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International Partnerships in the European Union Telephone Service Market: Towards a New Monopoly?

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INTRODUCTION

Throughout most of the existence of the European Union (EU), state–owned monopolies have provided both local and long–distance telephone service in their respective Member States.[1] Pursuant to Directive 90/388 on telecommunications competition (Directive) adopted by the Commission of the European Communities (Commission) in 1990, these monopolies must end in most Member States by 1998.[2] Liberalization of the telephone service market brings the hope of cheaper and more efficient service in the Member States, particularly for multinational businesses.[3] Privatization and the liberalization of the EU internal telephone market also represent vast profit opportunities for internationally established telecommunications companies.[4]

In response to mutual desires to maximize their positions in the newly emerging free market, global telecommunications companies and former state–owned monopolies (public telephone operators, or PTOs) have recently begun to form international partnerships.[5] MCI and British Telecom (BT) formed a joint venture in June 1993, and the former German state monopoly, Deutsche Telekom, is in the process of uniting with France Telecom.[6] Sprint, Deutsche Telekom, and

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[1] *See, e.g.*, *The Last One to the Draw*, ECONOMIST, Aug. 13, 1994, at 55, 55 [hereinafter ECONOMIST].

[2] Commission Directive 90/388 on Competition in the Markets for Telecommunications Services, art. 2, 1990 O.J. (L 192) 10 [hereinafter Telecommunications Competition Directive]. While the Directive itself mandates the opening of the telephone market, the Commission set the 1998 deadline subsequent to the passage of the Directive. *See id.*; ECONOMIST, *supra* note 1, at 55.

[3] Tanya Cordrey, *Battle Lines*, INT'L MGMT., May 1994, at 30, 30.

[4] *Id.*

[5] See Coopers & Lybrand, EC Commentaries, *Telecommunications*, Sept. 8, 1994, at *2.2, *available in* LEXIS, Intlaw Library, Eurscp File [hereinafter Coopers & Lybrand, *Telecommunications*].

[6] Monica Horten, *Business Technology: Phone Companies Make Connections Over the Ocean*, DAILY TELEGRAPH, Dec. 20, 1993, *available in* LEXIS, News Library, Curnws File; Cordrey, *supra* note 3, at 32. The joint venture between MCI and British Telecom is known as "Concert" and earned revenue of over one billion dollars in the past year. *AT&T Defends World Partners Venture,*

France Telecom are currently exploring a partnership geared towards multinational companies.[7] Telecommunications giant AT&T followed suit by joining the Dutch, Swedish, and Swiss joint venture called Unisource.[8] Earlier, AT&T considered the possibility of joining the possible Deutsche Telekom–France Telecom partnership.[9] The primary goal of these partnerships is to win outsourcing contracts from multinationals based in the Member States; that is, to unilaterally provide global services to multinational companies.[10]

This Note discusses EU competition law with respect to international joint ventures in the telephone service market. Part I focuses on the foundation of EU antitrust law, articles 85, 86, and 90 of the Treaty of Rome, and reviews case law applying these articles. Part II examines the 1990 Commission Directive 90/388 and the steps the EU has taken to facilitate application of the Directive. Part III addresses the question of whether EU competition law would prevent a new monopoly consisting of an international joint venture from forming in the phone service market in the wake of the dismantling of state–owned phone service monopolies. This Note concludes that the EU antitrust statutory framework offers adequate protection against the perpetuation of a phone service monopoly. Because of a desire to upgrade service quality in the new internal market, coupled with a scarcity of common law applicable to phone service providers, however, the EU may need to take more specific action in the future to safeguard against monopoly.

I. BACKGROUND

A. *Articles 85, 86, and 90 of the Treaty of Rome*

Articles 85 and 86 of the Treaty of Rome (Treaty Establishing the European Economic Community, or EEC Treaty) set forth the basic

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TELECOMMUNICATIONS ALERT, Oct. 5, 1995, *available in* LEXIS, News Library, Curnws File [hereinafter TELECOMMUNICATIONS ALERT]. The alliance between Deutsche Telekom and France Telecom is called "Atlas". William Boston, *U.S., European Telecoms Pact Confident of Approval*, REUTER EUR. COMMUNITY REP., *available in* LEXIS, News Library, Curnws File.

[7] Boston, *supra* note 6; Mike Mills, *Sprint May Sell Stake to European Giants*, WASH. POST, June 8, 1994, at F1. The tentative name for the alliance between Sprint, Deutsche Telekom, and France Telecom is "Phoenix". Boston, *supra* note 6.

[8] Tony Jackson, *Survey of International Telecommunications*, FIN. TIMES, Oct. 3, 1995, at VIII; Andrew Adonis, *Best Form of Defence: A Look at the Competitive Pressures Leading to International Alliances*, FIN. TIMES, June 16, 1994, at 21. The AT&T–Unisource joint venture is called "Uniworld". Jackson, *supra*, at VIII.

[9] *See* Cordrey, *supra* note 3, at 32.

[10] *See* Coopers & Lybrand, *Telecommunications*, *supra* note 5, at *2.2. Outsourcing involves the

principles of EU antitrust law.[11] Article 85 prohibits agreements, decisions, and concerted practices that aim to or, in fact, bring about restrictions on competition within the common market.[12] The article specifically targets activities such as price fixing and limiting or controlling markets, production, and technical development.[13] Additionally, a contract effectuating any of the restricted activities under article 85 is considered null and void.[14]

The last section of article 85 qualifies the force of the prohibitions by stating that they may be inapplicable if the activity in question "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit."[15] The activities concerned must be justified as indispensable to such improvement or promotion by an undertaking.[16] Furthermore, the activities may not have the potential for eliminating competition "in respect of a substantial part of the products in question."[17] Thus, the plain language of article 85 provides some general competition guidelines with a broad exception justifying a possible monopoly.

Article 86 deals with the abuse by undertakings of a dominant position in the internal market or in a substantial portion of it.[18] Generally, article 86 cites the same examples of abuse as the prohibited activities set forth in article 85.[19] In contrast with article 85, however, article 86 focuses on prejudice to consumers in its prohibition of limits on markets, production, and technical development.[20] Adopted in 1962, Council Regulation 17/62 provides the legal framework for enforcement by the Commission of both articles 85 and 86.[21]

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management and ownership of the telecommunications systems of multinational companies. Adonis, *supra* note 8, at 21.

[11] TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] arts. 85, 86.

[12] *Id.* art. 85, para. 1. The agreements, decisions, and practices prohibited are ones "which may affect trade between Member States." *Id.* Article 85 is the first Rule Applying to Undertakings. *Id.* Although "undertaking" is not defined by the article, contextually it appears to have the broad meaning of "business organization" or "business entity." *See id.*

[13] *Id.*

[14] *Id.* para. 2.

[15] *Id.* para. 3.

[16] *See* EEC TREATY, *supra* note 11, art. 85, para. 3.

[17] *Id.*

[18] *Id.* art. 86. "Dominant position" is not defined in the article. *Id.*

[19] *Id.* arts. 85, 86.

[20] *Id.*

[21] Hans van Houtte, *European Economic Community Antitrust Regulations Council Regulation No. 17/62 and Commission Regulation No. 27/62*, Basic Documents of Int'l Econ. L. (CCH), Intro-

Article 90 applies only to public undertakings and, more specifically, to undertakings granted special or exclusive rights by Member States.[22] It prohibits Member States from enacting any measure contrary to other articles of the Treaty of Rome.[23] Public undertakings that are monopolistic in nature fall within the scope of articles 85 and 86 as long as the competition rules do not inhibit the performance of tasks assigned to the undertakings.[24] Additionally, article 90 provides the Commission with the power to legislate directives to ensure the application of the article.[25] The Commission passed directives pursuant to article 90 in order to dismantle and control telecommunications monopolies.[26] Member States objected to this use of the legislative provision of article 90, claiming that the provision unlawfully allows the Commission to issue a directive without conferring with the Council of Ministers.[27] The Court of Justice of the European Communities (ECJ) has consistently ruled in favor of the Commission, however, in suits brought by Member States against directives promulgated under article 90.[28]

B. *Application of the Articles*

The Commission furnished guidelines in a 1991 Communication in order to clarify the application of the Treaty of Rome antitrust rules in the public and private telecommunications sectors.[29] Additionally, the Commission hoped to foster the development of high quality, technologically advanced, inexpensive services and networks for European consumers.[30] Although the guidelines did not create enforceable rights or affect the application of the articles by the ECJ, they gave examples of abuses of dominant positions by public and private under-

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duction, at A. Article 87 enables the Council of Ministers to furnish a framework for the application of articles 85 and 86. *Id.* Council Regulation 17/62, the first product of this power, applies directly in the Member States. *Id.*

[22] EEC TREATY, *supra* note 11, art. 90, para. 1. "Public undertakings" are entities owned by a Member State. *See id.*

[23] *Id.*

[24] *Id.* para. 2.

[25] *Id.* para. 3.

[26] *See* Coopers & Lybrand, *Telecommunications*, *supra* note 5, at *2.3.

[27] *Id.*

[28] *Id.* France lost a suit against the Commission in 1991 protesting the adoption of Directive 88/301/EEC, which provides for the opening up of the terminal equipment market. *Id.* Spain, Belgium, and Italy lost a suit against the Commission in 1990 requesting the annulment of the Telecommunications Competition Directive. *Id.*

[29] *Id.*

[30] *Id.*

takings.[31] The guidelines also provided for telecommunications operators to furnish complete interconnectivity between public networks in accordance with the articles.[32]

The ECJ has provided significant insight into the antitrust articles. *United Brands Co. and United Brands Continental B.V. v. Commission*[33] clarifies the concept of relevant market and the criteria the Court uses to determine whether an undertaking possesses a dominant position in that market.[34] The Court found that United Brands, an international grower, importer, and marketer of bananas, abused a dominant position under article 86 by charging different prices to companies for equivalent transactions.[35] Although United Brands occupied a market position in several Member States, the Court focused on the competition–suppressing effects of the behavior of the undertaking in its market rather than on the actual geographic scope of the market share.[36] In addition to holding that United Brands did not have to eliminate all competition in order to occupy a dominant position, the Court stated that simply being "in a position to impede effective competition on the relevant market" constituted a dominant position.[37]

In *Centre Belge D'Etudes de Marche–Tele–Marketing SA v. Compagnie Luxembourgeoise de Telediffusion SA and Information Publicite Benelux SA*,[38] the Court applied article 86 to the detriment of a Luxembourg television station, RTL, that awarded an advertising contract to an

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[31] Coopers & Lybrand, *Telecommunications, supra* note 5, at *2.3. Abuse of a dominant position for a public operator might consist of refusing to provide access to a network; for a private operator, refusing to supply interfaces. *Id.*

[32] *Id.*

[33] Case 27/76, United Brands Co. and United Brands Continental B.V. v. Commission, 1978 E.C.R. 207 (1978).

[34] *Id.* at 235–36, 238.

[35] *Id.* at 208–09.

[36] *See id.* at 235. In addition, the Court undercut the requirements in articles 85 and 86 that the activities affecting competition must "affect trade between Member States." EEC TREATY, *supra* note 11, arts. 85, 86; *United Brands*, 1978 E.C.R. at 208. If an undertaking in a dominant position, established in the internal market, tries to extinguish a competitor also established in the internal market, the relation of the behavior to trade between Member States is irrelevant as long as the elimination of the competition would have an effect in the common market. *United Brands*, 1978 E.C.R. at 208.

[37] *United Brands*, 1978 E.C.R. at 234; *see also* Case 6/72, Europemballage Corp. and Continental Can Co. Inc. v. Commission, 1973 E.C.R. 215 (1973). *Continental Can* states that "the strengthening of the position of an undertaking may be an abuse and prohibited under article 86 . . . if it has the effect of substantially fettering competition." *Id.* at 217. In addition, "[a]rticle 86 is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure. . . ." *Id.*

[38] Case 311/84, Centre Belge D'Etudes de Marche–Tele–Marketing SA v. Compagnie Luxembourgeoise de Telediffusion SA and Information Publicite Benelux SA, 1985 E.C.R. 3261 (1985).

exclusive agent of RTL instead of to the plaintiff advertising agency.[39] In a preliminary ruling, the Court found that RTL occupied a dominant position in the tele–sales market and, despite the statutory authorization of the monopoly, suggested that RTL abused this position by refusing to supply services to the plaintiff.[40] The Court declared that the market share of the organization was a crucial factor in determining whether the undertaking had a dominant position subject to abuse.[41] Although the Court did not define "market share" specifically, its constant references to the Belgian market implied that market share did not have to encompass the entire EU common market.[42] Consequently, the ECJ demonstrated its expansion of the application of article 86 antitrust principles to companies that occupy a dominant position in a domestic market only.[43]

In *Federation of Telephonic Equipment Manufacturers and Installers v. Telegraph and Telephone Authority*,[44] the Brussels commercial court held that the state telephone monopoly abused its dominant position under article 86.[45] The court noted that an abuse of dominant position occurs when a company "reserves to itself or to an undertaking belonging to the same group, without any objective necessity, an ancillary activity which might be carried out by another undertaking."[46] Under the presumption of good faith in Belgian law, the court failed to find discrimination in the telephone monopoly's award of a supply contract to a manufacturer with which it already had a contract.[47] Under article 86, however, the supply contract unlawfully allowed the monopoly and the manufacturer to operate "independently of any competition."[48] Without any apparent necessity, the telephone monopoly engaged in practices that would create additional costs for other manufacturers

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[39] *Id.*

[40] *Id.* The Court opined that "a monopoly protected by law represents one of clearest examples of a dominant position." *Id.* at 3265.

[41] *Id.* at 3267.

[42] *See id.* at 3262, 3264, 3267, 3268. Another indication that "market share" does not mean "common market share" lies in the Court's statement that "an undertaking abuses its dominant position in the market if it uses that position to force its way into a neighboring market." *Id.* at 3268. Logically, "market" could not mean the common market because EU antitrust law does not concern itself with the markets of neighboring nations. *See id.*

[43] *See Centre Belge*, 1985 E.C.R. at 3268.

[44] Federation of Telephonic Equip. Mfrs. and Installers v. Telegraph and Telephone Auth., 1990 E.C.C. 193 (1986), *available in* LEXIS, Intlaw Library, ECCase File.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

who could have performed the services as well as the retained manufacturer.[49]

II. THE TELECOMMUNICATIONS COMPETITION DIRECTIVE

A. *Provisions of the Directive*

Based on articles 85 and 86 and enabled by article 90, the Directive provides more specific guidance than the articles on phone service market competition.[50] The Directive sets forth a program to progressively introduce competition into the EU telecommunications market.[51] Because the primary aim of the Directive is to facilitate privatization of the ownership of telecommunications companies, however, it does not provide much guidance regarding the possible subsequent formation of private monopolies in the new liberalized market.[52]

Pursuant to the Directive, most Member States must liberalize their telephone markets by 1998.[53] The Commission extended the deadline for Spain, Ireland, Greece, and Portugal until 2003.[54] Recently, Spain announced plans to waive this extension in favor of the original deadline.[55] In addition, several Member States have sped up the process of liberalization ahead of the 1998 deadline.[56]

The Directive indicates that telecommunications organizations fall under the definition of undertakings for purposes of article 86.[57] Additionally, Member States must terminate grants of special or exclusive rights for supplying telecommunications services except in the field of

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[49] *See Federation*, 1990 E.C.C. 193.

[50] EEC TREATY, *supra* note 11, arts. 85, 86, 90; Telecommunications Competition Directive, *supra* note 2; *see also* Coopers & Lybrand, *Telecommunications*, *supra* note 5, at *2.4.

[51] Telecommunications Competition Directive, *supra* note 2, pmbl., para. 1. This program is the implementation of a proposal in the Commission's Green Paper on the development of the common market for telecommunications services and equipment. *Id.*

[52] *See id.*; *see also* Coopers & Lybrand, *Telecommunications*, *supra* note 5, at *2.4.

[53] *See* Richard L. Hudson, *Unisource Seeking Link in America, May Expand its Ties with AT&T Corp.*, WALL ST. J., Aug. 29, 1994, at B6A; ECONOMIST, *supra* note 1, at 55.

[54] *See* Cordrey, *supra* note 3, at 30.

[55] Gail Edmondson & Tim Smart, *Spain's Phone Giant Has Latin America Buzzing*, BUS. WK., Sept. 12, 1994, at 92, 92. The chairman of Spain's PTO, Telefonica, stated that he would be willing to meet the original 1998 deadline because allowing market competition will permit Telefonica to enter new telecommunications businesses. *Id.*; *see also* ECONOMIST, *supra* note 1, at 56.

[56] *See, e.g.*, ECONOMIST, *supra* note 1, at 56. For example, Britain privatized British Telecom in 1984. *Id.* Italy planned to publicly offer shares in its state holding company by the end of 1994, and Deutsche Telekom will probably offer shares by 1996. Cordrey, *supra* note 3, at 30, 32.

[57] Telecommunications Competition Directive, *supra* note 2, pmbl., para. 13.

voice telephony.[58] If a Member State maintains exclusive or special rights for the provision and operation of public networks, it must ensure that access to the networks is non–discriminatory.[59] Accordingly, operators requesting leased lines must be able to obtain them within a reasonable period.[60]

B. *Facilitation of the Directive*

The Commission created a competition directorate to investigate complaints about possible violations of the Directive or other antitrust rules.[61] The Commission noted an increasing number of complaints related to competition in its annual competition policy report issued in May, 1994.[62] For example, BT filed a formal complaint with the competition directorate regarding the possible alliance of AT&T with Deutsche Telekom and France Telecom.[63] As a result, the Commission is currently examining the Deutsche Telekom–France Telecom joint venture.[64]

To supplement the enforcement of the Directive, the EU created an avenue for Member State telecommunications companies to confront possible anti–competitive activities of U.S.–based telecommunications companies.[65] The former competition policy Commissioner signed an administrative antitrust agreement with the United States in September, 1991.[66] Presumably applicable to former state–owned monopolies and to smaller, newly–emerging telecommunications companies in the Member States, the agreement established a formal procedure for exchanging information about possible violations of EU or U.S. com-

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[58] *Id.* art. 2.

[59] *Id.* art. 4.

[60] *Id.* The Directive also compels Member States to annually compile and transmit information concerning their respective applications of the Directive for three years after its adoption. *Id.* art. 9.

[61] *See* Cordrey, *supra* note 3, at 33.

[62] *See* Coopers & Lybrand, EC Commentaries, *Competition*, Aug. 4, 1994, at *7.1, *available in* LEXIS, Intlaw Library, Eurscp File [hereinafter Coopers & Lybrand, *Competition*].

[63] Cordrey, *supra* note 3, at 33. Deutsche Telekom and France Telecom ultimately eschewed an alliance with AT&T in favor of an alliance with Sprint. *Europe Welcomes AT&T Breakup*, DM NEWS, Sept. 25, 1995, at 1 [hereinafter DM NEWS]. In the United States, the Justice Department and the FCC have declined to approve Sprint's alliance with Deutsche Telekom and France Telecom because of a belief that European market liberalization has not progressed enough to permit entry into the U.S. market. *Id.*

[64] Cordrey, *supra* note 3, at 33.

[65] Coopers & Lybrand, *Competition*, *supra* note 62, at *7.2.

[66] *Id.*

petition rules.[67] Although the actions taken or decisions rendered are not legally binding because the agreement is only administrative, the French government questioned the legality of the power of the Commission to make such a broad agreement.[68]

III. DISCUSSION

Because the Directive has not taken effect yet, there is a paucity of resultant interpretive case law. Accordingly, the antitrust articles and applicable case law must be used to shed light on the Directive and to analyze alleged instances of monopoly. In a broad context, the application of antitrust law to international joint ventures is not problematic.[69] As held by the ECJ in *Centre Belge*, the provision of telephone service falls within article 86 as part of the definition of "trade".[70] Additionally, the Directive considers telecommunications organizations "undertakings" for purposes of article 86, thereby subjecting telephone service joint ventures to the jurisdiction of EU antitrust law.[71]

Given the characteristics and existing partnerships of international telecommunications giants, a joint venture between one of these entities and a PTO has the potential to acquire a significant and perhaps dominant portion of the EU telephone service market.[72] AT&T, which has already formed a powerful joint venture called "World Partners" with other nations, could assist a former PTO in retaining a domestic monopoly.[73] AT&T would add technological innovation and a reputation for customer service to an existing dominant position of the PTO in the market of that Member State and, if applicable, in other Member States.[74] The fear of such a comprehensive assembly of advantages in one joint venture prompted BT to file a complaint with the Commis-

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[67] *Id.* The agreement enables either the EU or the U.S. to initiate an inquiry where it believes that anti–competitive activities in the territory of that party pose a threat to its respective interests. *Id.* The independence of each party's decisionmaking processes remains intact. *Id.*

[68] *Id.*

[69] *See Centre Belge*, 1985 E.C.R. at 3266. The article 86 prohibition of abuse of dominant position in the common market stems from the desire to protect "trade between Member States." EEC TREATY, *supra* note 11, art. 86.

[70] *Centre Belge*, 1985 E.C.R. at 3266. "Trade" is not defined by article 86 except that it applies to dealings between Member States. EEC TREATY, *supra* note 11, art. 86.

[71] Telecommunications Competition Directive, *supra* note 2, pmbl., para. 13.

[72] *See* Cordrey, *supra* note 3, at 32.

[73] *See* TELECOMMUNICATIONS ALERT, *supra* note 6.

[74] *See* Cordrey, *supra* note 3, at 33. Ironically, European PTOs avoided alliances with AT&T because of its large size, which PTOs feared would inhibit equality in a partnership. Jackson, *supra* note 8, at VIII. With the recent breakup of AT&T into three separate companies, AT&T is now

sion concerning the possibility of an AT&T alliance with Deutsche Telekom and France Telecom.[75] The chairman of BT alleged that such an alliance with AT&T would forge the largest telecommunications monopoly in the world, let alone in Germany and France individually, thereby suppressing liberalization and improvement of services.[76]

Even if PTOs prove unable to acquire a dominant position throughout the EU common market, the prospect of retaining domestic monopolies remains.[77] The concept of dominant position expressed in article 86 applies to the internal market "or a substantial part of it."[78] *Centre Belge* and *United Brands* imply that a relevant market may consist of a discrete domestic market as well.[79] Regardless of the relevant market, however, if PTOs convert from public to private monopolies and retain the potential for stifling competition, they will defeat the open market goals of the Directive.[80] Accordingly, domestic monopolies as well as common market monopolies would violate EU antitrust law under the articles and under the Directive.[81]

The Directive may provide an effective deterrent to monopolies by permitting Member States to retain special or exclusive rights for networks, specifically the ownership of lines.[82] This provision acts as a preventative antitrust measure because a lack of control and ownership of certain facilities reduces the chance that a telecommunications company could, without economic necessity, reserve for itself or another company an ancillary activity that could have been carried out by a third company.[83] According to entities like AT&T, however, this

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more streamlined and may be in a better position to offer its services in Europe. DM NEWS, *supra* note 63, at 1.

[75] *See* Cordrey, *supra* note 3, at 33.

[76] *Id.* Ironically, BT seems to be headed in the direction of acquiring a dominant position in the common market in light of its alliance with Norwegian Telecom. *See id.* at 32. BT, which has been privatized since 1984, still controls 90% of the $23 billion telecommunications market in Britain. ECONOMIST, *supra* note 1, at 56. In addition, BT has an alliance with MCI, another powerful international telecommunications company. Horten, *supra* note 6.

[77] *See* ECONOMIST, *supra* note 1, at 55.

[78] EEC TREATY, *supra* note 11, art. 86.

[79] *See generally Centre Belge*, 1985 E.C.R. 3261; *United Brands*, 1978 E.C.R. 207.

[80] *See* Michele Balfour & Cameron Crise, *A Privatization Test: The Czech Republic, Slovakia and Poland*, 17 FORDHAM INT'L L.J. 84, 89 (1993). A detrimental "impact on an effective competition structure" can satisfy the requisite harm to consumers under article 86. *Continental Can*, 1973 E.C.R. at 217.

[81] *See generally Centre Belge*, 1985 E.C.R. 3261.

[82] *See* Telecommunications Competition Directive, *supra* note 2, art. 4.

[83] *See Federation*, 1990 E.C.C. 193. A reservation of such an ancillary activity without objective necessity constitutes an abuse of dominant position. *Id.*

provision contradicts the spirit of liberalization and economic growth because it removes the ability of a company to establish its own facilities.[84]

Ironically, the impending 1998 deadline for the liberalization of the telephone service market may trigger the development of new monopolies in conjunction with increased competition.[85] Liberalization will shock PTOs who may not be cognizant of how to thrive or even subsist in a competitive market.[86] In light of the convergence of other telecommunications and information industries, state phone service monopolies must expand and make technological advances if they expect to survive in competition with diversified international telecommunications giants.[87] The Directive does not provide any guidance, however, on how to accomplish this feat.[88] Accordingly, from the perspective of the PTOs, international alliances may be essential for survival in the new global market.[89] In asserting the necessity of France Telecom's joint venture with Deutsche Telekom, a spokesperson for France Telecom predicted that all EU telephone operators will be forced to create strategic alliances within the next ten years.[90] Spain's waiver of its extension in favor of early liberalization is a testament to the attraction to and the competitiveness involved in forging international partnerships.[91]

Under article 85, a joint venture may be able to justify the acquisition of a dominant position in the EU common market.[92] The article 85 prohibition on the restriction of competition does not apply if the activities of the company in question contribute to improved goods production or distribution or to the promotion of economic or technical progress.[93] The innovations that international companies bring to partnerships with PTOs might qualify under this exception because lower prices and strides in technology and customer service will benefit EU consumers.[94] Thus, the sole issue in an antitrust case may be whether

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[84] Cordrey, *supra* note 3, at 33.

[85] *See* Hudson, *supra* note 53, at B6A.

[86] Cordrey, *supra* note 3, at 33.

[87] Gail Edmondson, *Brave Old World*, BUS. WK./THE INFO. REVOLUTION (spec. ed.), 1994, at 42, 43.

[88] *See* Telecommunications Competition Directive, *supra* note 2, pmbl.

[89] Cordrey, *supra* note 3, at 32.

[90] *Id.*

[91] ECONOMIST, *supra* note 1, at 56.

[92] *See* EEC TREATY, *supra* note 11, art. 85, para. 3.

[93] *Id.*

[94] *See id.*

the joint venture company abused its dominant position within the relevant market.[95]

The primary aim of joint ventures is to win outsourcing contracts from multinationals, but it is unclear whether winning a dominant share of the multinational market would equate to a dominant share on a domestic market or on the overall common market.[96] Accordingly, the formation of new monopolies may depend ultimately upon the amount of market share attributable to the business of multinational companies based in EU Member States.[97] If current law proves to be ineffective in preventing abuses of dominant position, the Commission possesses the power to issue additional antitrust directives in furtherance of the articles.[98] Nevertheless, under current law, antitrust enforcement in the EU seems to be relatively active.[99] The EU has the framework and potential for a successful future in preventing abuses of joint venture dominant positions.

CONCLUSION

Existing EU antitrust law is most likely adequate to prevent the perpetuation of a telephone service monopoly. The objectives of the Telecommunications Competition Directive—to privatize and liberalize the telecommunications market—fully support the concept of competition and should therefore trigger strict antitrust enforcement. On the other hand, the EU has a keen desire to upgrade the quality of telephone services, as evidenced by the first stated goal of the Directive: the improvement of telecommunications. As a result, the EU might be willing to overlook or tolerate monopolistic activity if an international joint venture provides the industry with significant technological or other service advances, thereby benefiting consumers.

It remains to be seen whether alliances between PTOs and existing international operators have the potential for creating new monopolies

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[95] *Id.* art. 86.

[96] *See* Coopers & Lybrand, *Telecommunications, supra* note 5, at *2.2.

[97] *See Centre Belge*, 1985 E.C.R. at 3267. Ironically, smaller EU telephone service companies and PTOs that do not form joint ventures may have a chance at competing with joint ventures for the business of multinationals. *See* Adonis, *supra* note 8, at 21. Large companies are often reluctant to give full control of a strategic asset like telecommunications to one company and therefore end up avoiding outsourcing contracts. *Id.*

[98] EEC TREATY, *supra* note 11, art. 90, para. 3. EU case law also supports the right of the Commission to issue directives under article 90. *See* Coopers & Lybrand, *Telecommunications, supra* note 5, at *2.3.

[99] Shlomo, Maital, *Antitrust Reborn*, ACROSS THE BOARD, March 1994, at 44, 44.

in a domestic market or in the common market. Perhaps the biggest threat to competition will arise when PTOs of individual Member States—such as Deutsche Telekom and France Telecom—join together and subsequently form partnerships with international giants. In this scenario, individual PTOs can combine their market shares from multinational businesses, thereby bringing the partnership entity closer to a dominant position in a market. Simply possessing a dominant position and seeking to strengthen this position may constitute an abuse violating antitrust law. As the body of case law interpreting antitrust law in the EU increases and develops, private telephone service providers will discover whether the EU will tolerate a possible new form of monopoly.

Stephanie L. Harkness