from the application of the Treaty, it cannot be

identical with the Treaty's goals. Consequently, the general economic interest must be that of the respective member state. However, the yardstick used to determine the validity of a *general economic interest* is community law.[42]

In its British Telecom decision, the European Court of Justice implicitly confirmed this intricate relationship between national interests and Community law when it rejected the Commission's contention that Article 90 (2) was aimed to preserve only the interests of the Member state directly concerned. The Court rejected that argument, stating that interpretation of Art. 90 (2) was not left to the discretion of the Member state; on the contrary, the Commission, under the Court's supervision, was responsible for application of this article.[43]

The general economic interest under Article 90 (2) is characterized by a substantive and a procedural criterion: The general economic interest is more than the specific economic interest of the undertaking concerned. In other words, the undertaking's interest in profit maximization must be subordinated to the general economic interest.[44] Procedurally, general economic interests are created by or on the basis of legislative decision. It is up to the legislator, or more generally a "measure adopted by the public authorities," to define and delineate the public interest objectives of public undertakings.[45] Consequently, whether or not the provision of telecommunications networks and services is a "service of general economic interest" depends upon regulatory decisions of the member states, subject to community law scrutiny.[46] The member states will have to define and redefine their *general economic interests* with respect to telecommunications networks and services.

Arguably, the provision of a nationwide telecommunications network infrastructure that is linked to international telecommunications facilities is a *service of general economic interest*.[47] Whether or not the same applies to the provision of local networks and to the provision of telecommunications services remains to be discussed.

The Treaty requires that the undertaking must be entrusted with the operation of the service in question. The Court has ruled that entrusting requires a governmental act by the competent authorities;[48] any de jure monopoly of a network provider will therefore ultimately have to be based upon a legislative decision.

Qualification as an undertaking within Article 90 (2) does not, in and of itself, free an entity from the obligations of the Treaty (including Article 59). Its applicability depends further upon the question of whether or not "the performance . . . of the particular tasks" assigned to a telecommunications administration would be obstructed by application of the rules of the Treaty.

The Court's decision in British Telecom appears to imply that the scope of this exception differs from the scope of the public interest exception developed elsewhere by the Court under Articles 59, 56; whereas the public interest exception applies only to public interest considerations of a noneconomic nature, the "performance...of the particular tasks" assigned to a public undertaking could also be obstructed by economic behavior.[49]

The particular task assigned to a telecommunications administration as telecommunications network provider is the construction and operation of telecommunications networks. The performance of this particular task could, arguably, be obstructed if the telecommunications administrations' exclusive right to provide networks were abolished. This could lead to cream skimming by competing network providers and ultimately obstruct the provision of universal network services by rendering the provision of a nationwide, modern telecommunications network impossible.[50]

The danger that the provision of network services may be obstructed must, however, be clearly demonstrated by the network provider in question.

The task assigned to a telecommunications administration as a telecommunications service provider may consist of the provision of universal services. Again, it is assumed that the performance of this task may be obstructed if competing service providers engage in cream skimming.

The British Telecom decision, as well as previous rulings, shows that the Court will scrutinize assertions of obstruction very carefully.[51] One must keep in mind, however, that the British Telecom case arose in a very unusual procedural setting.[52] The Commission's decision ordering British Telecom to terminate alleged abuse of its dominant position, vis-á-vis the private service provider Telespeed, was appealed, not by British Telecom, but, rather, by the Italian government. Furthermore, the British government intervened on the side of the Commission, thus opposing the Italian government's attempt to fight British Telecom's battle.

Since British Telecom had not availed itself of any legal remedies against the Commission's decision, and since the United Kingdom considered that BT's regulations with respect to forwarding agencies were not necessary in order to fulfill its public service functions, it could hardly be argued that BT's performance of its public service tasks was being obstructed.[53] In other words, the Italian government's argument that Telespeed obstructed the performance of BT's public service tasks lacked plausibility.

The Court could easily dispose of this argument by pointing out

that "the Italian Republic has produced no evidence to show that the overall balance of the agencies' activities in the United Kingdom was negative so far as BT was concerned or that the Commission's condemnation would, from an economic viewpoint, prejudice the accomplishment of the tasks assigned to BT."[54] Just how strictly the Court is likely to scrutinize assertions of obstruction in a case where the service provider was in the role of the plaintiff, remains an open question.

Asymmetric Regulation of the Behavior of Dominant Undertakings under Art. 86

The Treaty's main yardstick for asymmetric regulation of the behavior of telecommunications administrations is Article 86, which prohibits "any abuse by one or more undertaking of a dominant position within the common market or in a substantial part of it." Since Article 90 (2) does not summarily exempt the national network and service providers from the provisions of the Treaty, including the provisions on competition, each of their decisions concerning the establishment, extension, and use of their networks has to be considered on its own merits.

The national telecommunications administrations as telecommunications network and service providers are generally in a dominant position that enables them to "impede effective competition" in their respective markets.[55]

According to the Court's case law, the abuse of a dominant position, which is characterized by four types of abusive behavior according to Article 86 (2)(a)(d), is an objective concept relating to the behavior of an undertaking:

> which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[56]

Such abusive behavior may be directed toward competitors, customers or suppliers, and the public.[57]

The technological developments described above[58] appear to elicit five types of behavior which could be qualified as abusive:

1. extending the network monopoly,
2. extending the service monopoly,
3. regulating network access,
4. tariffing of competing service providers, and,
5. cross-subsidizing

A dominant telecommunications administration may inhibit competitors from entering the market by including certain telecommunications services or terminal equipment, which are not common throughout the network,[59] in its de jure network monopoly, thus excluding competing service providers from the market. Such decisions may, however, be justifiable under Article 90 (2); i.e., it may be considered a matter of "general economic interest" to locate certain protocol conversion services in the network rather than having this service performed by separate service providers in order to achieve a high level of penetration for the respective telecommunications service.

An existing service monopoly may be extended by adding "new" service features to "old" monopoly services (thus adding "value" to that service) or simply by establishing new services and excluding competing enterprises from providing them. Again, such an extension of an existing de jure monopoly may be justifiable under Article 90 (2) if it can be shown that the application of Article 86 would obstruct the performance of the particular task assigned to the telecommunications administration.

Regulations of network access may constitute an abuse of a dominant position with respect to service providers, if the network provider charges unreasonable access fees, or sets unreasonable or discriminatory technical standards for network access. The dominant provider must also refrain from imposing access conditions which constitute unlawful tying practices under Article 86 (d), i.e., by making access to the network conditional on whether terminal equipment or other (network) services are from the network provider as well.[60]

An abuse of a dominant position may also consist in "directly or indirectly imposing unfair purchase... prices" (Article 86 (a)), that is, in setting unfair tariffs for the use of the network providers' facilities by private service providers.[61] A question of particular interest to service providers is whether or not Article 86 of the Treaty prohibits usage-sensitive tariffs on leased (point-to-point) lines. Arguably, the use of volume-sensitive tariffs may be a disincentive for private service providers. On the other hand, flat-rate tariffs on leased lines may (due to the tariff structure of public networks) result in diverting traffic from the public networks, which is considered to be economically inefficient cream skimming.

In its British Telecom decision, the Court did not comment upon the legality of flat-rate or usage-sensitive tariffs under community law, even though the Italian government had raised this issue. Since the Court found no evidence that leased lines had been used, the question of how their use should have been tariffed was moot.[62]

Whether or not dominant network and service providers are also abusing their market position by cross-subsidizing certain competitive telecommunications services with revenues from monopoly services is an open question.[63] Arguably, cross-subsidization per se is not an abuse of a dominant market position and may even be necessary to stimulate demand in order to foster the growth of a telecommunications service and create a market. Additionally, the cross-subsidization of services of general economic interest may be justified under Article 90 (2).[64] Cross-subsidization could, however, could be considered to be abusive if it was used for unfair, "predatory" purposes.[65]

Agreements Among Undertakings: Regulation Under Art. 85

Article 85 prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market." Whereas intergovernmental telecommunications agreements would fall outside the scope of Article 85, it appears that certain types of agreements among telecommunications administrations could warrant the Commission's scrutiny. It has been argued[66] that Article 85 is applicable if and when agreements concluded within the CEPT adversely affect competition in telecommunications services.

Such agreements may concern network structures, the availability and tariffing of leased lines, or interconnection and routing arrangements. Though Article 85 may apply to these agreements, they are not necessarily invalid but could be permitted under an exemption from Article 85 (3). Exemption, however, would allow the Commission to scrutinize and influence, on a case-by-case basis, agreements concerning telecommunications networks and their use.

Regulatory Tools and Sanctions

In a case of anticompetitive behavior of public network and service providers, the Commission has at its disposal two sets of regulatory tools and sanctions. As far as the undertaking is concerned, the

regulatory tools and sanctions on the basis of Regulation 17 apply. Regarding the member state, the Commission may use the manquement d'etat proceedings under Article 169 of the Treaty as a regulatory tool.[67] The main tool, however, is supplied by Article 90 (3). On its basis, the Commission is empowered to ensure the application of the Treaty provisions by public undertakings on a case by case basis. Its decisions may order a member state to refrain, in the future, from infractions of the Treaty or to remove measures contrary to the Treaty.

Additionally, the Commission may, within its discretion, take legislative measures on the basis of Article 90 (3). This provision enables the Commission to address "appropriate" directives to member states in order to ensure the application of the provisions of Article 90. A *directive* is a regulatory instrument, which, according to Article 189, "shall be binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and methods." Just how far a Community law directive—with respect to the provision of telecommunications networks, services, and/or terminal equipment—could re-regulate the national telecommunications administrations is an open question. The case law of the European Court of Justice provides only scant elements for an answer.[68]

ASYMMETRIC RE-REGULATION: PROVISION OF TERMINAL EQUIPMENT

Provision of Terminal Equipment: Art. 37

With respect to the provision of terminal equipment, the Treaty requires asymmetric re-regulation in Article 37:

> member states shall progressively adjust any State monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of member states.

According to the case law of the European Court of Justice, a state monopoly of a commercial character is characterized by playing an active role in trading goods.[69] Typically, telecommunications administrations do not trade in goods. Their exclusive right to provide terminal equipment are not tantamount to an exclusive right to sell terminal equipment.

The scope of Article 37, however, is not restricted to trade monopolies:

> The provisions of this Article shall apply to any body through which a member state, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between member states. These provisions shall likewise apply to monopolies delegated by the State to others.

The asymmetric regulatory thrust of Article 37 is reinforced by ¶2, which obliges member states to "refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1." Undeniably, telecommunications administrations will "appreciably influence..imports...between Member States" by reserving an exclusive right to provide certain telecommunications terminals.[70] Such exclusive rights will force the producers of terminal equipment to sell all their products or a large part thereof to the telecommunications administration. Likewise, the consumers will be forced to use the equipment provided by the telecommunications administration. Consequently, Article 37 applies to the exclusive provision of terminal equipment.

The Commission has used its powers under Article 37 in the cordless telephones case against the German Federal Post Office (Deutsche Bundespost—DBP).[71] This case concerned an attempt of the DBP to extend its monopoly to the provision of cordless telephones. The Commission did not question the DBP's network monopoly. It did, however, intervene with regard to the extension of this monopoly to a terminal equipment device. The Commission argued that this extension of the existing monopoly constituted a new measure within the meaning of Article 37 PG2, which was directly prohibited by that Article.

The German Federal Post Office accepted the Commission's point of view, notwithstanding its own legal position that the provision of the cordless telephone was a service and not a provision of goods.[72] Consequently, the case was closed without a formal decision, which could have contributed to determine the scope of the exemptions to Article 37.

This provision is subject to Article 36,[73] which provides, inter alia, that import restrictions may be justified on grounds of public policy or public security as long as they do not "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States." These grounds must be of a noneconomic nature[74] and could arguably encompass valid technological reasons in favor of the exclusive provision of certain terminal equipment devices. The main public

policy goal proffered in this context is the protection of the public telecommunications network from harm.

According to the Court's case law, however, exclusive rights to provide terminal equipment would have to be strictly necessary in order to achieve public policy goals.[75] Since the public policy goal to protect the public telecommunications network from harm can be achieved in a less restrictive manner by type approval proceedings, exclusive rights to provide telecommunications equipment are not necessary in order to achieve a public interest goal under Article 36.

Another line of argument attempts to justify the exclusive provision of terminal equipment on the grounds that it serves the goal of consumer protection. The European Court of Justice held, in its Cassis de Dijon line of cases, that consumer protection may justify restrictions upon the free movement of goods.[76] Exclusive provision of terminal equipment is said to facilitate innovation if and when changes in the network infrastructure necessitate changes of terminal equipment.[77]

It is doubtful, however, whether or not exclusive rights to provide telecommunications terminal equipment would pass the Court's rigid "less restrictive alternative" test.[78]

Provision of Terminal Equipment: Art. 86

In the modem case, the Commission challenged the German Federal Post Office's decision to establish an exclusive right for the provision of modems to be connected to the direct call and telephone networks. In this case, the Commission based its proceedings on Articles 37 and 86 in conjunction with Article 90. The Commission argued that the extension of the Bundespost's monopoly fell within Articles 37 ¶2, and that tying the provision of telephone network services to the purchase of modems was an abuse of the Bundespost's dominant position as a network operator under Art. 86 of the Treaty. The case was geared toward addressing a formal decision under Article 90 (3) to the Federal Republic of Germany, thus testing the Commission's regulatory powers under Article 90.

Again, the case was settled without a formal decision. The Bundespost agreed to relinquish its exclusive right and type-approve privately owned modems.[79] When the modem case was settled, the Commission announced that it would consider any exclusive right of a telecommunications administration to provide telecommunications terminal equipment as an infraction of Article 37 ¶2 and as an unlawful tying arrangement under Article 86 of the Treaty.[80]

SEPARATION OF REGULATORY AND ENTREPRENEURIAL FUNCTIONS

On the structural level, the applications of asymmetric regulation to control the behavior of dominant telecommunications administrations may require separation of regulatory and entrepreneurial functions or, at least, procedural and substantive rules governing the Administration's regulatory behavior.

This structural re-regulation, which is deemed necessary in order to abolish existing asymmetries, concerns, in particular, the approval of terminal equipment and the licensing of competing service providers.

Approval of Terminal Equipment

Before being approved for connection to the network, terminal equipment must undergo technical tests in order to establish whether or not certain "essential requirements" are being met. Such approval procedures and standards are governed by the treaty provisions of Article 30 seq. concerning the free movement of goods.[81]

Asymmetric distributions of regulatory and entrepreneurial powers may lead to two different types of infringements upon the principle of Article 30:

1. technical standards may be over-stringent, and not the least restrictive means to achieve public interest goals.
2. the application of technical standards in a particular case may infringe upon Article 30.

The case law of the European Court of Justice as well as Council directives, provide a legal framework for the resolution of these problems.

According to the Court's case law under Article 30 of the Treaty, approval requirements must not be disproportionate in relation to the public interest goal pursued.[82]

With respect to approval procedures, the Court has developed a similar less restrictive alternative test. In the biological products case, concerning the approval of insecticides, the Court held that the importing member states may not require further tests and inspections if the same tests and inspections have already been carried out in another member state and if the results have been made available to the authorities in the importing member state.[83] In the woodworking machines case, concerning the safety standards for woodworking equipment, the Court held that a member state would violate the

principle of proportionality if it were to require that imported products satisfy literally and exactly the same technical specifications prescribed for national products.[84]

The administrative due process requirements under European law were further explored in the recent franking machines case; with respect to administrative procrastination in an approval proceeding for foreign franking machines, the Court held that conformity of substantive technical standards with Art. 30 does not suffice. Article 30 is violated when a member state adopts:

> a systematically unfavorable attitude towards imported machines, either by allowing considerable delay in replying to approval applications or in carrying out the examination procedure, or by refusing approval on the grounds of various alleged technical faults for which no detailed explanations are given or which prove to be inaccurate.[85]

The evolving body of secondary European telecommunications law comprises substantive and procedural rules concerning both technical standards for terminal equipment, and the application of these standards, i.e., the type-approval proceedings. The essential requirements which terminal equipment must meet under European law[86] are user safety, safety of employees of public telecommunications network operators, protection of public telecommunications networks from harm, and the interworking of terminal equipment in justified cases. The Council Directive of March 28, 1983,[87] established procedural rules obliging the Member states to inform the Commission of any new approval regulation before it is implemented. This notification procedure enables the Commission and other member states to object to any draft regulations which could be considered incompatible with Article 30 of the Treaty.

The Council Directive of July 24, 1986[88] has introduced the first stage of the mutual recognition of type approval for telecommunications terminal equipment. This first stage consists of the mutual recognition of the results of the conformity test specification.[89] The Directive establishes a procedure for the promulgation of common technical standards ("common conformity technical standards") used in all the Community member states by approval laboratories which must be approved by the restrictive member states. The Directive also contains requirements which the "certificates of conformity" issued by the national approval authorities have to fulfill (Article 7 (3)). If such a certificate of conformity has been issued for a particular type of terminal equipment in one member state, the authorities of another member state must recognize this certificate for the purposes of their own type approval procedures and must not require any further tests (Article 6 (2)).

In sum, the emerging Community telecommunications law with respect to the approval of terminal equipment is characterized by a considerable reliance on substantive (European) technical standards and by procedural rules. The organizational structures of the national approval authorities have not been subjected to (asymmetric) re-regulation.

Network Access

The need for asymmetric re-regulation under European law may also arise with respect to network access and use.

National telecommunications administrations could abuse their dominant positions as network providers by setting discriminatory technical standards for access and use of their networks by competing service providers.

Apart from case by case adjudication of such abuses under Article 86 of the Treaty, the Commission may, within its discretion, take legislative measures on the basis of Article 90 (3).[90] Their legitimate scope, particularly the question as to whether or not Article 90 (3) may become a legal basis for the development of a European open network architecture, similar to the comparable efficient interconnection and open network requirements of the U.S. Federal Communications Commission, will require further legal analysis.

In any event, given the division of regulatory powers between the European Community and its member states, re-regulation of network access will have to be based upon substantive technical standards and procedural rules of secondary Community law rather than on structural separation requirements with respect to the organizational structures of national telecommunications administrations.

CONCLUSION

The question whether or not European Community law requires an asymmetric re-regulation of telecommunications cannot be answered with a simple yes or no.

An analysis of the framework of the Treaty and the evolving European telecommunications law, leads to a set of differentiated answers.

While the American experience is helpful in tracing the problems of asymmetric re-regulation, it does not alleviate the burden of finding European solutions.

ENDNOTES

[1] For analyses of the regulatory developments in Belgium see: B. de Crombugghe/Y. Poullet, La Reglementation des Telecommunications en Belgique, in: Administration Publique, 1986, pp. 187–214; France: Genevieve Bonnetblanc, Les Telecommunications Fracaises: Quel Statut pour Quelle Entreprise ? Paris 1985; Jean Bernard Blaise, Rundfunk-und Fernmeldepolitik in Frankreich. Das neue franzosische Gesetz uber die Telekommunikation, in: Joachim Scherer (ed.), Nationale und europaische Perspektiven der Telekommunikation, Baden-Baden 1987, p. 69 seq.; Federal Republic of Germany: Joachim Scherer, Telekommunikationsrecht und Telekommunikationspolitik, Baden-Baden 1985; the Netherlands: Bernt Hugenholtz/Wouter Hins, The Law and Economics of Transborder Telecommunications: Report on the Netherlands, forthcoming; United Kingdom: Arnulf Heuermann/Karl-Heinz Neumann, Die Liberalisierung des britischen Telekommunikationsmarktes, Berlin 1985. For comparative analyses see: Robert R. Bruce/Jeffrey P. Cunard/Mark D. Director, From Telecommunications to Electronic Services, 2 vol., London 1986 (ed.: International Institute of Communications); Joachim Scherer, Nachrichtenubertragung und Datenverarbeitung im Telekommunikationsrecht, Baden-Baden, 1987.

[2] Cf. Commission of the European Communities, Towards a Dynamic European Economy: Green Paper on the Development of the Common Market for Telecommunications Services and Equipment, COM (87) 290 final, Fig. 3 and pp. 184–192. For a legal analysis of the Green Paper see Joachim Scherer, European Community opens its telecommunications networks: Legal aspects of the Green Paper, in: International Computer Law Adviser, September 1987. For an analysis of the Commission's early "teleinformatics strategy" see Thomas J. Ramsey, Europe responds to the challenge of the new information technologies, in: 14 Cornell International Law Journal (1981), pp. 237 seq.

[3] Postal and telecommunications services were separated in the United Kingdom in 1981. For an in-depth analysis of the economic implications see Arnulf Heuermann/Thomas Schnoring, Die Reorganisation der britischen Pose - Ansatze zu einem Vergleich mit der Deutschen Bundespost, in: Jahrbuch der Deutschen Bundespost 1985, p. 321.

[4] The European Court of Human Rights has decided that telephone conversations are covered by the notion of "private life" and "correspondence" within the meaning of Art.8 of the European Convention on Human Rights and that "powers of secret surveillance of citizens, characterizing as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions", Klass case, European Court of Human Rights, Judgement (7 Sept. 1978), Series A no. 28, p. 5, 21. This right of the individual was expanded in the Malone case, Judgement (2 August 1984), Series A no. 4/1983, 60/94, where "reasonable clarity" was required of laws and statutes abridging this right (p. 30) and, in particular, the right of telecommunications was extended to "metering" (i.e., the registration of the numbers dialed on a particular telephone): "The records of metering contain information, in particular the numbers dialed, which is an integral element in the communications made by telephone" (p. 31 seq.).

[5] With the emergence of new telecommunications services and the blurring of traditional boundary lines, the need for regulation in order to protect and enhance these freedoms, has increased.

Cf. Joachim Scherer, Telekommunikationsrecht und Telekommunikationspolitik, Baden-Baden 1985, pp. 681–722 with respect to the regulatory framework in the Federal Republic of Germany. For an evaluation of the implications that freedoms of expression and information under Art. 10 of the European Convention of Human Rights have on technical means of communications see Martin Bullinger, Freedom of expression and information: an essential element of democracy, in: Human Rights Law Journal 6 (1985), p. 338, at 349 seq.

[6] For a comparative analysis of the organizational structures of the European telecommunications administrations see R.R. Bruce/J.P. Cunard/M.D. Director, supra, note 1. For a comprehensive presentation of the organizational structure of the Deutsche Bundespost and its development see Helmut Bielefeld, Organisation, Heidelberg, 1982.

[7] See, for a description of the ISDN evolution from a technical perspective, Anthony M. Rutkowski, Integrated Services Digital Network, Dedham Mass. 1985, pp. 33–175; see also Joachim Scherer, supra. note 5, pp. 368–392, 553–567, describing the evolution of new telecommunications services. A lucid account of the technical evolutions is given by Marvin A. Sirbu, Jr., The Innovation Process in Telecommunications, in Telecommunications and Productivity, ed. Mitchell L. Moss, Reading, Mass: 1981, pp. 184–198.

[8] For an overview see Joachim Scherer, supra, note 1.

[9] For an overview of the ISDN-standardization efforts on the international level see A.M. Rutkowski, supra, note 7, p. 35 seq.

[10] Cf. above, note 3.

[11] Communication from the Commission to the Council on Telecommunications, COM (84) 277 final, p. 14, 20.

[12] For a progress report on these activities see Communication from the Commission to the Council on European Telecommunications Policy, COM (86) 325 final, p. 4–20.

[13] Commission of the European Communities, Proposal for a Council Recommendation on the Coordinated Introduction of the Integrated Services Digital Network (ISDN) in the European Community, COM (86) 205 final.

[14] 86/659/EEC, 31.12. 1986, O.J. L 382/36.

[15] This "critical mass" is proposed to be "about 5% of the 1983 telephone subscriber population in each country". COM 86 (205) final, p. 10.

[16] Council Recommendation 84/549/EEC, November 12, 1984, O.J. No. L 298, 16.11. 1984, p. 49.

[17] COM (87) 35, Feb. 9, 1987.

[18] COM (87) 35, Feb. 9, 1987. Whereas Recommendations do not have "binding force", a Directive "shall be binding, as to the result to be achieved, upon each member state to which the choice of form and methods", Art. 189 (3).

[19] For a thorough analysis of the Court's case-law concerning (tele-) communications and the media see Jurgen Schwarze, in, Jurgen Schwarze (ed.) *Rundfunk und Fernsehen im Licte dre Entwircklung des nationalen und internationalen Rechts*, Baden-Baden 1986, pp. 119–148.

[20] Art. 90 (2) provides: "Undertakings entrusted with the operation of services of general economic interest of having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interest of the Community".

[21] Cf. Ernst-Joachim Mestmacker, Europaisches Wettbewersrecht, Munchen 1974, p. 653.

[22] For the direct applicability of Art. 59 see Case 33/74, van Binsbergen, (1974), ECR 1299; Case 33/74, Walrave, (1974), ECR 1405; Case 39/75, Coenen (1975), ECR 1547.

[23] Recommendation No I.112, ¶201, CCITT Red Book (1985).

[24] See also Bernard E. Amory, Les Monopoles de telecommunications face au droit europeen, in RDAI No. 2 (1986), p. 117, at 129.

[25] Case 155/73, Sacchi (1974), ECR 4C9, Ground 6; see also Commission of the European Communities, Television without Frontiers, Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable, COM (84) 300 final, pp. 105 seq.

[26] For an analysis of the scope of Art. 55, 56, and the Court's "public interest" exception cf. Joachim Scherer, European Telecommunications Law: The Framework of the Treaty, in European Law Review 1987 (forthcoming).

[27] Case 10/71 Ministere Public of Luxembourg v. Muller (1971) ECR 723, Ground 13/16 (implicitly); Case 127/73—BRT II—(1974) ECR 313, Ground 19 (explicitly).

[28] The non-applicability of Treaty provisions is, in turn, restricted by Art. 90 (2) 2 which requires that the non-application of the Treaty rules must not affect the development of trade to such an extent as would be contrary to the interests of the Community.

[29] Case 41/83 British Telecom (1985), ECR, p. 873, Ground 22.

[30] For a case in point see BVerfGE 58, 300.

[31] Cf. the seminal Hauer Case, 44/79, Hauer v. Rheinland-Pfalz, (1979), ECR 3727, Ground 17–20.

[32] See also Hans Peter Ipsen, Europaisches Gemeinschaftsrecht, Tubinquen 1972, p. 658 (37/8).

[33] Case 190/80 French Republic et al. v. Commission (1982), ECR 2545, Ground 12; for a functional analysis of Art. 90 (1) see also Volker Emmerich, Das Wirtschaftrecht der offentlichen Unternehmen, Bad Homburg 1969, p. 376 seq., 407 seq.; J. Thiesing, in: von der Groeben/Thiesing/Ehlermann (eds.). Handbuch, I A 50, Art. 95, I.4.; Hochbaum, op. cit., n. 21, Art. 90, Note 1, 7.

[34] Cf. Hochbaum, in: von der Groeben/Boeckh/Thiesing/Ehlermann (eds.), Kommentar zum EWG-Vertrag, 3rd ed., Baden-Baden 1983, Art. 90, Note 8; see also J. Megret/J.-V. Louis/D. Vignes/M. Waelbroeck, Le Droit de la Communaute Europeenne, 4., Concurrence, Brussels 1972, p. 84 seq.

[35] Case 41/83, British Telecom (1985), ECR, p. 873, Grounds 17, 19.

[36] Cf. ¶¶14 and 13 of the German Postal Administration Act which provides that tariff and usage regulations are (1) issued by the Ministry of Post and Telecommunications acting in accordance with the Ministry of Economics and (2) subject to the Cabinet's veto.

[37] Case 311/84, Radio Luxembourg-Telemarketing (1985) ECR, p. 3261. Telemarketing.

[38] Cf. Arwed Deringer, Das Wettbewerbsrecht der Europaischen Wirtschaftsgemeinschaft. Kommentar zu den EWG-Wettbewerbsregeln. Dusseldorf 1961, Art. 90, Rz. 26, 27; Hochbaum, supra, note 34, Art. 90, Note 11.

[39] Cf. Hochbaum, supra, note 34, Art. 90, Note 12 with reference to the postal and telecommunications administrations; see also A. Deringer, supra, note 38, Art. 90, Note 27.

[40] Cf. Joachim Scherer, supra, note 7, p. 429–431.

[41] See, in particular, Case 10/71 Ministere Public of Luxembourg v. Muller (1971) ECR 723, Ground 8, 11–15; see also Case 127/73, BRT v. Sabam, (1974), ECR 313, Grounds 20, 23; Case 94/74, IGAV v. ENCC, (1975), ECR 699 Ground 33/35; Case 13/77, INNO/ATAB, (1977), ECR 2115, Ground 34.

[42] 42. Cf. E.-J. Mestmacker, supra, note 21, p. 662 seq.; see also Pernice, in Eberhard Grabitz (ed.), EWG—Vertrag, Munchen 1986, Art. 90, Note 35 with further references.

[43] Case 41/83 British Telecom (1985), ECR, p. 873, Ground 30.

[44] Cf. E.-J. Mestmacker, supra, note 21, p. 662 seq.; Pernice, supra, note 42, Art. 30, Note 36.

[45] Case 172/80, Zuchner v. Bayerische Vereinsbank AG, (1981), ECR 2021, Ground 7; see also case 127/73, BRT v. Sabam, (1974), ECR 313, E.-J. Mestmacker, supra, note 21, p. 662 and Pernice, supra, note 42, Art. 90, Note 33.

[46] See above, n. 40.

[47] Cf.—with reference to infrastructures in general—Pernice, supra, note 42, Art. 90, Note 35. For problems arising in the context of qualifying telecommunications services as services of general economic interest, see below.

[48] Case 127/73 BRT v. Sabam (1974) ECR 312.

[49] Cf. Case 41/83 British Telecom (1985), ECR, p. 873, Ground 33 ("from an economic viewpoint").

[50] For the applicable standard of review cf. Case 10/71 Ministere Public of Luxembourg v. Muller (1971) ECR, 723 Ground 14/15.

[51] Case 41/83 British Telecom (1985), ECR, p. 873, Ground 33.

[52] Cf. Reinhard Schulte Braucks, European Telecommunications Law in the Light of the British Telecom Judgment, in CMLR 23 (1986), p. 39 (47).

[53] Cf. Case 41/83—British Telecom—(1985), ECR, p. 873, Opinion of Advocate-General Darmon.

[54] Case 41/83—British Telecom—(1985) ECR, p. 873, Ground 33.

[55] Cf. Bernard Amory, in RDAI 2 (1986), p. 119. For the Court's definition of a "dominant position" cf. Case 27/76 United Brands v. Commission (1978) ECR 207 Grounds 10–126; Case 85/76 Hoffmann La Roche v. Commission (1979) ECR 461; see also Case 31/80, L'Oreal v. De Nieuwe AMCK (1980) ECR 3793, Ground 26/27; see also Schroter, supra, note 34, Art. 86 Note 9.

[56] Case 85/76 Hoffman La Roche v. Commission (1979), ECR 461 Ground 91; see also Case 31/80 L'Oreal v. De Nieuwe AMCK (1980) ECR 3793, Grounds 26/27; Case 322/81 NBI Michelin v. Commission (1983), 3461, Grounds 29/30;

see also Koch, supra, note 41, Art. 86, Notes 13, 43 and Schroter, supra, note 34, Art. 86, Note 40.

[57] Cf. Koch, supra, note 41, Art. 86, Note 14–16; 42 with references to the Court's decisions.

[58] Part I, 1. d.

[59] Cf. above, II.1.a.

[60] For a case in point see Commission of the European Communities, Information Memo No. IP 86 (379), July 1986, Common Market Rep. (CCH), 1986, 10, 801.

[61] For the Court's standard of review for prices under Art. 86 see Case 27/76—United Brands—(1978), ECR 206, Ground 248/257; see also D. Schwarz, Imposition de prix non equitables par des entreprises en position dominante, in Semaine de Bruges 1977, p. 381.

[62] Case 41/83 Italy v. Commission (1985), ECR Ground 26.

[63] Cf. Volker Emmerich, Anmerkungen zu den Postfinanzen, in Ordo 35 (1984), p.43 (61 seq.); see also E.-J. Mestmacker, supra, note 21, p. 390.

[64] For a more restrictive view see V. Emmerich, Ordo 35 (1984), p. 61.

[65] For a critical assessment of the concept of predatory pricing see Dieter Schwarz, Wettbewerbpolitische Problematik des Predatory Pricing, in Wirtschaft und Wettbewerb 1987, p. 93–99.

[66] by Bernard Amory, RDAI 2 (1986), 122 seq.; see also THomas J. Ramsey, supra, note 2. p. 277.

[67] Cf. Hochbaum, supra. note 34, Art. 90, Note 49; Pernice, supra, note 42, Art. 90, Note 60; Megret, supra 34, p. 91.

[69] Cf. Case 6/64, Costa v. ENEL, ECR X, p. 1254 (1298).

[70] Cf. Aurelio Pappalardo, Die Stellung der Fernmeldemonopole im EWG-Recht, in: Ernst-Joachim Mestmacker (ed.), Kommunikation ohne Monopole, Baden-Baden 1980, p. 201 (210); see also Volker Emmerich, Nationale Postmonopole und Europaisches Gemeinschaftsrecht, in: Europarecht 1983, p. 216 (218).

[71] Bull. EC 3–1985, point 2.1.43; see also 2 C.M.L. Rep. 397 (1985).

[72] Cf. Eckart Wiechert, Das Recht des Fernmeldewesens der Bundesrepublik Deutschland—Staaliche Aufgabe und private Betatilgung im Fernmeldewesen nach dem geltenden Recht, in: Jahrbuch der Deutschen Bundespost 1986, p. 119, 142 seq.

[73] Cf. Manfred Zuleeg, Die Umformung der Handelsmonopole, in: Ernst-Werner FuB (ed.), Der Beitrag des Gerichtshofs de Europaischen Gemeinschaften zur Verwirkluchung des Gemeinsan ? Marketes, Baden-Baden 1981, p. 29 (37 seq.); see also A. Papalardo, supra, note 70, p. 201 (213 seq); and implicitly Thompson, (1978), ECR 2247 (2275).

[74] Case 7/61, Commission v. Italy, 1961, ECR 695 (720); 95/81, Commission v. Italy, ECR 2187 (2204).

[75] Cf. Case 104/75, de Peijper, 1976, ECR 613 (635); Case 35/76, Simmenthal, 1976, ECR 1871 (1885); Case 13/78, Eggers, 1978, ECR 1935 (1955 seq); Case 153/78, Commission v. Federal Republic of Germany, 1979, ECR 2555 (2564 seq).

[76] Case 120/78, Rewe, 1979, ECR 649 (662); for an analysis see Cassis de

Dijon and its progeny see Alan Dashwood, the Cassis Dijon Line of Authority, in: In Memoriam J.D.B. Mitchell 1983, p. 145 seq.

[77] The German Federal Constitutional Court has acknowledged the validity of this argument in BVerfGE 46, 120 (146, 147 seq.)

[78] Cf. Joachim Scherer, supra, note 7, p. 401 seq.

[79] For a summary of the Bundespost's legal arguments see Eckart Wiechert, supra, note 72, p. 145–150.

[80] EC-Bull. 7/8 1986, 2.1.85.

[81] Art. 30 provides: "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between member states". Art. 36 provides in its pertinent parts: "The provision... of Article 30 ... shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of ... public policy or public security; the protection of health and life of humans...Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between member states".

[82] Case 124/81, Commission v. United Kingdom (UHT milk), 1983, ECR 203, ground 16; see also Case 261/81, Rau, 1982, ECR 3961.

[83] Case 272/80, 1981, ECR 3277, Ground 14.

[84] Case 188/84, Commission v. France, ECR 1985, p. 419 Ground 16.

[85] Case 21/84, Commission v. France, ECR 1985, p. 1355 Ground 11.

[86] Council Directive 86/361/EEC, O.J. 1986 L 217/23.

[87] Council Directive 83/189/EEC, O.J. 1983, L 109.

[88] Council Directive 86/361/EEC, O.J. 1986 l. 217/23.

[89] Cf. Commission of the European Communities, Proposal for a Council Directive concerning the first phase of the establishment of the mutual recognition of type approval for telecommunications terminal equipment, COM (85) 230, p. 211.

[90] Cf. Case 190/80, ECR 2545, Grounds 1 seq.