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EUROPE RESPONDS TO THE CHALLENGE OF THE NEW INFORMATION TECHNOLOGIES: A TELEINFORMATICS STRATEGY FOR THE 1980's

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In November 1979, the Commission of the European Communities (the Commission) proposed that the Member States of the European Communities (EC) secure one-third of the world market in teleinformatics, a market including telecommunications, computers, and related goods and services.[1] The message is clear: the EC lags far behind the United States and Japan in this field and it wants to catch up. The Commission's goal is to increase the European share of the teleinformatics market by the end of the 1980's.

The Commission's plan is an effort to fill in gaps left by programs and measures of the EC institutions themselves, the Member States, private companies, and other international organizations. These programs and measures have included trans-border data flow and privacy protection laws[2] and telecomm-

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1. The Commission's views and recommendations are contained in Commission of the European Communities, European Society Faced With the Challenge of New Information Technologies, Doc. COM (79) 650 final (1979) [hereinafter cited as Dublin Report]. The Dublin Report was prepared upon the recommendation of Commissioner Etienne Davignon, and was submitted to the Heads of State and Government on November 29-30, 1979. As employed in the Dublin Report and in this Article, the term "new technologies" encompasses the vast complex of communications and information industries. *Id.* summary 1-2. This Article will refer to the EC strategy as the "teleinformatics strategy." The term "teleinformatics" is derived from "telematic," a term intended by the EC to apply to all those services, systems, equipment, and products that are based on the use of electronic information techniques, including telecommunications, computers, advanced components and micro-processors, and data banks. *Id.* at 4.

2. *See* notes 36-49 *infra* and accompanying text.

unications policies, as well as policy initiatives in such areas as informatics, data processing, microelectronics, and social problems of the new technologies. A review of EC studies and actions in these areas demonstrates that the Brussels-based Eurocrats have examined this complex field in the context of the objectives set forth in the Treaty of Rome.[3]

This Article begins with a discussion of the basic problems confronting the EC in the teleinformatics field. Next, the Article discusses the recently proposed EC strategy that is designed to address such problems and outlines the legal bases for the strategy's three main aims: preparing society for the new technologies, establishing a homogenous EC market in teleinformatic goods and services, and creating new markets and strengthening the EC's industrial capacity to meet the challenges of the new technologies. Finally, the Article develops an analysis of the EC strategy and suggests that in light of Treaty of Rome objectives, the EC institutions have far from exhausted their authority under the Treaty.

3. Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (*in force* Jan. 1, 1958) [hereinafter cited as Treaty of Rome]. An authoritative English translation appears in [1973] Gr. Brit. T.S. No. 1, Part II (Cmd. 5179 II), at 1.

The European Communities operate through four institutions: the Council, the Commission, the Assembly, and the Court of Justice. For the purposes of this Article, these institutions will be discussed in the context of their responsibilities under the Treaty of Rome.

Article 189 of the Treaty of Rome gives the Council and Commission the authority to "make regulations, issue directives, take decisions, make recommendations or give opinions." Treaty of Rome, *supra,* art. 189.

A regulation has general application, "is binding in its entirety and directly applicable in all Member States." P. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 183 (1972). Regulations are the most important source of secondary EC legislation. *Id.* at 184. The "directly applicable" aspect of a regulation means that it creates rights and obligations not only for Member States, but also for their citizens. *Id.*

A directive is binding "as to the result to be achieved, upon each Member State to which it is directed." Treaty of Rome, *supra,* art. 189. Directives are distinguishable from regulations in that directives are binding only as to the result to be achieved and pertain only to the addressee. A directive may or may not confer rights on private persons, depending on its nature and intent.

A decision is "binding in its entirety upon those to whom it is addressed." *Id.* art. 189. "The addressee can be a Member State or a legal or natural person and decisions can be taken by the Council and by the Commission." P. MATHIJSEN, *supra,* at 186. Decisions are generally administrative decisions that implement EC law. *Id.*

Recommendations and opinions "shall have no binding force." Treaty of Rome, *supra,* art. 189. Recommendations "aim at obtaining a certain action or behavior from the addressee while 'opinions' express a point of view at the request of a third party." P. MATHIJSEN, *supra,* at 187. However, the distinction between recommendations and opinions is not legally significant. *Id.*

I

THE DILEMMA: JUSTIFICATION FOR A UNIFIED COMMUNITY STRATEGY

The European post-war economic boom has slowed since 1974, and Europe's overall economic position in the world has begun to decline.[4] In 1978, European heads of state recognized the need to find new sources of growth to offset the decline in traditional industries such as steel, textiles, shipbuilding, and coal.[5] These leaders voiced the view that the evolving information industries offer a primary source of economic growth and social development. The Commission was to study the matter and report back. The resulting Commission Report analyzed the European teleinformatics situation and proposed actions that the EC should take in response.[6]

The current EC position in the area of teleinformatics leaves much to be desired. Although European industry has made substantial intellectual contributions to the new technologies, the United States and Japan are clearly the leaders in the commercial and industrial fields.[7] For example, Europe supplies only sixteen percent of the world market in computers, whereas the United States supplies over seventy percent.[8] In the key peri-informatic area, Europe's share of the market has fallen from one-third in 1973 to one-quarter in 1978.[9]

Unlike the United States[10] and Japan,[11] the EC is characterized

4. Dublin Report, *supra* note 1, foreward 1. The Commission stated that "[a] considerable effort will have to be made for the Community, its citizens, its cumbersome social structures and its fragile political balances to react in a positive way by adapting to the new economic and political realities of the world today." *Id.*

5. *Id.* summary 1.

6. *See* Commission of the European Communities, New Information Technologies: First Commission Report, Doc. COM (80) 513 final (1980) [hereinafter cited as First Commission Report]. The First Commission Report generally follows the lines of action originally proposed in the Dublin Report, note 1 *supra*.

7. Dublin Report, *supra* note 1, summary 3.

8. *Id.*

9. *Id.*

10. American success in the teleinformatics industry is seen as a function of a vast home market, in part due to massive orders by the federal government, publically supported research and development programs, and uniform and inexpensive telecommunications networks. American industry, according to the Commission, has combined these advantages with business initiative and technological innovations to achieve world dominance. *Id.* at 7-8.

11. The Commission paid particular attention to the Japanese "Plan for the Information Society" introduced in 1967. In this plan the Japanese government, in cooperation with private enterprises, established programs of research, development, and education to transform its labor/energy/materials intensive industries into information intensive industries. The Japanese strategy in the teleinformatics industry is similar to the strategy Japan employed to gain major shares of the world's steel, motor vehicle, and consumer electronics market. The Japanese government is "preparing to gain an increasing foothold on the world market [in teleinformatics] by ensuring both that the products offered

by a number of diverse and divisive national strategies. A purely national and uncoordinated approach will not suffice to bring European enterprises into a competitive world position. Such programs fail to permit exploitation of the EC's continental scale. Moreover, the EC suffers because of differing standards, practices, and procedures in various teleinformatics industries. For example, in telecommunications, the separate national administrations (PTTs)[12] have developed distinct technologies,[13] procurement procedures,[14] and tariff and service policies.[15] European teleinformatic enterprises cannot, in their present form, effectively compete in either the world or European market with U.S. and Japanese industries.[16] Policies of a purely national dimension render the task of creating economies of scale difficult and expensive.[17] Given such depressing prospects, the Commission decided to enter the teleinformatics field and attempt to devise solutions within the EC framework.

II

THE COMMUNITY RESPONSE

Based upon its recommendations in the Dublin Report, the Commission, on September 1, 1980, invited the Council of Ministers (Council) to develop a comprehensive strategy to meet the challenge of the new technologies.[18] The formal communication calls for periodic referral to the Council of "measures that [the Commission] deems appropriate, including budget measures where necessary" designed to achieve the goals of the Dublin Report.[19] The First Commission Report was a communication of the activities of the

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are of a high technical standard and that the volume of sale will allow very competitive prices." *Id.* at 8-9.

12. As used in this Article, the term PTTs refers to the national postal, telephone, and telecommunications administrations of the EC Member States.

13. *See* notes 108-15 *infra* and accompanying text.

14. *See* notes 123-24 *infra* and accompanying text.

15. *See* notes 290-300 *infra* and accompanying text.

16. Dublin Report, *supra* note 1, at 12. It is believed that such domination by the United States and Japan in the short term would result in:

> —the final loss of European control over an essential field;
>
> —damage to the competitive position of the Community both in Europe and in the rest of the world;
>
> —the loss of the potential new jobs, which should compensate for loss of jobs caused by the new technologies;
>
> —a reduction in [European] independence in decision-making in all walks of public and private life.

Id.

17. *Id.* at 15.

18. The formal communication from the Commission to the Council is contained in First Commission Report, note 6 *supra*.

19. *Id.* at 1.

Commission in the area.[20] The Commission proposed "lines of action" with three main aims:

(1) to initiate measures to help society and industry to master the new technologies and adapt to their use;
(2) to establish a uniform EC market by encouraging common standards; and
(3) to create and promote new markets for the new technologies and to strengthen corresponding European industrial capacity.[21]

Many portions of the Commission's proposed strategy are not new. Rather, the proposal in large part represents an amalgam of various EC policies developed over the past seven years in the fields of data processing, informatics, microelectronics, telecommunications, and privacy protection. Nonetheless, the comprehensive proposal represents a major departure from the EC's piecemeal approach dictated by numerous and uncoordinated national programs.

A. Projects to Prepare Society for Innovation

The teleinformatics revolution will certainly have profound implications for European societies. Many Europeans still view the new technologies with hostility, fearing the potential adverse effects on employment and privacy protection. To gain political support for the rapid introduction of new technologies into Europe, the Commission has structured its policies to take due account of the underlying social concerns involved.[22] The Commission proposal calls for an overall strategy involving "measures" on the part of companies, national governments, and the EC.[23]

1. Labor

The effect of the new technologies on employment and working conditions is one of the major concerns of European trade unions and professional associations.[24] The EC must respond to these concerns if it hopes to obtain political support for its programs. European workers and their unions will not endorse programs designed

20. *Id.*
21. *Id.* at 3.
22. *See* Dublin Report, *supra* note 1, at 5-6.
23. *Id.* at 13-17. Companies are merely to "operate profitably in the market and to promote their own development under whatever conditions the public authorities may lay down." *Id.* at 14. Regarding national governments, the Commission endorsed various state aid programs proposed by or currently underway in the Member States. The Commission also foresees the national authorities playing an "essential role" in trade-promotion through the placing of public orders. *Id.* For a discussion of EC measures, see notes 123-34 & 301-09 *infra* and accompanying text.
24. *Id.* at 18. See extensive bibliography in Commission of the European Communities, Employment and the New Micro-Electronic Technology, Doc. COM (80) 1 final at annex 11-14 (1980) [hereinafter cited as Employment Report].

to encourage the new technologies if such programs will lead to the loss of jobs.

Some Member States have already begun efforts to educate workers on the realities of the new technologies.[25] The Commission now recommends that such efforts be strengthened, and calls for the elevation of the dialogue between management and industry to the EC level.[26] First, by "consulting the two sides of industry," labor and management, the Commission hopes to facilitate the conclusion of outline agreements or collective wage agreements addressing such issues as wages, job security, working conditions, health and safety standards, and retraining of workers displaced by the new technologies.[27] Second, the Commission proposes a community pool "to centralize studies, research work and information on the impact of new technologies on employment."[28] Third, the Commission calls for a "periodic assessment of the impact of telematic systems and services on society."[29]

Before the issuance of the First Commission Report, the Commission had already begun examining the impact of microelectronic advances on employment.[30] In the earlier study the Commission concluded that the public authorities and their "social partners" must indicate their views on social and employment problems associated with the rapid development of the microelectronics industry.[31] Moreover, these parties should be called upon "to define appropriate procedures for discussion and negotiation" at the appropriate organizational level.[32] The Commission proposed numerous lines of action, including: (1) developing economic policies in order to maintain and encourage demand for new microelectronic technology; (2) increasing the awareness of problems that the new technologies raised in terms of work conditions; (3) improving the quality of life by application of the new technologies; (4) developing new vocational training programs; (5) adapting and developing labor market measures (guidance, placement, mobility) to avoid job mismatching; (6) adapting social protection arrangements to ensure that the new technologies do not adversely affect the standard of living of

25. Dublin Report, *supra* note 1, at 18.

26. *Id.* at 18-19.

27. *Id.* at 19.

28. *Id.*

29. *Id.* (emphasis omitted). This assessment is to be made every five years, using the so-called Delphi method or representative sampling used "with great success" by the Japanese. *Id.* at 20.

30. *See* Employment Report, note 24 *supra*.

31. *Id.* at 11.

32. *Id.*

workers; and (7) directing major information campaigns.[33] It is up to the public authorities and "social partners" to cooperate in implementing these actions. The Commission, too, has expressed its willingness to encourage cooperation.[34] The proposed lines of action may ultimately require an EC directive to deal with European trade union concerns over such matters as minimum employment levels, rights to training, job reclassification, employment security, and working conditions. The authority of the EC to issue such a directive can be found in the Treaty of Rome's goal of promoting the free movement of workers.[35]

2. *Privacy Protection and Individual Freedom*

A second essential aspect of the Commission's project to prepare European society for the new technologies involves the protection of individual freedoms. EC institutions began examining the threat of data processing to personal privacy at least four years before issuing the Dublin Report. In 1975, for example, the European Parliament recommended that the Commission prepare a directive on the protection of individual rights against abuses arising from data processing.[36]

Beginning in 1973, an increasing number of European countries began to enact data protection laws.[37] So far, two different data protection systems have been adopted, represented by the approaches of

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33. *Id.* at 11-12.

34. *Id.* at 13.

35. The Commission is sensitive to the interests of the EC's labor force and has experience in developing programs to ensure that labor concerns are adequately addressed. *See, e.g.,* Commission of the European Communities, Proposal for a Directive on Procedures for Informing and Consulting the Employees of Undertakings with Complex Structures, in Particular Transnational Undertakings, Doc. COM (80) 423 final (1980). *See also* notes 226-30 *infra* and accompanying text.

36. In May 1979 the Legal Affairs Committee of the European Parliament issued the Bayerl Report, [1979-1980] Eur. Parl. Doc. (No. 100) (1979) [hereinafter cited as Bayerl Report], in which it stated:

> The statement in the 1975 Resolution that "a Directive on individual freedom and data-processing is an urgent necessity, not only to ensure that Community citizens enjoy maximum protection against abuses or failures of data-processing procedures, but also to avoid the development of conflicting national data-protection legislation" is even more relevant today than it was then.

Id. at 21. The Legal Affairs Committee found that, while privacy is certainly a prime concern of the EC, "[o]f almost equal importance is the principle of free international flow of information." *Id.* at 22. The Committee expressed its concern for "protectionist measures" taken by Member States as a result of differing legislation. The Committee labeled the situation "damaging for European integration." *Id.* at 22.

37. *See generally* F. HONDIUS, EMERGING DATA PROTECTION IN EUROPE (1975). France, Sweden, Denmark, Norway, the Netherlands, Austria, Belgium, Luxembourg, and the Federal Republic of Germany all have data protection laws of one type of another. *See* Hondius, *Data Law in Europe,* 16 STAN. J. INT'L L. 87, 94 (1980); Kirby, *Transborder Data Flows and the "Basic Rules" of Data Privacy,* 16 STAN. J. INT'L L. 27, 39 (1980).

Sweden[38] and Germany.[39] Differences exist among the various national laws as to the treatment of automated and manual files,[40] public and private data banks,[41] and legal and natural persons.[42] These differences in the laws of the Member States prompted the European Parliament in late 1979 to demand that the Commission formulate a directive aimed at harmonizing the laws of the various Member States.[43]

For the most part, EC institutions have applauded the continuing efforts of the Organization for Economic Cooperation and Development (OECD)[44] and the Council of Europe[45] to conclude multilateral data protection agreements. In the 1979 Bayerl Report, however, the Legal Affairs Committee opined that an EC directive would be a desirable addition to the OECD and Council of Europe agreements, because the former is not binding, and the latter is "optional to its 21 member states" and is subject to a potentially lengthy adoption and ratification process.[46] An EC directive, therefore, may be a necessary alternative or addition to the international agreements, if effective harmonization of the various states' laws is to occur.

The Commission, while definitely concerned with protecting the individual from the possible abuses associated with data processing/flow/storage, also has the responsibility of preserving the fundamental economic principles and objectives of the Treaty of Rome.[47] For example, the Commission has stressed that harmonious development of economic activities within the EC calls for the creation of a genuine common market in data processing in which the free movement of goods, the right of establishment, and freedom of private services are assured, and competition is not distorted.[48] All data protection

38. Bayerl Report, *supra* note 36, at 24.

39. *Id.*

40. Some of the Member State rules cover both automated and manual files, some only one kind. The Legal Affairs Committee prefers legislation covering both manual and automatic processing. Bayerl Report, *supra* note 36, at 25.

41. European laws tend to be omnibus in nature, covering both public and private files in the same act. In the United States, separate data protection laws govern each sector. R. Turn, Review of TDF Legislation 2 (December 1979) (unpublished paper for TDF Presentation on file at *Cornell International Law Journal*).

42. For a discussion on whether data protection should be extended to legal as well as natural persons, see Bayerl Report, *supra* note 36, at 25-27.

43. Bayerl Report, note 36 *supra*.

44. *See generally* Fishman, *Introduction to Transborder Data Flows,* 16 STAN. J. INT'L. L. 1, 15-23 (1980).

45. Convention for the Protection of Individuals With Regard to Automatic Processing of Personal Data, Jan. 28, 1981, Europ. T.S. No. 108.

46. Bayerl Report, *supra* note 36, at 23.

47. *See* notes 171-309 *infra* and accompanying text.

48. *Id.*

laws erect barriers to the transnational flow of data. To the extent that national laws are overly restrictive, the EC may wish to issue a directive prohibiting them in the future.[49]

B. Establishment of a Homogeneous Market

According to the Commission, the EC's largest unexploited asset is its continental market; in particular, that portion of the market occupied by public procurements.[50] The EC will develop and prosper in teleinformatics only if suppliers of goods and services are confident they will have a sufficiently large market to compete internationally.[51] Moreover, users of developing European teleinformatic services must be able to obtain desired services and equipment under favorable market conditions.[52] At present, however, the internal European market for teleinformatic goods and services remains fragmented because of differing Member State administrative procedures, technical rules, national preferences, and the conflicting financial interests of the various PTTs.[53]

The Commission would like to create conditions similar to those in the United States. The United States has been able to exploit its continental scale for teleinformatic goods and services as a result of a standardized, yet dynamic, teleinformatics infrastructure. The common standards allowing for a homogeneous market in the United States result from the predominate roles of large firms such as AT&T and IBM and of Federal Communications Commission policies.[54]

In Europe, however, no public or private authority fulfills this harmonization function on a Community-wide basis. Limited cooperation does exist through the European Conference of Post and Telecommunications Administrations (CEPT)[55] and the International Telegraph and Telephone Consultative Committee

49. *See* Bayerl Report, note 36 *supra*. The Council has the authority to issue directives under Article 100 of the Treaty of Rome. Treaty of Rome, *supra* note 3, art. 100.

50. Dublin Report, *supra* note 1, at 23.

51. *Id.* at 24.

52. *Id.*

53. *Id.* at 15; Commission of the European Communities, Recommendations on Telecommunications, Doc. COM (80) 422 final at explanatory memorandum 2 (1980) [hereinafter cited as Telecommunications Report].

54. Dublin Report, *supra* note 1, at 24. For a comparison of the U.S. telecommunications market with the market in other countries, see Markoski, *Telecommunications Regulations as Barriers to the Transborder Flow of Information,* 14 CORNELL INT'L L.J. 287 (1981).

55. The European Conference of Post and Telecommunications Administrations (CEPT) is made up of representatives from 26 European countries. It is governed by a biennial plenary conference and two permanent commissions that deal respectly with the posts and telecommunications. *See* Markoski, *supra* note 54, at 298 n.47.

(CCITT).[56] Recommendations resulting from consultation within these two groups, however, are neither legally enforceable nor supported by what the Commission describes as "strategic decisions of joint industrial policy."[57] Consequently, the Commission has recommended that the Council use its powers of standardization to harmonize the European markets in telecommunications and data processing.[58]

1. Telecommunications

An efficient and economically viable telecommunications system will be essential in order for Europe to support a vast range of teleinformatic services. The Commission has strongly supported the efforts of the PTTs to cooperate in developing integrated digital transmission and switching networks that would enable enterprises to offer a broad new range of teleinformatic services.[59] Currently, Europe has neither Community-wide services nor a Community-wide market for terminals and other telecommunications equipment.

56. The CCITT is one of four permanent organs of the International Telecommunications Union. International Telecommunications Convention, *done* October 25, 1973, art. 5, 28 U.S.T. 2497, T.I.A.S. No. 8572. The CCITT's duties include studying technical, operating, and tariff questions relating to telegraphy and telephony and to issue recommendations on them. *Id.* art. 11. The working structure of the CCITT is set forth in article 58 of the Convention. The CCITT does not play a significant role in setting national standards regarding the design of telecommunications equipment. Such decisions are left to the individual PTTs who generally set their own standards and specify what local manufacturers will produce. Study by S. Gill, P.A. Management Consultants Ltd., Organization for Economic Co-operation and Development (OECD) Conference on Computer/Telecommunications Policy 185, 218 (Feb. 4-6, 1975) [hereinafter cited as Gill Report].

57. Dublin Report, *supra* note 1, at 24.

58. Community authority to enact harmonizing directives is the subject of Articles 3 and 100 of the Treaty of Rome, note 3 *supra*. Article 3(h) provides for "the approximation of the laws of Member States to the extent required for the proper functioning of the common market." *Id.* art. 3. Article 100 gives the Council, "acting unanimously on a proposal from the Commission," the power to "issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market." *Id.* art. 100. Where the Commission finds that differences among various national laws are "distorting the conditions of competition in the common market," the Council, on a proposal from the Commission, has the power under Article 101 to legislate by a qualified majority in order to eliminate the distortion in question. *Id.* art. 101. *See generally* P. MATHIJSEN, *supra* note 3, at 108-10.

The distinction between Articles 100 and 101 is potentially important in the teleinformatics field. For example, if a proposed line of action calls for approximation of national procedures regarding standards or procurement, the Treaty of Rome requires unanimity in the Council. Treaty of Rome, *supra* note 3, art. 100. Thus, any affected Member State could effectively block the adoption of such a directive. Conversely, if a particular line of action calls for a directive to eliminate distortions of competition caused by national regulations the Council can act by qualified majority vote. *Id.* art. 101. *See* note 244-75 *infra* and accompanying text.

59. *See* Dublin Report, *supra* note 1, at 24; Telecommunications Report, *supra* note 53, explanatory memorandum, at 3.

The Commission views the European situation as "strikingly different" from that in the United States, where terminal users have the right, as well as the technical capability, to plug into any common carrier network and obtain transcontinental communication.[60]

In 1977, the Commission and the PTTs established a Working Group on Future Networks that subsequently recommended measures in the field of digital networks with a view toward establishing Integrated Services Digital Networks (ISDNs).[61] ISDNs are networks with sophisticated digital transmission and switching capabilities that provide the user with multiple voice, video, and data communication services over the same transmission medium.

The Commission believes that the introduction of ISDNs by all Community PTTs offers a unique opportunity for harmonization.[62] Harmonization efforts require substantial resources, skilled workers, and time. If the Working Group reaches agreement on a harmonization plan, the Member State PTTs will be called upon to implement any recommendations that the Working Group makes.[63] This implementation process, however, must take place in the midst of "different national services, technologies and procedures inherited from the past and in the presence of inevitable competitive commercial interests."[64]

Against this background, the Commission submitted three draft recommendations and one draft declaration[65] on harmonization to the Council in September 1980.[66] These proposed measures are designed to create political support for the implementation of the CEPT and CCITT measures, irrespective of differing inclinations among the CEPT participants.

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60. Telecommunications Report, *supra* note 53, explanatory memorandum, at 2-3.

61. *Id.* explanatory memorandum, at 3-4.

62. Telecommunications Report, *supra* note 53, text of recommendations, at 1.

63. Under the procedures of CEPT and the CCITT, the PTTs will not be bound to follow working group recommendations. The PTTs will likely attempt to follow such recommendations, however, since they are active participants in the CEPT's and the CCITT's policy formulation process.

64. Telecommunications Report, *supra* note 53, explanatory memorandum, at 4.

65. Interestingly, the Commission chose the weakest of all EC legislative measures, the recommendation, as the appropriate vehicle for implementing a new community telecommunications strategy. Article 189 of the Treaty of Rome states that "[r]ecommendation and opinions shall have no binding force." Treaty of Rome, *supra* note 3, art. 189. Also noteworthy is the Commission proposal for a Council "declaration"—a measure not mentioned in the Treaty of Rome. In a detailed explanation of these proposals, the Commission referred to the "declaration" as a fourth "recommendation" thereby suggesting that it too had no binding force.

66. Telecommunications Report, note 53 *supra*.

a. ' Draft Recommendation I

The Commission's First Draft Recommendation contains four suggestions for PTT activity in teleinformatics. First, the Draft Recommendation calls upon the PTTs to consult with each other before introducing new teleinformatic services.[67] The Recommendation's consultation mechanism is designed to avoid technical disparities that might adversely affect subsequent EC harmonization measures. The Commission is apparently seeking a genuine commitment to consult both at a policy level and a technical level.[68] The Recommendation, however, leaves the PTTs free to choose an appropriate time and framework for such consultations.[69] Second, the recommendation proposes that the introduction of new teleinformatic services after 1983 follow a "common harmonized approach."[70] This proposal implies further cooperative measures including administrative efforts to define the type and scope of new services, implement common policies, and pool market studies with a view toward adopting a common market approach.[71] Third, the Recommendation provides that beginning in 1985 the PTTs should order digital and switching systems that will be technically compatible, and will facilitate harmonization and integration.[72] Finally, the Recommendation calls upon the PTTs to regularly inform the Commission of the progress of the work in CEPT.[73] In conjunction with the last suggestion, the Commission assures that it will review the PTTs' progress regularly and report back to the Council by January 1985. Whenever necessary, the Commission shall make appropriate proposals to the Council in order to ensure Community-wide harmonization of networks, services, and equipment.[74]

Draft Recommendation I, while clear in stating its objectives, is vague in suggesting effective mechanisms to achieve them. The Commission apparently avoided making substantive recommendations in the belief that the PTTs would challenge them as being outside the competence of the EC institutions.[75] In other words, the Commission evidently believed that it was not an opportune time politically for the EC to assert meaningful jurisdiction over the

67. Telecommunications Report, *supra* note 53, text of recommendations ¶ 1, at 2.
68. *Id.* annex, at 3.
69. The Commission expresses a preference that the consultations take place within the framework of CEPT. *Id.* text of recommendations, at 2.
70. *Id.* ¶ 2 at 2.
71. *Id.* annex, at 3-4.
72. *Id.* text of recommendations ¶ 3, at 2.
73. *Id.* ¶ 4 at 2.
74. *Id.* at 2.
75. *See* notes 184-87 *infra* for discussion of the political relationship between the Member State PTTs and the EC.

PTTs.[76]

Draft Recommendation I also reflects a large amount of Commission optimism. The Recommendation envisages positive results from consultation procedures by 1985. There is little evidence that a consensus currently exists among the various PTTs regarding equipment standardization.[77] In addition, due to lengthy depreciation schedules on present telecommunications facilities, Recommendation I would probably have little impact on large portions of the EC telecommunications systems for many years.[78]

Another problem with Draft Recommendation I stems from its apparent assumption that the consultation process will take place among similarly situated PTTs. Policy differences with regard to the development of new services exist among the European PTTs reflecting different technological capabilities.[79] When engaging in the consultations prescribed in the Draft Recommendation, the PTTs must resolve these policy differences if they are to achieve the Commission's harmonization goals.

b. Draft Recommendation II

The goal of Draft Recommendation II is the creation of a Community-wide market for leasing and purchasing terminal equipment.[80] Full exploitation of the European terminal market requires that private firms, in addition to the PTTs, be permitted to supply

76. There may be several bases upon which the Commission may justify the exercise of jurisdiction over the PTTs. For example, one European commentator already believes that the Commission could challenge CEPT agreements as violating the Treaty of Rome competition rules. For further discussion see notes 269-75 *infra* and accompanying text.

77. The individual PTTs, to a large extent, set their own national standards. Gill Report, *supra* note 56, at 207.

78. Gill notes that in comparison to "other businesses of a similar technical nature, telecommunications carriers have adopted relatively long periods over which to depreciate their investments in plant and equipment." *Id.* at 210. The British Post Office, for example, depreciates telephones over 20 to 25 years, exchanges over 16-29 years, and telephone lines and cables over 19 to 40 years. *Id.* Such practices are common throughout the world. *Id.* PTTs will not be in a position to immediately adjust depreciation schedules to accommodate the aims of Draft Recommendation I.

79. The divergence of policy between the British and the French is an example. The British are less advanced than the French in the area of digital switching, and tend to develop new services, in part, on the basis of current capabilities.

80. In traditional telecommunications systems, the telephone set is the primary user terminal. The new technologies, however, have made available to the user hundreds of new types of terminals. Recommendation II does not attempt to define what constitutes a telematic terminal. Instead, it indicates what is *not* a terminal, and includes in this list "telephone sets for main stations, Private Automatic Branch Exchanges (PABXs) for traditional telephony, conventional teleprinter machines and initially modems not forming part of terminal devices." Telecommunications Report, *supra* note 53, text of recommendations, at 3. In a detailed explanation of the Recommendations, the Commission makes clear that a first priority of the PTTs should be "to arrive at an agreed definition of terminals. . . ." *Id.* annex, at 7.

equipment to users. The Commission concluded that only "[a] Community market can offer users the widest benefits of innovation and choice and offer suppliers of new terminals the economies of scale which can enable them to write off rapidly the costs of development and investment in new products."[81]

Draft Recommendation II proposes that users within the EC be free to lease or purchase new types of telematic terminal equipment from either private suppliers or from the PTTs.[82] Moreover, the Commission recommends specific actions to ensure that the European terminal market is operated on a non-discriminatory basis. In this regard, the Recommendation focuses on type approval procedures.[83] Recommendation II encourages the PTTs to move rapidly toward reciprocity with regard to type approval procedures. The Recommendation also states that, beginning in 1981, the PTTs should receive supply tenders from manufacturers of other Member States before purchasing telematic terminal equipment themselves.[84]

Draft Recommendation II provides for periodic consultation between the Commission and the PTTs to ensure that an open market "is being achieved without undesirable consequences for the pattern of Community trade with the outside world."[85] According to the Commission, existing agreements will cover non-European terminal suppliers.[86] The Council has already adopted a Decision providing that type approval arrangements should not discriminate against non-European suppliers from nations with a reciprocal

81. *Id.* explanatory memorandum, at 5. Certain Member States have already recognized the need for private terminal suppliers. The British, for example, announced in September 1980, plans to open up its telecommunications system to "approved equipment" of private suppliers. United-Kingdom users could, as a result of such liberalization, buy terminal equipment from European and non-European suppliers. *See* ECONOMIST, Dec. 6, 1980, at 64; DATAMATION, Oct. 1970, at 78. Several commentators suggest that the British plan may make it possible for private firms to provide value-added services, an area long limited to the British Post and Telegraph Monopoly. *E.g.,* Markoski, *supra* note 54, at 294 n.30.

82. Telecommunications Report, *supra* note 53, text of recommendations, at 3.

83. "Type approval" refers to those procedures and tests that terminal equipment must pass before a PTT will permit it to be attached to the public common carrier network. *Id.* annex, at 7. The Commission takes the position that the PTT monopoly covers transmission between subscribers including all types of switching and transmission links (satellite and cable). *Id.* text of recommendations, at 9. Thus, the network extends to a termination point at the user's premises. At that point the network can only interface with "type approved" terminal equipment. *Id.* annex, at 7.

84. Telecommunications Report, *supra* note 53, text of recommendations ¶ 3, at 4. The Commission envisages progress first in the area of public procurement, with a general liberalization of the terminal equipment market to follow. The strategy mirrors that of the Commission in the area of data processing. *See* notes 97-134 *infra* and accompanying text.

85. Telecommunications Report, *supra* note 53, text of recommendations ¶ 4, at 4.

86. *Id.* annex, at 12.

policy.[87]

In its report accompanying Recommendation II, the Commission concluded that its proposed Recommendation must not prejudice its basic responsibility to ensure that the Treaty of Rome's rules on competition are enforced.[88] Thus the Commission appears to be offering a subtle warning to both private industry and public administrations: They are to avoid restrictive practices to the extent these practices frustrate the creation of a competitive market in terminals.[89]

c. Draft Recommendation III

The Commission's third Recommendation addresses the opening up of public contracts. Recommendation III, if implemented, would initiate a phase of action during which the PTTs would "gain experience" in "inviting" tenders for a minimum proportion of their purchases from other EC countries on a non-discriminatory basis.[90] The Commission also recommends that during the period 1981 to 1983 the PTTs seek competitive proposals from EC suppliers of terminal equipment for at least ten percent of their annual orders.[91] Recommendation III further cautions that its proposal is made "without prejudice to the applicability of the rules of the Treaty [of Rome], especially Articles 30 and 86."[92] In Recommendation III, as in Recommendation II, the Commission appears to be putting on notice those enterprises, public or private, that might prefer to continue practices proscribed under the Treaty of Rome, especially those practices that restrict the free flow of goods or otherwise distort competition within the EC.[93] Finally, Draft Recommendation III calls on the Commission to monitor the progress of the recommended actions.[94]

d. Draft Declaration

A proposed Council Declaration would establish an Advisory Liaison Committee to monitor progress, identify policy problems, and propose actions to ensure the effective implementation of the

87. *Id.*

88. *Id.* The Commission currently has authority to attack restrictive barriers to competition whether or not Recommendations are ever implemented. *See* notes 247-309 *infra* and accompanying text.

89. *Id.*

90. *Id.* text of recommendations ¶ 1, at 5.

91. *Id.* ¶ 2, at 5.

92. *Id.* at 5.

93. *See* notes 88-91 *supra* and accompanying text; notes 247-309 *infra* and accompanying text.

94. Telecommunications Report, *supra* note 53, text of recommendations ¶ 3, at 5-6.

three Recommendations.[95] The Committee would represent both the Commission and the PTTs, but the Commission states that ultimate responsibility for development of the European telecommunications market rests "on the shoulders of the telecommunications administrations themselves, supported by the firm political commitment of the Member States . . . ."[96]

An overview of the Commission's proposals reveals the cautious approach the Commission is presently taking in addressing the complex problem of creating an integrated EC telecommunications infrastructure. The EC officials are apparently reluctant to enter the field of telecommunications regulation too rapidly; a field traditionally viewed as the exclusive domain of the national administrations. At this time, encouraging cooperation may be the only politically realistic means of achieving the goal of harmonization.

2. *Data Processing*

Since issuance of the Council Resolution on Data Processing of 1974,[97] the Commission has focused much of its attention on achieving harmonization and standardization in the field of data processing. The Commission considers it vital to implement a common strategy reflecting "the realities of the data-processing scene."[98] The "realities" center around developing strategies to meet IBM's global domination of the market in computer equipment and software.[99] The Commission's goal since 1975 has been "to promote and encourage the formation of at least one major European-based

95. *Id.* at 7.

96. *Id.* annex, at 14.

97. Council Resolution of 15 July 1974 on a Community Policy on Data Processing, 17 O.J. EUR. COMM. (No. C 86) (1974). [hereinafter cited as 1974 Council Resolution on Data Processing]. The 1974 Resolution noted the need for a defined EC policy "to promote research, industrial development and applications of data processing." *Id.* ¶ 3. The Council invited the Commission to report on the European situation and to submit proposals. *Id.* ¶ 4.

98. Commission of the European Communities, Community Policy for Data-Processing, Doc. COM (75) 467 final 2 (1975) [hereinafter cited as 1975 Commission Report on Data-Processing].

99. *Id.* at 3. The Commission warned in its 1975 report that "[t]he challenge of IBM, however, remains daunting and is taking a new form as it makes rapid progress towards providing customers with a total information system, including telecommunications facilities, and an immense variety of possible online applications systems." *Id. See also* [1973-1974] EUR. PARL. DOC. (No. 153) (1974). [hereinafter cited as the 1974 Coustè Report]. The Coustè Report notes that, "[i]n spite of the enormous importance of data-processing to the Community, Europe has . . . been obliged to proceed almost entirely on the basis of American technology. . . . More than 90% of the computers installed in Europe are based on American technology, and a single American company *IBM, holds about 60% of the European market*." Coustè Report, *supra,* ¶ 2, at 26 (emphasis added). The largest European firms ICL (English), CII (French), SIEMENS (West German), and PHILIPS (Dutch) are "dwarfs" by comparison. *Id.*

grouping capable of sustaining a viable economic existence and of achieving balanced partnership with partners in the United States and Japan."[100]

In its 1975 Report, the Commission noted "two contradictory trends" as the world enters "the era of distributed computing."[101] The first trend involves the progressive creation of new opportunities for diversified and decentralized data processing services. According to the Commission, this trend can continue only if the public authorities "create a framework of standards, procurement and aid which prevent monopolisation and assist this process of diversification."[102] The second, "less attractive" trend, however, involves the progressive development by a single company of comprehensive systems and software services to meet virtually every data processing need, thereby "lock[ing] customers in for many years to come [and] severely limiting their freedom of choice . . . ."[103] The latter trend would continue unless public authorities work to provide a favorable environment for alternative suppliers.[104]

In evaluating its options, the Commission has paid particular attention to the goals of the 1974 Council Resolution[105] and has concluded that: (1) it is not acceptable to users or to the public for a single company to dominate the technology of central processors and distributed computing; (2) at least some part of this important industry must be under European control; (3) the European market for data processing equipment is too large to go unattended; and (4) it is possible for a variety of European companies to thrive in this industry provided they can operate in a favorable European environment and are properly promoted.[106] The Commission has elaborated upon these and related policies in developing EC programs relating to data processing standardization, portability, and procurement.[107] These programs are designed to permit users (including the PTTs themselves) of teleinformatic products to obtain equipment and software from a variety of suppliers, to reduce conversion costs, and to attract new suppliers and facilities into the European market.

100. 1975 Commission Report on Data-Processing, *supra* note 98, at 2.
101. *Id.* at 4-6.
102. *Id.* at 4.
103. *Id.*
104. *Id.*
105. 1974 Council Resolution on Data Processing, note 97 *supra*.
106. 1975 Commission Report on Data-Processing, *supra* note 98, at 5.
107. The systematic EC programs envisaged in the 1974 Council Resolution on Data Processing, note 97 *supra*, are now referred to as multinational programs.

a.' Standards Policy

The Commission views Community-wide standards as essential to the creation of a free and competitive data processing market in which users will be able to combine equipment and software from different suppliers and begin to use new products without high conversion costs.[108] Once the standards have been agreed upon, they should be applied by impartial public bodies representing a broad spectrum of industrial and user interests. The Commission wishes to avoid a situation where standards are "imposed by an individual dominant concern, whose standards inevitably change without regard to such wider interests (of users and industry)."[109]

In 1975, as a first step in formulating an EC policy on data processing standards, the Commission established the Working Group on Standards.[110] The Working Group is responsible for recommending and formulating policies for the implementation of EC standards in the data processing field.[111] The Commission hopes that the Group's work will promote the efforts of other public research and support bodies to ensure that public procurement and other national policies support, implement, and require suppliers to respect recommended EC standards.[112] Priority activities for which the Working Group on Standards has already set up appropriate working parties include: (1) defining standards for the data processing language COBOL;[113] (2) developing network standards, which are critical to the development of distributed data processing;[114] and (3) developing a new European-based international standard language for use in real-time data processing systems.[115]

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108. *See* 1975 Commission Report on Data-Processing, *supra* note 98, at 6.
109. *Id.* at 6.
110. *Id.* at 7.
111. *Id.*
112. *Id.* at 9.
113. *Id.* at 7. When the Commission established the Working Group on Standards in 1975 COBOL was the most widely used high level language in data processing. Partly in response to these EC initiatives CEPT, *see* note 55 *supra,* established its own working parties to work on the harmonization of future telecommunications services and standards. This work illustrates the complex and interdependent problems associated with the process of planning data processing and telecommunications systems.
114. *Id.*
115. *Id.* "Real-time" is the processing method that is capable of receiving data at any time and obtaining results immediately. The reaction time varies as a function of processing constraints as well as of need. A "real-time network" consists of terminal equipment, a transmission network, and processing equipment, operating in a manner that enables several users to have simultaneous access to it, with each of their requests being fulfilled within a given time and at given intervals. An example of a real-time network is an air or train ticket reservation system. *See* S. NORA & A. MINC, THE COMPUTERIZATION OF SOCIETY 174 (1980).

In 1975 the Commission predicted that by 1980 real-time data processing systems would represent one-third of the data processing market. Thus, the Commission pro-

b. Portability

Another aspect of the Commission's data processing policy involves the promotion of portable[116] software.[117] Portable software allows the user to transfer his applications to new hardware or to use otherwise incompatible items of equipment simultaneously.[118] A properly formulated portability policy would reduce conversion costs to users of data processing systems by increasing the life of software products and by permitting wider integration of diverse software products and equipment.[119] In addition, increased portability may provide the user with greater freedom of choice and a broader range of matching requirements as well as offer greater flexibility in data exchange and task assignment procedures.[120] Finally, the Commission believes that increased portability will promote and facilitate competition among suppliers, thereby enabling European nondominant producers to penetrate the data processing market more easily.[121] EC efforts in the area of portability have included studies on software language, conversion tools, and the feasibility of developing a common software interface for minicomputers.[122]

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posed a European initiative to create a standard language to replace the numerous separate national languages destined to become obsolete. Taking this initiative, the EC moved towards creating a homogenous and competitive data processing market.

116. Programs are portable if different data processing systems can execute them without modifying the application software and the data. S. NORA & A. MINC, *supra* note 115, at 172.

117. Software refers to the entire set of programs, procedures, rules, and documents related to the operation of data processing systems. *Id.* at 176.

118. 1975 Commission Report on Data-Processing, *supra* note 98, at 8.

119. *Id.*

120. *See* Council Decision of 27 September 1977 adopting a Series of Informatics Projects in the Field of Software Portability, 20 O.J. EUR. COMM. (No. L 255) 22 (1977) [hereinafter cited as 1976 Council Decision on Portability]. The decision states: "Accordingly, when applications are transferred to new hardware, or when they are processed simultaneously by different items of equipment, the degree of difficulty encountered by the user will depend on what, for sake of convenience, will be called 'portability'." *Id.* annex, at 23.

121. *See* 1975 Commission Report on Data-Processing, *supra* note 98, at 9. The Commission theorizes that economies of scale confer on dominant data processing manufacturers the ability to develop and market a very wide range of software applications. European-based suppliers, taken separately, are not in a position to market so wide a range of applications. *Id.* Thus, the availability of portable software facilitates the combination of equipment of different manufacturers with applications developed by other software and hardware companies. Ironically, increased portability may create an environment more beneficial to the dominant U.S. suppliers than to the European companies.

The EC institutions may also be able to justify their work in the portability area based on the competition rules of the Treaty of Rome. *See* notes 247-309 *infra* and accompanying text.

122. *See* 1976 Council Decision on Portability, *supra* note 120, annex, at 24.

c., Procurement Policy

Another element of the Commission's data processing strategy is the coordination of public procurement policies, an objective as important for creating an open and competitive data processing market as it is in the telecommunications sector.[123] The importance of coordinating public procurement policies in data processing is demonstrated by the fact that public markets account for thirty percent of the entire EC data processing market.[124]

The new Commission procurement policy has three main objectives: (1) assisting public buyers in obtaining a wider and more economical choice of equipment;[125] (2) creating a more open and homogeneous market for industry, ensuring that European-based companies have access to all EC contracts on the same conditions;[126] and (3) encouraging the procurement, throughout the EC, of data processing equipment, software, and services from European-based companies.[127]

Toward achieving these objectives, the Council issued a directive in December 1976[128] coordinating procedures for the award of public supply contracts. The Directive requires that, after January 1981, supply contracts for data processing be open to competitive tender.[129] It is yet unclear, however, whether the Directive, as sup-

123. Restrictive national procurement policies in either sector create barriers to a homogeneous market.

124. *See* Commission of the European Communities, A Four-Year Programme for the Development of Informatics in the Community, Doc. COM (76) 524 final 5 (1977). The Commission believes that the scope and potential for a rational public procurement policy is best shown by the United States experience where "federal government policy has ensured that certain standards have been imposed (for example COBOL), where the practice of buying rather than leasing equipment is common . . . and where IBM had in 1975 only 36 percent of the park by value, compared with 68 percent in the US market as a whole." *Id.*

125. *Id.* at 5. This occurs by "exchange of experience and adoption of the best common practices." *Id.*

126. *Id.*

127. *Id.* The Commission only encourages the procurement of equipment and services comparable in price and performance to other equipment, software, and services.

128. Council Directive of 21 December 1976, Coordinating Procedures for the Award of Public Supply Contracts, 20 O.J. EUR. COMM. (No. L 13) (1977).

129. *See id.* Article (6) of the Council Directive states that

> contracting authorities may award their supply contracts without applying the procedures referred to in Article 4 (1) and (2) in the following cases: . . . (h) for equipment supply contracts in the field of data-processing, and subject to any decisions of the Council taken on a proposal from the Commission and defining the categories of material to which the present exception does not apply. *There can no longer be recourse to the present exception after 1 January 1981 other than by a decision of the Council taken on a proposal from the Commission to modify this date.*

Id. (emphasis added).

Thus, any exceptions that may exist to the open awarding of public supply contracts in the area of data processing are now expired. *See also* Council Directive of 22 July 1980,

plemented, will cover all "contracting authorities" in the EC.[130] What is clear is that the Commission is convinced that the creation of a homogeneous market in data processing depends on the imposition of common standards and requirements on procurements by public authorities. The Dublin Report proposed that the Council issue a decision to the Member States that would "oblige" their administrations to "adopt common standards for all their equipment, to offer EC users the same approved data exchange facilities, and to see that these facilities are incorporated in all equipment they buy after 1983."[131]

The most recent EC initiative in the area of data processing is the 1979-1983 multiannual program adopted by the Council of Ministers in September 1979.[132] The new four-year program concentrates on general measures such as standardization policy and public procurement, as well as various promotional measures relating to software and applications.[133] By a contemporaneously issued regulation the Council empowered the Commission to offer financial aid for feasibility studies on data processing in the EC and for predevelopment studies, development projects, and pilot projects that promote the general aims of the program.[134]

Adapting and Supplementing in Respect of Certain Contracting Authorities Directive 77/62/EEC Coordinating Procedures for the Award of Public Supply Contracts 23 O.J. EUR. COMM. (No. L 215) (1980) [hereinafter cited as Council Directive of 22 July 1980].

130. The original list of affected "contracting authorities" was very limited. Council Directive of 21 December 1976, Coordinating Procedures for the Award of Public Supply Contracts, 20 O.J. EUR. COMM. (No. L 13) art. 1, at 2 (1977). The Supplementing Directive increased the list substantially. Council Directive of 22 July 1980, *supra* note 129, art. 1, at 2. While most of the "contracting authorities" are now included in the list, the PTTs continue to be excluded.

131. *See* Dublin Report, *supra* note 1, at 26. *See also* discussion on restrictions against the free flow of goods, notes 200-19 *infra* and accompanying text.

132. Council Decision of 11 September 1979 Adopting a Multi-annual Programme (1979 to 1983) in the Field of Data-Processing, 22 O.J. EUR. COMM. (No. L 231) 23 (1979).

133. *Id.* Given a rather ambitious agenda, the EC's proposed budget appears low.

134. *See* Council Regulation (EEC) No. 1996/79 of 11 September 1979, on a Community Support Mechanism in the Field of Data Processing, 22 O.J. EUR. COMM. (No. L 231) art. 5, at 2 (1979). Article 3 of the Regulation requires that the project must be of "Community interest" and likely to foster development within the EC of a stronger and more competitive European data processing industry. To qualify, the application must come from either users in two Member States, users and undertakings in at least two Member States, or undertakings or associations thereof, established in different Member States. *Id.* art. 3, at 1. Some question arose when the Regulation was issued as to whether the aid program was intended to exclude non-European undertakings or users, albeit established or residing in a Member State. However, given the broad application of the freedom of establishment it is doubtful whether non-European-owned undertakings could be excluded from applying for aid when they were established pursuant to the laws of a Member State. *See* notes 301-09 *infra* and accompanying text. Given the transnational quality of undertakings in the forefront of the data processing industry it might be difficult to seek out and find a truly "European undertaking."

C. The Creation of New Markets and Industrial Capacity

1. Exploiting an Enlarged Information Market

The enlargement of the European information service market is another goal in the Commission's general strategy. In order to accomplish this goal, the Dublin Report states that it will be necessary to gain greater access to the markets of developed non-Member States, such as the United States, for the products of the European information industry.[135] The Dublin Report also proposes that the EC offer "technical, legal, commercial and financial assistance" to projects in non-Member States that have formed associations with the EC.[136] The Report concludes that the first step in bringing about an enlarged infrastructure should be the extension of Euronet, a Community-wide data communications network.[137]

The Commission's proposal of October 1, 1980,[138] for a Council decision adopting a third plan of action, sets down four specific objectives in the effort to enlarge the European information service market. First, by December 1983 at the latest, Euronet should be turned into a public network managed by the PTT administrations, but under the control of and with continued cofinancing from the Commission.[139] The proposed plan of action also contemplates Euronet's geographic extension to new Member States and interconnection with other European networks and even networks outside Europe.[140] According to the Commission, the creation of high quality information services has fallen behind demand.[141] Thus, the plan's second objective is to promote the creation and improvement of high quality information services,[142] using a more refined system of the call for proposals as its main mechanism.[143] The Commission predicts, however, that it will be able to finance, on a short term basis only, no more than five to ten percent of the proposals.[144] These first

135. Dublin Report, *supra* note 1, at 30.

136. *Id.*

137. *Id.*

138. Commission of the European Communities, Proposal for a Council Decision Adopting a Third Three-Year Plan of Action (1981-1983) in the Field of Information and Documentation in Science and Technology, Doc. COM (80) 552 final (1980) [hereinafter cited as Third STID Plan of Action]. *See also* Dublin Report, *supra* note 1, at 27.

139. Third STID Plan of Action, *supra* note 138, at 2-4.

140. *Id.* at 2.

141. *Id.* at 5.

142. *Id.* at 5-9.

143. *Id.* at 8-9. Under the call for proposals mechanism, the EC will supply part of the cost of developing selected projects. *Id.* at 8. The proponent of the project, however, remains responsible for the long term viability of the project. *Id.*

144. *Id.* at 9.

two objectives are given highest priority.[145]

The third objective of the proposed plan of action contemplates EC measures to support users and to promote market development.[146] The proposed plan calls for a promotional campaign designed to draw new users to the information services of Euronet and to bring about more intensive use by current users.[147] These measures would also include special projects such as training facilities,[148] market research,[149] studies of users' selection criteria,[150] attention to the work of standardization,[151] the initial development of a document order and delivery system for Euronet,[152] and new applications for multilingual tools.[153] The final objective of the proposed plan of action is to use both workshops and studies to monitor new technological developments.[154] The workshops and studies, together with a "strategic analysis" reflecting a consensus on new information transfer techniques, would provide direction for EC actions in the future.[155] The proposed third plan of action would have a budget of sixteen and one half million European units of account (EUA).[156] Thus, again, given the broad agenda, the proposed budget appears extremely modest.

2. Software Applications and Microelectronic Technology

The Dublin Report addressed itself to two other concerns relating to the creation of new markets and industrial capacity. The Report encouraged EC promotion of more software applications and the harmonization of these applications throughout the EC if appropriate, *e.g.,* in the area of air traffic control.[157] Also, the Report placed special emphasis on the role of the EC in the realm of microelectronic technology.[158] The Report described the various national programs as designed merely to disseminate technology.[159] It deemed the Member States' and individual companies' uncombined resources inadequate to compete with the public aid granted to

145. *Id.* at 10.
146. *Id.* at 10-16.
147. *Id.* at 10.
148. *Id.* at 11.
149. *Id.* at 12.
150. *Id.* at 12-13.
151. *Id.* at 13-14.
152. *Id.* at 14.
153. *Id.* at 15-16.
154. *Id.* at 17-19.
155. *Id.* at 18-19.
156. *Id.* budget plan, at 2.
157. Dublin Report, *supra* note 1, at 31-32.
158. *Id.* at 33-35.
159. *Id.* at 34.

the competitors of the European microelectronics industry.[160] Thus, the EC's role is to promote long term developments in new microelectronic technology in order to put European industry in a competitive, perhaps leading, position by the middle of the 1980's.[161]

This last concern of the Dublin Report has found more concrete expression in the Commission's proposal of September 1, 1980, for a Council regulation concerning microelectronic technology.[162] According to the Commission, the EC is overly dependent on imports in this area, while its own production and application of microelectronics technology lag behind that of developed non-Member States.[163] Like the Dublin Report, the proposed regulation would have the EC assume responsibility for ensuring European competitiveness in this field. The proposed regulation's main objective is the development of "a capability for design and production of competitive submicron technology circuits by 1985 . . . ."[164] The proposed regulation sets forth three means by which to reach this goal. First, the proposal would have the Commission coordinate current national programs for the promotion of microelectronic technology.[165] Second, the proposed regulation would supply public financing for up to fifty percent of the cost of research into new concepts for the computer-aided design and testing of submicron technology.[166] This research would be conducted in special projects, usually located at universities within the EC, that would also receive the sponsorship of interested industrial companies.[167] The third and "most urgent" proposal would promote, again with public funds, the development of equipment for the production of microelectronic technology and the ability to use it.[168] For the moment, the necessary public funds will generally come, not from the EC budget, but

160. *Id.*

161. *Id.*

162. Commission of the European Communities, Proposal for a Council Regulation (EEC) Concerning Community Actions in the Field of Microelectronic Technology, Doc. COM (80) 421 final (1980).

163. *Id.* at 2-3.

164. *Id.* at 6.

165. *Id.* at 6-7. For instance, Article 3 of the proposed regulation includes a strict requirement on the Member States with respect to such coordination: "In order to ensure that the consultations provided for in this Regulation are effective, Member States shall, independently of their obligations under the rules of competition, supply the Commission without delay on their own initiative, or at the Commission's request, with up to date advance information of a scientific, economic and financial nature concerning any activities under their authority for the promotion of microelectronic technology that are in progress. . . ." *Id.* draft council regulation, art. 3.

166. *Id.* at 7-9.

167. *Id.* at 8-9.

168. *Id.* at 9-11.

from the Member States.[169] Nevertheless, the EC would exercise some regulatory control over the financing mechanism in order to ensure equivalent assistance in the various Member States and some degree of uniformity in eligibility and other standards.[170] This regulatory control would also reduce possible distortion in competition within the EC.[171]

III

THE COMMUNITY'S RESPONSE— AN ASSESSMENT

Europe is far behind other nations in the field of new technologies.[172] The EC's policymakers are taking a leading role in seeing to it that Europe catches up. The Commission has devised and is now promoting several lines of action aimed at helping Europe reach its goals by the late 1980's.[173]

As discussed in Part II, the lines of action the Commission feels are necessary include preparing society for the new technologies, creating a homogeneous market for teleinformatic goods and services, promoting a European information sector, and creating a new industrial capability.[174]

In deciding on its own strategy, the Commission paid particular attention to both the United States and Japanese experiences.[175] The United States owes its world leadership position to its unified domestic market, technologically integrated telecommunications network, and massive infusions of public and private capital either in the form of procurement or research and development.[176] Japan's success in the teleinformatics industries resulted from a systematic long-term national strategy supported by both government and industry.[177]

The EC, however, has neither the unified domestic market of the United States nor the systematic long-term strategy of Japan. Since the EC is made up of ten distinct national entities, any strategy that includes voluntary structural changes must be based on a consensus. It is not surprising, therefore, that the programs thus far proposed by the Commission contemplate EC institutions serving as

169. *Id.* at 15. The proposal envisages a possible refund from the EC budget to the Member States for their costs. *Id.*
170. Id.
171. *See id.* at 14.
172. Dublin Report, *supra* note 1, at 1-5.
173. *Id.* at 6-8.
174. *See* text accompanying note 21 *supra*.
175. *See* notes 10-11 *supra*.
176. *See* note 10 *supra*.
177. *See* note 11 *supra*.

forums for coordination rather than as bases of command.[178]

A. THE POLITICAL SITUATION

To achieve its goal of the creation of a homogeneous common market in teleinformatics goods and services, the EC must have an integrated and dynamic telecommunications infrastructure. In this regard, the United States is looked upon as a model.[179] The United States possesses an open and relatively unrestricted communications system.[180] Europe, on the other hand, does not offer Community-wide teleinformatics services or a Community-wide market for telecommunications equipment.[181]

The differences in the two approaches stem from the different regulatory policies of Europe and the United States.[182] In the United States, authorities have attempted to stop restrictive monopolistic practices in the telecommunications industry.[183] In Europe, the monopolies continue, with the PTTs controlling not only the telephone and telegraph systems, but extending their influence to various other sectors of the teleinformatics market as well.[184]

The Commission, though not advocating the break-up of PTT monopolies, seems to prefer the U.S. approach because it allows consumers access to a basic communications system relatively free of restrictions.[185] However, the Commission is not convinced that the

178. Dublin Report, *supra* note 1, at 13.

179. *Id.* at 7-8.

180. *Id.* at 8. For a more detailed study regarding the telecommunications environment in the United States see GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESS, DEVELOPING A DOMESTIC COMMON CARRIER TELECOMMUNICATIONS POLICY: WHAT ARE THE ISSUES, Doc. CED 79-18 (1979) [hereinafter cited as GAO REPORT].

181. Telecommunications Report, *supra* note 53, at 2.

182. *See* Markoski, *supra* note 54, at 289-96.

183. GAO REPORT, *supra* note 180, at 13-14. "Within the past 20 years [the] FCC has decided to allow competition in two previously, largely monopolized domestic telecommunications sectors—terminal equipment and specialized private line services (a segment of the intercity transmission sector)." *Id.* at 13. The FCC offered several rationales for allowing competition in these sectors. First, the public would benefit from increased competition since it would lead to "increased technical innovation, the introduction of new techniques and services, potentially lower costs, and increased responsiveness on the part of existing carriers." *Id.* at 14. Second, the FCC reasoned that specialized common carriers that were providing private line services could be expected to satisfy demands not met by existing carriers, and thus expand the size of the total market. *Id. See* Hush-a-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956) (telephone subscribers have a right to make reasonable use of device manufactured by petitioners for increasing privacy of conversations and including extraneous noises); Specialized Common Carrier Servs. Decision, 29 F.C.C.2d 890 (1971) (FCC underscored a policy favoring free entry into the regulated industry of specialized communications service).

184. Markoski, *supra* note 54, at 297-305, 317-20.

185. Dublin Report, *supra* note 1, at 8; Telecommunications Report, *supra* note 53, at 2-3.

EC's political structure would allow for the implementation of a strategy similar to that of the United States.

Several factors account for the lack of an EC political base adequate to support the imposition of significant structural or policy changes relating to the PTTs: (1) the economic and political strength of national administrations; (2) the absence of pan-European producers of teleinformatic goods and services; and (3) the ineffectiveness of EC institutions in carrying out the fundamental objectives of the Treaty of Rome.

The Member State PTTs, which in most cases are administrative arms of their respective governments, have a considerable amount of economic and political strength.[186] National authorities in the various Member States, including representatives to the Council, cannot disregard pressure from PTTs, concerned unions, and manufacturers of telecommunications equipment. Conceivably, these administrations could oppose changes needed to create an integrated EC teleinformatics market on the grounds that such changes might disrupt national economies.[187]

A second factor contributing to the inadequate EC political base in the teleinformatic arena is that there are presently few indigenous pan-European manufacturers of teleinformatics equipment. Such manufacturers would have a direct interest in the implementation of EC reforms that remove restrictions on trade between Member States. Large multinational manufacturers will not be likely to extend the needed support either. These multinationals might well prefer a Europe of fragmented markets, enabling them to continue their market dominance.[188] EC efforts to create a unified market

186. In France, for example, the PTT has become one of the country's largest investors (second only to the military). In 1978, PTT investments totaled 4.6% of France's national total. So powerful is the PTT that France's National Assembly recently issued a report recommending that a new high-level public authority be established to take over some of the tasks of the Direction Generale des Télécommunications (DGT), one of two elements of the PTT. According to the National Assembly, the DGT's recent acquisition of France's state transmission monopoly, Télfusion de France, resulted in an excessive centralization of power. *See* France: La télématique, *An IIC Report,* INTER MEDIA, Jan. 1981, at 12, 14.

187. "For political, economic and technical reasons the monopolistic carrier in each country has tended to be associated with one or more indigenous suppliers." Gill Report, *supra* note 56, at 218. This association between national carriers and national suppliers has been "a significant factor in restricting the opportunities for international trade in this area." *Id.* In France, the DGT is currently developing an informatics program designed to provide an entire family of products and services capable of meeting many market needs. The equipment contracts for this program have so far been won by four major French companies. France: La télématique, *An IIC Report,* INTER MEDIA Jan. 1981, at 12, 15.

188. In many cases, multinationals become as "French," "German," or "Italian" as necessary to make their market entry. Once established, the subsidiaries are able to offer their products in local markets in competition with indigenous manufacturers. The com-

would do little to expand the business of the multinational, and may be perceived by certain multinationals as disadvantageous in the long run.[189]

The third factor responsible for the EC's inadequate political base is that the EC institutions have too often been ineffective in carrying out the objectives of the Treaty of Rome. The Council of Ministers has felt compelled to reach unanimous decisions on important EC policy objectives, often vitiating fundamental Treaty objectives in the process.[190] Moreover, a whole series of specialized councils has been established, and when matters of importance such as agriculture, energy, monetary policy, or telecommunications come up, the foreign ministers often defer to national specialized experts.[191] As a result, solutions tend to be based on national compromises. Finally, the Commission, though endowed with the power to propose the legislation necessary to carry out EC objectives,[192] generally uses its powers "frugally," putting forward only those proposals that are likely to be unanimously accepted by Member States.[193]

The remainder of this Article will evaluate the Commission's teleinformatics strategy in the context of the above realities, and attempt to show that the Commission has perhaps been overly cautious in utilizing its potential legal authority to promulgate more aggressive programs or initiate particular enforcement actions for carrying out its overall teleinformatics strategy.

B. THE LEGAL BASE

The thrust of the EC's teleinformatics strategy conforms with the basic objectives of the Treaty of Rome, as stated in Article 2: "to

petitive advantage of the multinational is due to the fact that multinationals may spread research and development costs across a world market, whereas local European manufacturers have a smaller market over which to spread such costs. *See generally* Gill Report, *supra* note 56, at 219-22.

189. This observation would not be true for certain teleinformatics services suppliers, such as Control Data Corporation or Automatic Data Processing Corporation (ADP), which, due to the transnational character of their offerings, do best in a European market with fewer barriers and restrictions.

190. *Crisis in EC Institutions,* EUROPE, Mar. - April 1981, at 22 [hereinafter cited as *Thorn Interview*]. EC Commission President Gaston Thorn gave his views on what should be done to solve the crisis in the EC's institutions in this interview with EUROPE magazine.

191. *Id.* at 23.

192. Treaty of Rome, *supra* note 3, art. 189.

193. The EC Commission President noted:

> It is clearly laid down in the Treaty that only the Commission has the power to propose legislation. Yet over the past few years, it has used these powers frugally. I agree that its motivation has been laudable—only to put forward proposals likely to be accepted by member states.

Thorn Interview, supra note 190, at 24.

promote throughout the EC a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it."[194] Furthermore, the EC may rely upon the implementation rules of Article 3 to create a common market as a method of achieving its teleinformatics strategy.[195] The rules include: abolishing restrictions on the free movement of goods (Articles 9-37), persons (Articles 48-58), services (Articles 59-66), and capital (Articles 67-73); removing restrictions or conditions affecting competition (Articles 85-94); and harmonizing legal provisions and administrative rules affecting the establishment and functioning of the common market (Articles 100-102).[196]

The Commission could employ the common market rules of Article 3 in one of two ways: either as a legal base for Community-wide legislation,[197] or as a mechanism through which to undertake selective regulation against Member States and specific private or public enterprises.[198] Thus far in the teleinformatics field, the Commission has not chosen to exploit its authority to issue Community-wide legislation, relying instead upon Article 235 for the proposition that the Treaty of Rome has not provided the necessary powers with which the EC can enter the field, and that therefore unanimous Council consent is needed before action can be taken.[199] The second

194. Treaty of Rome, *supra* note 3, art. 2.

195. *Id.* art. 3.

196. Treaty of Rome, note 3 *supra*.

197. The primary decisionmaking powers regarding legislation rest with the Council. When the establishment of a common market calls for legislation, it is generally the Council that responds by issuing necessary regulations and directives. The Commission also has the authority to issue such legislation, but it usually exercises this authority only on the basis of individual cases. The Commission's most important role in the legislative area is in proposing legislation to the Council. The degree to which the Council will promulgate legislation to deal with particular problems or Treaty objectives becomes a function of the Commission's resolve to put the proposals before it. *See generally* P. MATHIJSEN, *supra* note 3, at 137.

198. The Commission may impose fines, or, in certain circumstances, request specific performance. The Treaty of Rome, *supra* note 3, art. 89, gives the Commission the authority to investigate competition infringements and take appropriate measures to bring them to an end. If the Treaty does not specifically provide a mechanism to achieve a Treaty objective, the Commission may resort to use of Article 235. *See* note 199 *infra*.

199. Article 235 provides:

> If action by the Community should prove necessary to obtain in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.

Id. art. 235. The powers granted in Article 235 are subsidiary in nature and are to be used in instances in which the Treaty has not granted powers necessary for the achievement of an EC objective. In the last few years, Article 235 has been resorted with increasing frequency. *See* 5 H. SMIT & P. HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY 6-280 to 281 (1976) [hereinafter cited as SMIT & HERZOG]. How-

méthod, selective regulatory action, involves less risk of coordinated Member State opposition which could potentially operate to keep the Commission out of the field.

What follows is a brief examination of those Treaty rules that the Commission could possibly employ to expand its teleinformatics strategy, and a discussion of how the rules might be applied to specific problem areas.

1. Restrictions Against the Free Movement of Goods

A fundamental ingredient in the creation of the common market is the elimination of all obstacles to the free flow of goods between Member States.[200] Duties, traditionally viewed as the prime barriers to trade, are not the only obstacles the Treaty addresses. In Articles 30-37, the Treaty addresses the phenomenon of "quantitative restrictions"[201] as well. These latter Articles are particularly relevant to the EC's strategy for the import and export of teleinformatic products.[202]

Articles 30-37 prohibit not only quantitative restrictions, but "all measures having equivalent effect."[203] The Court of Justice has interpreted this concept broadly, and it has been employed to prohibit such measures as: Member State trading rules that are capable of hindering directly or indirectly, actually or potentially, intra-Community trade;[204] excessive procedural formalities imposed upon importers;[205] requirements that manufacturers of certain products utilize products originating in the country of manufacture;[206] measures requiring an importer to purchase or sell a specified quantity of nationally produced products in order to be eligible for an import

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ever, because Article 235 requires unanimous Council action, it is generally used only in matters of strong political consensus among the Member States.

200. Treaty of Rome, *supra* note 3, art. 3. Article 3(a) provides for the "elimination, as between Member States, of custom duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect." *Id.*

201. Treaty of Rome, *supra* note 3, arts. 30-37.

202. *See* notes 200-19 *infra* and accompanying text.

203. Article 30 provides: "Quantitative Restrictions on imports and *all measures having equivalent effect* shall, without prejudice to the following provisions, be prohibited between Member States." Treaty of Rome, *supra* note 3, art. 30 (emphasis added). Article 34(1) contains the same prohibitions with respect to exports. *Id.* art. 34.

204. Procureur du Roi v. Dassonville, [1974] E. Comm. Ct. J. Rep. 837, [1974] 2 Comm. Mkt. L.R. 436.

205. Int'l Fruit Co. v. Produckstschap, [1971] C.J. Comm. E. Rec. 1107, [1971] COMM. MKT. REP. (CCH) ¶ 8158. In *International Fruit*, the "Court of Justice indicated, though it did not have to deal directly with [the] point, that the requirement of any import license for intra-Community trade would violate Article 30." *See* 1 SMIT & HERZOG, *supra* note 199, at 2-128.

206. Règlement No. 175/66/CEE de la Commission, 9 J.O. COMM. EUR. 3487 (1966). *See also* 1 SMIT & HERZOG, *supra* note 199, at 2-128.

license;[207] and measures that establish a minimum price for imports or exports.[208] Hence, the quantitative restriction equivalency concept has been interpreted broadly; some authority even exists for the proposition that rules of administrative practice having a restrictive *effect* on trade may constitute a violation of Article 30, even if no *actual impact* on trade is shown.[209] In view of the liberal construction given to the quantitative restriction provisions, the Commission should pay particular attention to several concerns that the Dublin Report raised with respect to the PTTs' public procurement practices and type approval restrictions on equipment.

The procurement policies of national telecommunications administrations have effectively been excluded from the EC's policy reforms in the area. While some sectors of the teleinformatics industries, such as data processing equipment and services, are currently protected by EC directives, the PTT's have been permitted to continue discriminatory "buy-French," "buy-German," or "buy-Italian" policies that may be in contravention of Article 30. The Council does have the legal authority to remedy the situation; a 1976 Council Directive specifically states that "restrictions on the free movement of goods in respect of public supplies are prohibited by the terms of Articles 30 *et seq.* of the Treaty."[210] However, given the political considerations discussed earlier,[211] it is doubtful that the PTTs would react favorably to an EC attempt to expand this Council Directive.

Several PTTs within the EC place restrictions on what equipment may be placed on the basic phone system. These restrictions range from outright prohibitions of any interconnect equipment not made within the concerned Member State, to type approval arrangements and equipment registration procedures.[212] Since these prac-

207. *See* note 206.

208. *See* 1 SMIT & HERZOG, *supra* note 199, at 2-129.

209. *Id.* The French Council of State, however, has held that an actual impact on imports must be shown before there can be a measure equivalent to a quantitative restriction. *Id.*

210. Council Directive of 21 December 1976, Coordinating Procedures for the Award of Public Supply Contracts, 20 O.J. EUR. COMM. (No. L 13) 1 (1977). While noting that public contracting procedures are within the scope of Article 30, the Council also relied on Article 100 as a basis for entering the field. *Id. See also* Council Directive of 26 July 1971, 14 J.O. COMM. EUR. (No. L 185) (1971) (directive enacted pursuant to Article 100).

211. *See* notes 179-93 *supra* and accompanying text.

212. For example, in Germany, interconnection with the basic phone system is authorized only if the interface equipment is German-made or German-registered (*i.e.*, "approved"). As a result of stiff regulations and approval requirements, a non-German-based supplier of data services is limited in its choice of equipment, irrespective of the desirability of the approved equipment from a cost or design perspective.

This situation is in sharp contrast to that found in the United States, where one may interconnect the communications network after going through a relatively easy certifica-

tices are capable of obstructing the free flow of goods, the Commission should be particularly concerned with investigating them. The Commission could easily inquire into such practices based on Article 30, especially in light of *State v. Sacchi*[213] where the Court of Justice found Italian Radio and Television practices, which amounted to no more than expounding a "buy-Italian" policy on a public television broadcast, suspect.[214]

The Member States could possibly advance two defenses to a Commission charge of applying measures equivalent to quantitative restrictions. First, Article 35 provides that Member States will abolish quantitative restrictions more rapidly than provided for in the Treaty only if their "general economic situation and the situation of the economic sector concerned so permit."[215] Second, Article 36 allows Member States to place restrictions on "imports, exports or goods in transit . . . on grounds of public morality, public policy or public security; . . . or the protection of industrial and commercial property."[216] Imports or exports of legitimate concern under this Article might include access equipment for national security data storage systems or encrypting devices for national security communications systems. Note that Article 36 advances the caveat that the restrictions exempted from control therein should not "constitute a means of arbitrary discrimination or a disguised restriction on trade

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tion process. Certification will be refused only if the accessing equipment will harm the network.

213. State v. Sacchi, [1974] E. Comm. Ct. J. Rep. 409, 14 Comm. Mkt. L.R. 177 (1974).

214. *Id.*

215. Article 35 provides: "The Member States declare their readiness to abolish quantitative restrictions on imports from and exports to other Member States more rapidly than is provided for in the preceding Articles, if their *general economic situation and the situation of the economic sector concerned so permit.*" Treaty of Rome, *supra* note 3, art. 35 (emphasis added). Without a Community-mandated timetable for the elimination of measures having an effect equivalent to quantitative restrictions, Article 35 leaves it to the individual states concerned to decide whether their economic situations, or the economic sector concerned, enable them to eliminate the restrictions unilaterally. However, Article 33(7) authorizes the Commission to enact directives providing timetables and procedures for the elimination of such restrictions. *Id.* art. 33(7).

216. *Id.* art. 36. The term "public policy" is susceptible to differing interpretations. "In its narrowest sense, [public policy] refers to the avoidance of disturbances affecting law and order and includes the maintenance of national security." 2 SMIT & HERZOG, *supra* note 199, at 2-616 to 617. In a broader sense, public policy refers to "public good"—a concept that "comprises all basic (and not only essential) principles of the ethical, political alnd economic order of the State." *Id.* at 2-617. The broader construction probably best expresses the concept of "public policy" within the meaning of Article 36. *Id.*

The concept of public policy may be particularly difficult to define in the economic area. "Most states view the achievement of certain economic goals as one of the main purposes of their state policy. . . . In some situations, these [goals] could possibly be jeopardized by the establishment of non-nationals on the territory of the State concerned." *Id.* at 2-618.

between Member States."[217]

Thus far the EC's teleinformatics strategists have not chosen to challenge such restrictive national import practices in light of Article 30, taking a more cautious approach instead, and merely inviting the PTTs of Member States to buy each other's equipment.[218] If the Commission does not choose to address the problem with Community-wide legislation, it might choose instead to make inquiries into only those situations involving particularly abusive practices. Selective application of Articles 30-37 is better than no application at all. If the Commission chooses to take no action, perhaps an adversely affected European manufacturer or supplier of teleinformatics equipment could bring a complaint in the appropriate legal forum.[219]

2. *Restrictions Against the Free Movement of Workers, the Right of Establishment, and the Freedom to Supply Services*

In addition to the free movement of goods, the Treaty also provides for the free movement of workers,[220] the right of establishment,[221] and the freedom to supply services.[222] The Commission ought to consider these freedoms in planning its teleinformatics program since necessary to any successful strategy is an environment in which *workers* are adequately equipped and free to participate in the development of new technologies;[223] new technology-related industries are free to *establish* where they choose;[224] and teleinformatics professionals and technical experts are free to provide their *services* in the Member State of their choice.[225]

a. Workers

In order to bring about the free movement of workers, Member States are called upon to abolish discrimination between workers of the various Member States as regards "employment, remuneration and other conditions of work and employment."[226] Article 48 establishes the worker's right, subject to concerns of public order, public

217. Treaty of Rome, *supra* note 3, art. 36.
218. *See* notes 90-94 *supra* and accompanying text.
219. For a discussion of the ability of individuals to bring suits under Articles 30-37, see S.P.A. Salgoil v. Italian Foreign Trade Ministry, [1968] C.J. Comm. E. Rec. 661, [1969] Comm. Mkt. L.R. 181.
220. Treaty of Rome, *supra* note 3, arts. 48-51.
221. *Id.* arts. 52-58.
222. *Id.* arts. 59-66.
223. *See* notes 226-30 *infra* and accompanying text.
224. *See* notes 231-38 *infra* and accompanying text.
225. *See* notes 239-46 *infra* and accompanying text.
226. Treaty of Rome, *supra* note 3, art. 48.

safety and public health, to accept offers of employment and move freely within the Member States for such purposes, remain employed in Member States on the same basis as nationals of that country, and remain in the Member State after having been employed there.[227]

Article 50 provides that "Member States shall, within the framework of a joint programme, encourage the exchange of young workers."[228] The purposes of Article 50, according to some experts, are different from those found in Articles 48-49, which aim at freeing the movement of labor.[229] Article 50 purposes are educational and cultural, and include such goals as improving vocational training opportunities and enabling young people to become acquainted with other countries within the EC.[230]

Thus far, the Commission has not discussed the possible application of Treaty rules relating to the free movement of workers to its strategy for teleinformatics. Articles 48-51 provide a base upon which the Commission could promote and assist in coordinating Member State programs aimed at preparing the current work force as well as a new generation of workers for jobs in the field of the new technologies. Such programs might encourage Member States to offer common vocational and technical courses related to the new technologies.

b. Establishment

The right of establishment[231] includes "the right to take up and pursue activities as self-employed persons and to set up and manage undertakings" in a Member State under the same conditions laid down for that Member State's own nationals.[232] The Council and Commission are required to carry out the duties established in Articles 52-53 by various measures, including the abolition of national procedures and practices, "the maintenance of which would form an obstacle to freedom of establishment."[233]

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227. *Id.* art. 48(3)(a)-(d). Article 49 gives the Council authority to issue directives and regulations setting out measures aimed at bringing about the free movement of workers. *Id.* art. 49. Through its Article 49 regulatory authority, the Council could issue directives or regulations necessary to remove restrictions that inhibit workers in the high technology area from moving freely within the EC. *See* notes 226-30 *infra* and accompanying text.

228. *Id.* art. 500.

229. *See* Treaty of Rome, *supra* note 3, arts. 48-49.

230. In order to increase the mobility of young workers, the Advisory Committee for vocational training in 1977 adopted guidelines aimed at making training consistent throughout the EC. 11 EUR. COMM. COMM'N GEN. REP. 123 (1977). The Commission's teleinformatics strategists could possibly follow through with these earlier initiatives.

231. Treaty of Rome, *supra* note 3, arts. 52-58.

232. *Id.* art. 52.

233. *Id.* art. 54(3)(c). Note that Article 56(1) makes the provisions on the right of establishment inapplicable to national measures containing discriminatory provisions

The right of establishment has been interpreted broadly to include "industry, commerce, finance, agriculture, public works, crafts and the professions."[234] Furthermore, the right of establishment covers not only the performance of activities themselves, but collateral acts such as setting up agencies, branches, or subsidiaries to form companies and acquire ownership in existing firms.[235] Persons benefiting from the right of establishment include legal as well as natural persons.

To be entitled to treatment as natural persons, companies or firms must be "formed in accordance with the law of a Member State," and have their "registered office, central administration, or principal place of business within the Community."[236] Thus, a wholly foreign-owned, non-EC company may set up a subsidiary in the EC in accordance with the law of a Member State and be entitled to the right to establish anywhere in the EC, provided it has a registered office, its central administration, or a principal place of business within any state.[237] Once established, the subsidiary is free to conduct its business in any Member State, even if the state has restrictions against the establishment of foreign-controlled companies.

The Commission is not likely to rely upon articles 52-58 when formulating or implementing Community-wide teleinformatics programs. However, the right of establishment provisions may prove to be useful if a Member State promulgates restrictive laws or regulations that have the effect of excluding other Member State enterprises from entering one or another section of its teleinformatics market.[238]

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promulgated on grounds of public policy. *Id.* art. 56(1). *See* note 216 *supra* for a discussion of "public policy" as it relates to quantitative restrictions.

234. See 2 SMIT & HERZOG, *supra* note 199, at 2-538 to 540.

235. *Id.* at 2-539.

236. Article 98 provides:

> Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

Treaty of Rome, *supra* note 3, art. 58. *See generally* 2 SMIT & HERZOG, *supra* note 199, at 2-637 to 648.

237. 2 SMIT & HERZOG, *supra* note 199, at 2-637 to 648.

238. In situations where a Community-based data processing enterprise is refused entry into another Member State on grounds of "public policy," the Commission should take action to investigate. Since such refusals could fragment the EC's data processing market, the Commission should be particularly concerned with determining whether the Member State's "public policy" justification is legitimate. Individuals, as well, have the power to bring actions before national courts to claim the advantages of free establishment. For a discussion of the self-executing nature of Article 52, see *id.* at 2-543 to 544.

c. Services

The abolition of obstacles to the free movement of services is another objective of the Treaty of Rome.[239] By ensuring the equal treatment of residents and nonresidents,[240] the Treaty's chapter on services[241] protects the economic activities of EC nationals who wish to provide services within other Member States. The Treaty rules on services, together with the rules on workers and establishment, supplement the common market in goods by allowing EC residents to perform their activities on a Community-wide basis.[242] Article 59, which requires that restrictions on the freedom to provide services be abolished, has been construed broadly.[243] The services Articles 59-66 protects include professional, commercial and industrial services, and the activities of craftsmen.[244]

EC authorities interested in achieving a common market for teleinformatics services may wish to inquire into those legislative or regulatory measures that, to varying degrees, have a restrictive effect on the provision of intra-Community services, such as privacy data protection laws[245] and transnational data processing laws. The EC interest here lies not in challenging the authority of Member States to promulgate such legislation, but in ensuring that the legislation

239. Treaty of Rome, *supra* note 3, art. 3(c), 59-66.

240. *Id.* art. 59.

241. *Id.* arts. 59-66.

242. The free movement of services may be distinguished from free establishment in that the latter implies the creation of at least a temporary plant or office, whereas the former does not. Movement of services, in turn, is distinguishable from free movement of labor in that the former implies activities by independent contractors while the latter implies activities by an employed person. *See* 2 SMIT & HERZOG, *supra* note 199, at 2-649.

243. The General Programme for the Abolition of Restrictions on the Freedom to Provide Services, 5 J.O. COMM. EUR. 32 (1962) [hereinafter cited as General Programme], indicates that restrictions against the movement of services includes regulations that although applicable to residents or non-residents, in fact restrict exclusively or predominantly the furnishing of services of non-residents. 2 SMIT & HERZOG, *supra* note 199, at 2-654. The General Programme "also provides that not only discriminations resulting from formal enactments, but also those resulting from the implementation of such enactments or from mere administrative practices, are subject to elimination." *Id.* at 2-655. While the General Programme deals only with acts of a Member State, the Court of Justice has extended the prohibitions to acts of private parties. *Id.*

244. Treaty of Rome, *supra* note 3, art. 60. According to the Court of Justice in State v. Sacchi, [1974] E. Comm. Ct. J. Rep. 409, 14 Comm. Mkt. L.R. 177 (1974), television broadcasting is also a service, and thus is covered by the Treaty rules on services. On the other hand, the rules on goods would cover trading in broadcasting equipment. *See* 2 SMIT & HERZOG, *supra* note 199, at 2-661.

Subdivision (C) of Title III of the General Programme, note 243 *supra*, requires the abolition of "any prohibition on or impairment of the financial means necessary for the carrying out of the services." *Id.* This prohibition might apply to practices in those Member States exercising strict foreign exchange controls. *See* 2 SMIT & HERZOG, *supra* note 199, at 2-655.

245. *See* notes 36-49 *supra* and accompanying text.

does not unduly frustrate basic treaty objectives. Thus, the Treaty chapter on services may lend itself to Commission involvement on a case-by-case basis in relevant judicial forums or as a mechanism for initiating programs having Community-wide applicability.[246]

3. The Treaty Rules on Competition

A free and open European market in teleinformatic goods and services is a central element in the EC's strategy to meet the challenge of the new technologies. The Treaty's rules on competition[247] provide a legal basis for promulgating Community-wide legislation to remove existing barriers to a homogeneous teleinformatics market or regulating against those undertakings, both public and private, that participate in anticompetitive activities or practices.

Many of the Commission's proposed recommendations in the teleinformatics area revolve around problems created by Member State PTTs, such as divergent procurement policies and technical standards. While the Commission will undoubtedly continue its investigations into alleged abuses by private undertakings in the high technology area, future inquiries may begin to focus on the activities of public undertakings.

a. Article 90 Restrictions on Public Undertakings

Article 90 provides that public enterprise and enterprises to which Member States grant exclusive or special rights are subject to all the Treaty rules, particularly the rules on competition.[248] If a public enterprise violates a rule of the Treaty, the Commission may take appropriate action against the violating Member State by issuing directives or decisions.[249]

By prohibiting Member States from enacting or maintaining in force any measure contrary to the rules contained in the Treaty,

246. For a discussion of the self-executing nature of Article 59, see 2 SMIT & HERZOG, *supra* note 199, at 2-658.

247. Treaty of Rome, *supra* note 3, arts. 85-94.

248. Article 90(1) provides:

> In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94.

Treaty of Rome, *supra* note 3, art. 90(1).

249. Treaty of Rome, *supra* note 3, art. 90(3). The authority given to the Commission by Article 90(3) does not deprive the Commission of any other enforcement authority that it may have by virtue of other provisions. For example, pursuant to Council Regulation 17/62, 1962 J.O. COMM. EUR. 204 [hereinafter cited as Regulation 17/62], the Commission may levy fines or penalties against a Member State for violations by an enterprise that is controlled by the State. Regulation 17/62 implements Articles 85 and 86 of the Treaty. *See* also 3 SMIT & HERZOG, *supra* note 199, at 3-364.

Article 90 in effect assures that Member States will not secure for state-controlled enterprises benefits that private enterprises could not obtain without violating the Treaty.[250] Article 90 must be broadly construed, moreover, since it represents the very purpose of the Treaty: to prevent Member States from achieving unfair advantages to the detriment of the Treaty's fundamental objective of creating a common market.[251]

Article 90(2) provides an exception for "undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly."[252] These undertakings are subject to the Treaty rules (Article 90(1)) only to the extent that "the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them."[253] However, the exception is lost if the development of trade is affected to "such an extent as would be contrary to the interests of the Community."[254] Because Article 90(2) provides an exception to the application of *all* Treaty rules, including those considered essential for the creation of a common market, it should be narrowly construed.[255]

If a public enterprise does violate a Treaty rule, and does not fall within the Article 90(2) exception, the Article 90(1) prohibition will be unqualified and unconditional, needing no further implementation at the national level.[256]

Article 90(1) prohibits Member States and their undertakings from taking measures contrary to *any* Treaty rule.[257] The proscription of Article 90(1), therefore, is relevant not only to the enforcement of the rules on competition, but also to other mechanisms

250. In NV GB-INNO-BM v. Vereniging van de Kleinhandelaars in Tabak, [1977] E. Comm. Ct. J. Rep. 2115, 21 Comm. Mkt. L.R. 283 (1978), the Court of Justice adopted the general principle that Member States cannot give any enterprise the unfair advantages prohibited by Articles 85 and 86 of the Treaty. *Id.* at 2123-24, 21 Comm. Mkt. L.R. 216-17.

251. Treaty of Rome, *supra* note 3, arts. 2, 3.

252. *Id.* art. 90(2).

253. *Id.* The purpose of the Article 90(2) exception is to permit Member States to assign the provision of general services to enterprises of their own choosing, but not at the expense of fundamental EC objectives. Article 90(2) represents a compromise between the subjection of such undertakings to the full force of the Treaty rules and excluding them altogether. *See* 3 SMIT & HERZOG, *supra* note 199, at 3-359.

254. Treaty of Rome, *supra* note 3, art. 90(2).

255. 3 SMIT & HERZOG, *supra* note 199, at 3-346.

256. "Not only may a Member State not introduce any new measure, it must immediately abrogate any that are already in existence." 3 SMIT & HERZOG, *supra* note 199, at 3-345. The fact that Article 90(1) "imposes an obligation on Member States does not exclude the possibility of its creating direct rights in the citizens of the Member States." *Id.*

257. Treaty of Rome, *supra* note 3, art. 90(1).

designed to regulate or control activity that violates the Treaty, such as the free flow of goods and the right of establishment provisions.

The broad scope given Article 90(1), together with the narrowly construed Article 90(2) exception, indicates that there is little basis for excluding the activities of Member State PTTs and other public entities from the application of Article 90.[258] If the PTTs and other public entities are within the scope of the Treaty, the following three categories of anticompetitive practices prohibited by the Treaty's rules on competition will be relevant to the success of any EC teleinformatics strategy: (1) agreements between undertakings that affect trade and distort competition;[259] (2) abuses of a dominant position within the common market; and[260] (3) Member State aid schemes that favor national industries.[261]

b. Agreements Which Affect Trade or Distort Competition

Article 85 bans all agreements between enterprises 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."[262] Agreements falling within the prohibitions of Article 85(1) are automatically void.[263] However, agreements may be exempted from Article 85(1)'s strict application under the conditions set forth in Article 85(3).[264]

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258. *See* Thompson, *Challenging CEPT Agreements,* TELEPHONY, Jan. 26, 1981, at 68. [hereinafter cited as TELEPHONY ARTICLE 2]. Thompson's article includes an interrogatory of the English Queen's counsel who has made a "special study" on the Treaty and its applicability to the activities of PTTs. The British expert responded in the affirmative to the question: "Are the PTTs who within the Common Market are either government departments, or separate statutory corporations, subject to the provisions of Articles 85 and 86 of the Treaty of Rome *pursuant to Article 90 of the Treaty?" Id.* at 69 (emphasis added).

259. Treaty of Rome, *supra* note 3, art. 85.

260. *Id.* art. 86.

261. *Id.* arts. 92-94.

262. *Id.* art. 85(1). Article 85 prohibitions apply to "all agreements between undertakings, decisions by associations of undertakings and concerted practices." *Id.* Activities prohibited under Article 85 include: price fixing; limiting or controlling production, markets, technical development, or investment; market sharing; applying dissimilar conditions to equivalent transactions with other trading parties; and requiring the conclusion of contracts to be subject to the acceptance by the other parties of supplementary obligations having no connection with the subject of the contracts. *Id.* art. 85(1)(a)-(e). For an extended discussion of the meaning and application of Article 85, see Gijlstra & Murphy, *EEC Competition Law After the Brasserie de Haecht II and SABAM Cases,* 2 LEGAL ISSUES OF EUROPEAN INTEGRATION 79 (1974).

263. Treaty of Rome, *supra* note 3, art. 85(2).

264. To qualify for exemption under Article 85(3), agreements must meet two positive and two negative conditions. The positive conditions are:

(a) the agreement must contribute to improving the production or distribution of goods or promoting technical or economic progress; and

, The rules for prohibiting agreements under Article 85 or exempting them from its application are set out in Regulation 17/62 of the Council of the EEC.[265] If an agreement does not qualify for exemption under Article 85(3), the enterprise involved will be subject to fines, penalties, or other necessary remedial measures.[266] The Commission is also empowered to issue injunctive relief by requiring the wrongdoing enterprise to put an end to the prohibited activities.[267] When read together with Article 90, Article 85 enables the Commission to issue appropriate directives and decisions to the Member States.[268]

So far, the Commission's interest in the applicability of the rules on competition to its teleinformatics strategy has centered upon those PTT practices that favor national manufacturers. The EC strategists have paid little attention to agreements between PTTs themselves. These agreements, made within the confines of the CEPT,[269] relate, *inter alia,* to communication tariffs, conditions affecting the use of leased circuits, and the structure of international data networks.

To the extent that agreements between PTTs affect trade between two or more Member States and have as their object or effect the prevention, destruction, or distortion of competition within the EC, the Commission, on its own or on the basis of a complaint filed by an adversely affected party, should be able to make inquiries and take appropriate remedial actions.[270] However, the Commission has thus far received little incentive to make such inquiries. In addition to certain political realities,[271] this hesitancy may be due to the

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(b) the agreement must allow consumers a fair share of the resulting benefits from such improvements or progress.

The two negative conditions are:

(a) the arrangement must not impose any restrictions unless they are indispensable to the achievement of the above objectives; and
(b) the agreement must not enable the undertakings involved to eliminate competition in respect of a substantial part of the products in question.

Id. art. 85(3). TELEPHONY ARTICLE 2, *supra* note 258, at 68.

265. Regulation 17/62, note 249 *supra*. The Regulation requires that the Commission be notified of any agreements referred to in Article 85(1) that have come into being after Regulation 17/62 was entered into force for which those concerned wish to invoke Article 85(3). An agreement that contravenes Article 85(1) remains null and void until an injured party, or any party to the agreement notifies the Commission. After the Commission is notified, the agreement is deemed valid until the Commission makes a ruling on it. *See* Thompson, *Treaty Violations by the European PTTs?,* TELEPHONY, Dec. 22, 1980, at 64.

266. *See* Regulation 17/62, note 249 *supra*.

267. *See* note 249 *supra*.

268. Treaty of Rome, *supra* note 3, arts. 85, 90.

269. *See* note 55 *supra*.

270. Treaty of Rome, *supra* note 3, art. 89(1).

271. *See* notes 179-93 *supra*.

fact that the PTTs defenses have not yet been judicially tested.

Before challenging the PTTs, the Commission would probably require a thorough economic analysis of the effect of the PTTs on the common market, as well as an assessment of the likelihood that the PTTs would qualify for an exception from the Treaty rules under Article 85(3).[272]

If put under Article 85 scrutiny, PTTs might argue for an Article 85(3) exception on the grounds that their agreements: (1) are absolutely necessary for survival in an environment of technically diverse communications systems; (2) represent the only progress that has been made in intra-European communications, and as such have served to benefit the consumer; (3) contain only those conditions that are indispensable to the attainment of European communications objectives; and (4) do not eliminate competition. Since each PTT exists as a monopoly in a particular Member State, there can be no lessening of a nonexistent competition.[273]

Examples of agreements that might be the focus of Commission action are those concerning the routing of circuits through certain Member States to the exclusion of others, setting inordinately high tariffs for leased circuits crossing national boundaries, imposing volume sensitive pricing, or setting rates based primarily on the value of the service to the user.[274] All of these agreements in varying degrees distort competition in vital segments of the EC's teleinformatics market. In particular, they limit the number of business choices available to data service providers.[275] Agreements resulting in such competition restrictions, and which are not necessary to provide basic service to customers of the PTTs, may provide the Commission with its first opportunity to make Article 85 inquiries concerning teleinformatics.

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272. The Commission would first determine whether agreements made among the PTTs (such as those found in the confines of CEPT) affect trade between at least two Member States. *See* Treaty of Rome, *supra* note 3, art. 85(1). Since commerce among Member States has become increasingly dependent upon the structure of the various Member State communications networks, there are few industries whose trade would not be affected by restrictive agreements among PTTs. For a discussion of the interpretation of "affect" in Article 85(1), see 2 SMIT & HERZOG, *supra* note 199, at 3-100 to 117. Next, the Commission would determine whether the agreements have as their object or consequence the restriction, distortion, or prevention of competition within the common market. Treaty of Rome, *supra* note 3, art. 85(1). *See generally* 2 SMIT & HERZOG, *supra* note 199, at 3-117 to 125.

273. *See generally* TELEPHONY ARTICLE 2, note 258 *supra*. Since the burden is on the Commission to establish an infringement, the PTTs would be in a defensive position.

274. *Id.* at 70. *See also* Gill Report, *supra* note 56, at 215-17.

275. Providers of services may be forced to redesign networks in order to avoid unreasonably high tariffs, including the placement of processing computers in a Member State with the lowest communications costs. This in turn may have a ripple effect, requiring the data service provider to purchase specialized equipment made in the host country.

c. ' Abuse of a Dominant Position

Article 86 prohibits any abuse "of a dominant position within the common market or in a substantial part of it . . . insofar as [that abuse] may affect trade between Member States."[276] Since Article 86 prohibits any "abuses of a dominant position,"[277] it operates not only against monopolies per se, but also provides for the control of oligopolistic market situations.[278] However, because it operates only against an abuse that may potentially affect trade between Member States, it does not make all dominant positions illegal per se.[279] The concept of abuse is further illustrated by the examples of abuses listed in Article 86:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[280]

This list is not exhaustive. The objective of the establishment of a common market and the general purpose provisions of the Preamble and Articles 2 and 3 may also provide the basis for a Commission

276. Treaty of Rome, *supra* note 3, art. 86. For materials on Article 86 generally, see Jones, *A Primer on Production and Dominant Positions Under E.E.C. Competition Law,* 7 INT'L LAW. 612 (1973); Korah, *Interpretation and Application of Article 86 of the Treaty of Rome: Abuse of a Dominant Position within the Common Market,* 53 NOTRE DAME L. 768 (1977/78); Ramsey, *In Support of the Treaty's 'Fundamental Objectives': A Survey of Recent Developments Concerning the Interpretation of an Abuse of Dominant Position under Article 86 of the Treaty of Rome,* 1 LEGAL ISSUES OF EUROPEAN INTEGRATION 1 (1975).

277. Treaty of Rome, *supra* note 3, art. 86. In defining the concept of an abuse or improper exploitation of a dominant position, the Commission stated:

> There is said to be improper exploitation when the conduct of an enterprise objectively constitutes a deviation from the objectives that have been settled by the Treaty. The improper practices of a dominant enterprise may exist vis-à-vis present competitors, potential competitors or with regard to suppliers and customers. As there is no general definition of an improper exploitation, its existence must be decided upon each case in the light of the objectives of the relevant EEC legislation.

Memorandum of Concentration within the Common Market of Dec. 1, 1965, as cited in Ramsey, *supra* note 276, at 4.

278. *See* A. PARRY & S. HARDY, EEC LAW 302 (1973).

279. *Id.* Three conditions must be met before the Article 86 prohibition can be invoked: (a) a dominant position must exist; (b) that position must be abused; (c) there must be a possibility that trade between Member States may be affected by the abuse. *Id.* at 302-07.

280. Treaty of Rome, *supra* note 3, art. 86(a)-(d).

finding of abuse.[281] The Court has found abuses by undertakings in a dominant position to include the charging of excessively high prices,[282] the misuse of a copyright,[283] and the intended merger between a dominant manufacturer of metal containers and a smaller, yet important, competitor.[284]

Some authorities have questioned whether certain PTT agreements and recommendations made within CEPT might come within the purview of Article 86 prohibitions.[285] For example, the PTTs, which are undertakings in dominant positions, have participated through CEPT in "restrictive or punitive practices."[286] Practices questioned include: maintaining excessively high tariffs for leased circuits crossing national frontiers; prohibiting use of customer-owned or customer-provided terminal equipment; maintaining artificially higher charges than are required of a PTT if operating in a competitive economy; and, imposing on customers "all use" tariff categories as well as requiring additional volume sensitive charges where a leased circuit is used by more than one entity.[287] Restrictive practices or policies feared but not yet on the scene include PTT intentions to use "value of service to customer" as the dominant factor in fixing rates and to "absorb all private use networks into public networks."[288] Agreements or policies placing restrictions on competition by imposing unfair rate structures or unreasonable use restrictions on telecommunication services deserve special attention when discussing the applicability of Article 86.

(1). Unfair Rate Structures: The SWIFT Experience

The experience of the Society of Worldwide Financial Telecommunications (SWIFT) with the European PTTs illustrates the unfair rate structure problem. When SWIFT decided to develop its own international telecommunications network to serve the worldwide banking community it met with the first major effort by European

281. *Id.* preamble, arts. 2, 3. *See, e.g.,* Europhemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities, [1973] E. Comm. Ct. J. Rep. 215, 12 Comm. Mkt. L. R. 199 (1973) (the Court found that an "abuse" under Article 86 includes an obstruction of Article 3(f) goals).

282. *See, e.g.,* Sirena S.r.l. v. Eda S.r.l., [1971] E. Comm. Ct. J. Rep. 69, 10 Comm. Mkt. L. R. 260 (1971).

283. *See, e.g.,* Belgische Radio en Televisie v. S.A.B.A.M., [1974] E. Comm. Ct. J. Rep. 313, 14 Comm. Mkt. L.R. 238 (1974).

284. *See, e.g.,* Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities, [1973] E. Comm. Ct. J. Rep. 215, 12 Comm. Mkt. L. R. 199 (1973).

285. TELEPHONY ARTICLE 2, *supra* note 258, at 70.

286. *Id.* These practices might also be the focus of Commission action under Article 85. *See* text accompanying note 274 *supra.*

287. *Id.*

288. *Id.*

PTTs to curtail the use of private networks.[289] SWIFT is not the first to devise such a network, however. The Société Internationale des Télécommunications Aeronautiques (SITA) has been operating a similar network utilizing privately leased circuits since 1959. The arrangement gives SITA unlimited access to privately leased circuits at flat monthly rates in conformity with CCITT recommendations.[290]

Concerned with the potential loss of telex revenues, the various PTTs, acting through the CEPT organization, concluded that SWIFT's proposal for an arrangement similar to SITA's could be granted only if it were altered by computing SWIFT's circuit costs on the basis of both a flat rate and a per message element.[291]

Although it appears that SWIFT and CEPT have resolved the disagreement over the proposed rate structure, the implications of CEPT's original proposal remain troublesome. Essentially, CEPT put SWIFT in a take-it-or-leave-it position, whereby SWIFT had to either pay a volume sensitive surcharge or lose access to privately leased lines.[292] While it has been reported that SWIFT did, in fact, file a complaint with the Commission, reports of any official inquiries apparently have not been released to the public.[293]

From an Article 86 perspective, it appears that CEPT, in its dealings with SWIFT, attempted not only to impose unfair prices, but also to apply unequal conditions to like parties in like transactions.[294] In the face of a complaint, it is likely that the CEPT would

289. By using volume insensitive circuits, leased from various public administrations, SWIFT hoped to be in a position to control access to its own network as well as to realize substantial savings over the use of then existing public services. *See* Markoski, *supra* note 54, at 298-99.

290. TELEPHONY ARTICLE 2, *supra* note 258, at 73.

291. Markoski, *supra* note 54, at 299. Markoski suggests that the CEPT counterproposal would substantially increase the cost of using SWIFT to a degree that it would threaten "the economic viability of the SWIFT network even before it began operations." *Id.*

292. TELEPHONY ARTICLE 2, *supra* note 258, at 73.

293. *Id.* at 70.

294. Article 86 prohibits unfair prices as well as price discrimination. Treaty of Rome, *supra* note 3, art. 86(a). In United Brands Co. v. Commission, [1978] E. Comm. Ct. J. Rep. 207, 21 Comm. Mkt. L.R. 429 (1978), the Court applied the Commission's description of unfair prices as those that are "excessive in relation to the economic value of the product supplied." *Id.* at 299, 21 Comm. Mkt. L.R. at 501. In addressing the issue of price discrimination, the Court applied Article 86 to prohibit "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage." Treaty of Rome, *supra* note 3, art. 86(c).

When applying the *United Brands* test to the SWIFT-CEPT issue, the Commission and/or the Court would probably compare the surcharge price formula CEPT offered SWIFT with the flat monthly charge it extended to SITA. *See* notes 290-91 *supra* and accompanying text. Also, "any attempt by the PTTs to impose a volume sensitive surcharge on SITA (in order to remove the 'unequal treatment" onus) would no doubt be equally stoutly contested on the grounds that there has been no change in the conditions

maintain that its proposal had not violated any CCITT recommendations and that the proposed rate structure was fair.[295]

It remains to be seen whether any investigation will take place. In the meantime, the Commission will likely take a cautious approach to controversies such as the CEPT-SWIFT dispute. The EC's teleinformatics programmers should not ignore the issue. The CEPT-SWIFT controversy is an example of how communications rate schemes might distort competition and affect the development of advanced teleinformatic services. Member States may, in the long run, have more to lose than telex revenues if unfair rate schemes continue to flourish; the private sector may lose the desire to exploit the new technologies, thus thwarting the third general aim of the EC's teleinformatics strategy.[296]

(2). Use Restrictions

A second area in which certain Member State PTTs could abuse their dominant positions involves restrictions placed on the use of international telecommunications lines. Such restrictions are particularly worrisome to undertakings in the data service industry. These data service companies, which provide a variety of services to their customers, including systems that pass massive amounts of data between locations, rely heavily on the communications networks of the various PTTs. The ability to provide services is a function of the ease and cost of arranging communications systems with the PTTs. To the extent that Member States put unfair restraints on the use of the public communication systems, the data service provider may be restrained in the manner in which it conducts its business.

Of particular interest to EC teleinformatics strategists are those PTT use constraints that may have a negative impact on the establishment of data processing services within the EC. One commentator has suggested that new regulations promulgated by the Federal Republic of Germany, providing that non-German data processors

or operations of SITA which would warrant such a change after 30 years of operating under flat rate tariffs." TELEPHONY ARTICLE 2, *supra* note 258, at 73.

295. TELEPHONY ARTICLE 2, *supra* note 258, at 73. The burden would be on the Commission to establish that the agreement was unfair. One writer has suggested that the Commission could compare CEPT's proposed rate scheme to what it might have developed if CEPT had adopted regulations similar to those of the FCC in the United States concerning similar service offerings. *Id.* at 70. This idea is interesting, but any such study would be difficult to conduct. Given the numerous PTTs involved, one might have to formulate a European communications "shopping basket," and then compare the arrived at indexed rate with the U.S. rates.

296. For a discussion of the third general aim of the EC strategy, see notes 135-71 *supra* and accompanying text. Overly restrictive rate schemes may keep out private service providers and thus frustrate the EC strategy. *See, e.g.*, Study by M. Beesley, Dept. of Industry (Jan. 1981) [hereinafter cited as Beesley Study].

may not obtain access to the German market through an international leased channel circuit unless that circuit terminates in either a single terminal device or a German-based computer system, create such constraints.[297]

Such restrictions on competition may come within the prohibitions of Article 86 and thus serve to defeat the fundamental objective of the Treaty, the creation of a common market.[298] To come within the prohibitions of Article 86, a dominant undertaking in one country need not be dominant throughout the EC.[299] The main issue is whether the abusive practice within one Member State affects trade between Member States. The Commission probably has the authority under Article 86 to investigate overly restrictive regulations promulgated in a particular Member State.[300]

d. State Aid Schemes

Articles 92-94 of the Treaty contain specific rules regarding aid granted to undertakings by Member States.[301] The Commission has applied these rules on numerous occasions when approving national aid schemes designed to support various sectors of the teleinformatics industry.[302] The relevance of the rules on state aid schemes to the EC's overall teleinformatics strategy is demonstrated by the Commission's growing concern over the proliferation of uncoordinated national development programs in the new technologies area.[303]

The basic rule regarding Member State aid schemes is found in Article 92(1), which provides that any aid granted by a Member State that "distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar

297. *See* Markoski, *supra* note 54, at 317-19.

298. Treaty of Rome, *supra* note 3, arts. 2, 86.

299. 2 SMIT & HERZOG, *supra* note 199, at 3-256 to 258.

300. If the new regulations prove to unfairly restrict competition within the EC, adversely affected companies would theoretically have standing to bring the matter before Courts or informally, to the attention of the Commission. However, even before complaints surface, the EC strategists may wish to consider taking measures to protect against the proliferation of Member State regulations that appear to have as their intent or effect the protection of national industries.

301. Treaty of Rome, *supra* note 3, arts. 92-94. For the general Commission policy concerning aid schemes for industries, see Eighth Report, 6-8 COMMISSION OF THE EUROPEAN COMMUNITIES, REPORT ON COMPETITION POLICY 122-23 (1979) [hereinafter cited as Eighth Competition Report].

302. *See, e.g.,* Eighth Competition Report, *supra* note 301, at 144-45 (Commission's conditional approval of United Kingdom's proposal to introduce an aid scheme promoting research and development in the microelectronics field); Sixth Report, 6-8 COMMISSION OF THE EUROPEAN COMMUNITIES, REPORT ON COMPETITION POLICY 122 (1977) and Fifth Report, 5 COMMISSION OF THE EUROPEAN COMMUNITIES, REPORT ON COMPETITION POLICY, 120-21 (1976) (concerning German aid schemes); Sixth Report, *supra,* at 121 (concerning French aid schemes).

303. *See generally* Dublin Report, note 1 *supra*.

as it affects trade between Member States, be incompatible with the common market."[304] Article 92 also contains a list of aid schemes which are, or may be considered by the Commission to be, compatible with the common market.[305] One excepted category includes aid "to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State."[306] Such aid schemes need not have direct Community-wide benefit, but must be projects in which all Member States have a joint interest.[307] Another category of aid schemes Article 92 explicitly endorses includes those schemes whose purpose is the development of certain economic activities.[308] The Commission has used this provision to approve Member State aid for the development of transportation, textile, shipbuilding, aircraft, film, and computer industries.[309]

The EC's desire to have some degree of coordination between Member State development projects could be frustrated if states decide to support nationally oriented teleinformatic industries. Article 92 may provide EC authorities with the necessary "braking" mechanisms, and future requests for exceptions from Article 92 prohibitions may be met with stricter Commission scrutiny than before.

IV

PROPOSALS

The EC officials responsible for planning programs designed to prepare Europe for the challenge of the new technologies are to be commended for recognizing that Europe lags behind the others in the teleinformatics field, and that immediate cooperation among the Member States is needed if Europe is to catch up. The EC's threefold plan appears to be suited to the present European situation and basically conforms to the objectives of the Treaty of Rome.

The most difficult problem facing the EC strategists will be the creation of the sought-after "homogeneous market." As long as

304. Treaty of Rome, *supra* note 3, art. 92(1).

305. *Id.* art. 92(3).

306. Treaty of Rome, *supra* note 3, art. 92(3)(b).

307. *See* 3 SMIT & HERZOG, *supra* note 199, at 3-403. Nationally supported projects become less defensible as the project's benefit or purpose vis-à-vis other Member States is narrowed. For example, a German or British plan to fund advanced research on advanced designs benefits the whole Community and is likely to be acceptable, whereas a project to devise a uniquely "French" computer language for use only on French-made software or hardware would not benefit other Member States, and hence be viewed as a threat or distortion to competition.

308. Treaty of Rome, *supra* note 3, art. 92(3)(c).

309. 3 SMIT & HERZOG, *supra* note 199, at 3-405 to 409.

national communications monopolies, in conjunction with associated equipment manufacturers and labor organizations, view an integrated and truly competitive EC market as threatening to their own interests, the prospect of having Europe develop its own teleinformatic giants comparable to IBM, ITT, and Control Data Corporation will remain dim. A competitive environment similar to that of the United States does not currently exist in Europe, and the Commission's initiatives to further such an environment have, thus far, been modest. The EC's hesitation in this area is no doubt a function of political realities. Even in light of such realities, this Article suggests that the EC has not begun to exhaust its potential authority under the Treaty.

This Article presents five suggestions on how the EC can begin to more fully utilize its authority in the teleinformatics field. First, the EC should continue its efforts to develop a modern technologically integrated telecommunications infrastructure similar to that found in the United States, allowing for complete and open network interconnection between the Member States.

Second, the EC should take affirmative steps to assure that Member States remove restrictions on the use of and the type of equipment that may be used to obtain access to public communications systems. PTT restrictions aimed at keeping private enterprises out of what they consider to be "their market" will not foster EC objectives. Such practices fragment the EC market, offer little development incentive to emerging European enterprises and, ironically, favor the continued dominance of non-European controlled giants which are generally able to avoid the fall-out of short-sighted protectionist policies.

Third, EC authorities should promote the harmonization of divergent Member State mechanisms for setting communication rates.[310] Because harmonized rate structures could assist in the creation of an open and competitive teleinformatics market, EC institutions should not hesitate to enter this field. Rather than a campaign to break up national monopolies, what is called for in this area is greater EC involvement with national authorities to "encourage" more rational and uniform rate structures.[311]

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310. This suggestion touches upon politically sensitive issues, such as the manner in which Member States cross-subsidize post office revenues with those of the phone companies. Recent British and Swedish efforts to separate the post offices from the phone companies indicate a more enlightened approach, and hopefully portray a sign of things to come.

311. The EC could, for example, encourage rates based upon the cost of capitalizing communication networks, *not* the post office; and the cost of building communications networks, *not* the value of the service to the consumer.

Fourth, the EC should begin immediate inquiries concerning the ultimate role of telecommunications monopolies. For example, the EC should question whether allowing PTTs total unregulated entry into all sectors of the teleinformatics market serves EC objectives. The increased revenues flowing into the PTTs as a result of the development of publicly owned switching or information networks available to telephone customers must be balanced against any negative impact that such initiatives might have on private enterprises competing for the same market.[312]

Finally, EC recommendations regarding the elimination of restrictive public procurement and type approval practices must be strengthened. In their current state, they offer little incentive for Member State reform. If the situation does not begin to change by the mid-1980's, as hoped by the Commission, the EC should employ more powerful weapons, such as regulations or directives, to prohibit such practices.

CONCLUSION

The programs proposed thus far reflect a positive EC commitment to create new markets and strengthen corresponding industrial capacity. The EC strategists have taken a balanced approach concerning the protection of individual privacy, demonstrated by proposals that reflect the endorsement of privacy protection laws without hindering homogeneous economic development. Furthermore, the programs underscore an EC commitment to utilize the new technologies for the betterment of society and to prevent massive unemployment upon the arrival of the information era. Whether Europe will be able to effectively catch up to the United States and Japan by the 1990's in the manufacture of high-technology products will depend on many factors including resources from both the private and public sectors for research and development and coordination among Member States with respect to ongoing national research and development projects. The EC has a responsibility to see to it that the factors merge in an environment that stimulates, rather than inhibits, competition within the private sector.

312. *See, e.g.,* Beesley Study, note 296 *supra*.