The French Telecommunications Cases

[General Note. The two reports below are not directly connected. However, what they have in common is the fact that both involve the French government's alleged failure to implement European Community Directives in the field of telecommunications, with particular reference to the Directives' aim to encourage greater competition. The cases also involve the Commission's intention to initiate legal proceedings against the French government: in the first case, on account of a failure to implement a decision by the Court of Justice, and in the second, on account of a failure to implement a Directive. The procedure for initiating legal proceedings against a Member State's government is laid down in Article 228 of the EC Treaty. Before the Commission can take legal action against the Member State, it must first prepare a "reasoned opinion".]

The French Telecommunications Case (1)

COMPETITION (TELECOMS): COMMISSION STATEMENT

Subject: "Free competition"
Implementation of directive
Reasoned opinion
Transparency
Proportionality

Industry: Telecommunications (universal service and interconnection)

Source: Commission Statement IP/03/515, dated 8 April 2003

(Note. Competition in the postal sector is largely dependent on the arrangements made for financing a universal postal service. This was the subject of a Directive, which was in turn the subject of proceedings in the Court of Justice against the French Republic. The Court's held against France; and the Commission is now threatening legal action unless the Court's judgment is fully implemented.)

A judgment handed down by the Court of Justice of the European Communities in December 2001 criticised France's system for financing universal service in telecommunications. Almost sixteen months later, the Commission has concluded that insufficient remedial action has been taken. It has therefore decided to serve formal notice on the French authorities to comply fully with the Court's ruling. The Court of Justice judgment of 6 December 2001 confirmed all the complaints put forward by the Commission when it started proceedings in April 2000. The Court took the view that the lack of transparency in certain aspects of the French arrangements and the methods used to calculate some cost components of universal service were incompatible with the Directives on full competition in telecommunications markets and on interconnection.

Following this judgment, the French Government altered some of the calculations of the net cost of universal service between 1997 and 2000. These corrections produced a significant reduction in the financial cost of universal

service, which was divided by four over that period. However, the French authorities have, in the Commission's view, failed to comply fully with the Court of Justice judgment. First, the total respective contributions by the different service providers to financing universal service from 1997 to 2001 have still not been published, contrary to the requirements of the Directive on interconnection. Second, the method used to calculate the "C1" net cost component of universal service from 1998 to 1999 is still not transparent. Third, the arrangements for the settlement of overpayments by alternative service providers to France Télécom or to the universal service fund are not appropriate. In particular, the French Government initiated recovery of the alternative providers' nett contributions for 2002 in the summer of that year, even though those providers' claims for 2001 pursuant to the Court judgment had still not been established and the amounts paid to France Télécom between 1997 and 1999 had not been refunded to them.

One of the main objectives of the procedure which culminated in the Court of Justice had been to ensure that service providers who had contributed to the universal service fund could in practice rapidly recover the overpayments. The Commission is thus forced to conclude that one of the essential aspects of the Court judgment has not been given full effect. The Commission has accordingly decided to serve formal notice on the French authorities pursuant to Article 228 EC. The French Government has one month in which to reply. If France still fails to comply with the Court of Justice judgment in respect of the issues raised, the Commission will send the French authorities a reasoned opinion and, if appropriate, will ask the Court to impose a fine. The Commission's aim is not to call into question the principle of the financing of universal service in France; it is merely seeking to ensure that the Court judgment is complied with in full.

Directives EC/19/96 (on "full competition") and EC/33/97 (on "interconnection") authorise the establishment of mechanisms for sharing the net cost of universal service when providing this service represents an unfair burden on the operator in question. However, Member States availing themselves of this option must comply with various provisions designed to ensure that the cost of universal service is assessed in a transparent and proportionate way. The purpose of these provisions is to guarantee that the financing mechanism does not result in excessive charges being made on the competitors of the service provider responsible for universal service to the latter's benefit.

A financing mechanism of this type was set up in France as early as 1997. French law identifies three universal service cost components, referred to as C1, C2 and C3. Until 2000 more than 85% of contributions by alternative service providers (telecommunications operators and internet access providers) took the form of direct payments to France Télécom (C1 and C2), the balance (C3) transiting via a universal service fund administered by the Caisse des Dépôts et Consignations (Consignments and Loans Fund). Since 2000 all payments have been made via the universal service fund. France and Italy are the only Member States in which responsibility for providing universal service effectively results in compensation being paid to the former telecommunications incumbent.

The Commission first started administrative proceedings against France in 1998, followed by a referral to the Court of Justice on 17 April 2000 comprising six detailed complaints. The Court ruled against France on 6 December 2001 in respect of all six complaints presented by the Commission. During 2002, while not amending the Decree of 13 May 1997 governing universal service, the French authorities undertook to recalculate the figures for previous years. However, they have failed to take action on all aspects of the Court ruling. In particular, the issue of refunds to service providers for the C1 and C2 components from 1997 to 1999 has not been resolved.

The French Telecommunications Case (2)

COMPETITION (TELECOMS): COMMISSION STATEMENT

Subject: "Free competition"
Implementation of directive
Reasoned opinion
Transparency
Equal treatment
Complaints

Industry: Telecommunications; cable networks

Source: Commission Statement IP/03/520, dated 9 April 2003

(Note. In view of a complaint by the trade association representing cable network operators, the Commission has taken the view that these operators are not given equal treatment in France when competing to provide access to telephone and Internet services; and that this inequality has led to the tiny proportion of access services these operators are currently able to provide. Given that the combined effects of two Directives in this field were intended to guarantee greater competition in this sector, the Commission considers that France has failed to comply with the Directives; it has accordingly issued a "reasoned opinion".)

On 8 April 2003 the Commission decided to send France a reasoned opinion for having failed to comply with the "Full Competition" and "Cable" Directives by maintaining special arrangements for the provision of telecommunications services by cable. The combined effect of the two Directives for cable operators is to remove restrictions on the provision of telecommunications services on cable networks, which until recently were essentially dedicated to the distribution of television programmes.

The two Directives required Member States to allow cable television network operators to provide telecommunications services under the same conditions as any other telecommunications operator. One of the objectives of the Cable Directive was to develop competition between infrastructures for the provision of telecommunications services. As far as the regulatory framework is concerned, the Directive stipulates that authorisation procedures must be identical if the same

services are being provided, regardless of whether the service is provided on cable networks or on public telecommunications networks.

The Commission considers that France has not complied with the Directives, since on two important points it has maintained separate regulatory arrangements for telecommunications services provided by cable operators. In the first place, the provision of telephone services by cable operators requires systematic prior consultation of all the municipalities concerned, which then issue an opinion. For the provision of other telecommunications services, such as Internet access, the cable operators are required to inform the relevant municipalities in advance. These requirements, which do not apply to the other telecommunications operators, seriously handicap cable operators' business and discourage them from attempting to move into these fields. One cable operator was actually refused permission to provide telephone services in a number of municipalities after they had issued an unfavourable opinion.

In addition, cable network operators do not enjoy the same rights to use public facilities as the operators of other telecommunications networks. In particular, the charges for use of public facilities are not subject to the same ceilings. These various handicaps have prevented the cable networks from developing fully as an infrastructure for the provision of telecommunications services.

Directive EC/51/95 (the Cable Directive) was designed to remove restrictions on the provision of telecommunications services by cable television network operators. Together with Directive EC/19/96 (the Free Competition Directive), it was intended to have the effect of allowing cable television network operators to provide telephone and Internet access services under the same conditions as any other operator using any other infrastructure. Furthermore, the two Directives provided that cable operators must be able to have non-discriminatory access to infrastructure in establishing their networks. The purpose of these provisions was to stimulate competition in the telecommunications sector by fostering the growth of telecommunications services provided on platforms other than the traditional telephone networks.

Failure to comply with the Directives and the maintenance of discriminatory regulations that are unfavourable to cable operators help to explain the minor role played by cable operators in the telecommunications sector. Cable network operators account for less than 0.2 % of access to fixed telephony services, less than 15% of high-speed Internet access and less than 4% of Internet access markets as a whole.

The Commission's investigation is in response to a complaint which the French Association of Multi-Service Network Operators (AFORM) lodged with the Commission in October 2001. In its reasoned opinion adopted on 8 April, the Commission gives France two months to bring its legislation into line with Community law. ■