

COMMISSION DECISION**of 10 December 1982****relating to a proceeding under Article 86 of the EEC Treaty (IV/29877 — British Telecommunications)****(Only the English text is authentic)****(82/861/EEC)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty⁽¹⁾, as last amended by the Act of Accession of Greece, and in particular Article 3 thereof,

Having regard to an application lodged under Article 3 of Council Regulation No 17 on 22 June 1979 by Telespeed Services Limited against the United Kingdom Post Office,

Having regard to the decision of 18 April 1980 to open proceedings in this case,

Having given the United Kingdom Post Office the opportunity to make known its views on the objections raised by the Commission, in accordance with Article 19 of Council Regulation No 17, and with Commission Regulation No 99/63/EEC of 25 July 1963⁽²⁾ on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17,

After consultation with the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS**A. British Telecommunications**

- (1) British Telecommunications is a public corporation established under the Telecommunications Act 1981, an enactment of the United Kingdom Parliament.
- (2) British Telecommunications has, under the Telecommunications Act 1981, a statutory duty to provide telecommunication services and a statutory monopoly for the running of telecom-

munication systems throughout the United Kingdom.

- (3) During most of the time in which the activities later described took place the telecommunication services now provided by British Telecommunications were provided by the United Kingdom Post Office under the Post Office Act 1969, also an enactment of the United Kingdom Parliament. British Telecommunications assumed the responsibilities of the United Kingdom Post Office for telecommunication services from 1 October 1981 under the Telecommunications Act 1981.
- (4) The enactment of the Telecommunications Act 1981 formed part of the measures taken by the United Kingdom Government with the intention of encouraging competition in the telecommunication field.
- (5) Both British Telecommunications and the United Kingdom Post Office are hereinafter referred to as 'BT'.

B. The International Telecommunication Convention and Union

- (6) All EEC Member States are among the signatories of the International Telecommunication Convention (ITC) which lays down the purposes and structure of the International Telecommunication Union (ITU). The International Telegraph and Telephone Consultative Committee (CCITT) is one of the permanent organs of the ITU.
- (7) Under Article 11.1 (2) ITC the duties of the CCITT shall be to study technical, operating and tariff questions relating to telegraphy and telephony and to issue recommendations on them. Members of the CCITT are the telecommunication administrations of all ITU member countries, as of right, and any recognized private operating agency which, with the approval of the member country which has recognized it, expresses a desire to participate in the work of the Committee. BT is such a recognized private operating agency.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

- (8) Under Article 44 ITC the Members are bound to abide by the provisions of the Convention and the Administrative Regulations and to take the necessary steps to impose the observance of these provisions upon private operating agencies authorized by them to establish and operate telecommunications and which engage in international services. Article 1.1 (2) of both Telegraph Regulations and Telephone Regulations provides that 'In implementing the principles of the Regulations, Administrations (or recognized private operating agencies) should comply with the CCITT Recommendations, including any Instructions forming part of those Recommendations, on any matters not covered by the Regulations.'

C. Retransmission of telephone and telex messages in the UK

- (9) Charges, terms and conditions relating to telecommunication services in the United Kingdom were and are laid down by BT in 'Schemes', made under Section 28 of the Post Office Act 1969 and Section 21 of the Telecommunications Act 1981 respectively.

(a) *Telex Scheme 1971*

- (10) The Post Office Telex Scheme 1971 contained the following provision which, in effect, prohibited the operation of commercial message-forwarding agencies:

'21.(2) Except as otherwise provided by any licence granted by the Post Office to the (*telex*) subscriber or with the consent in writing of the Post Office, neither the subscriber nor any other person shall receive any consideration either directly or indirectly in return for or otherwise howsoever on account of the use of the subscriber's installation by or on behalf of any person other than the subscriber (...).'

(b) *Schemes T7/1975 and T1/1976*

- (11) In recognition of the fact that message-forwarding agencies can perform a useful service for United Kingdom customers, the above provision was replaced in the Post Office Telex Scheme 1975 (Scheme T7/1975) by paragraph 43 (2) which provided *inter alia* that 'A subscriber may use his (*telex*) installation for the purpose of sending and receiving messages on behalf of other persons and may allow other persons to use his installation for the purpose of

sending and receiving messages on their own behalf'. One condition laid down at paragraph 43 (2) (b) (iii) was that 'any amount charged by a subscriber in respect of the receipt and delivery of a message which both originates and is for delivery outside the United Kingdom or the Isle of Man shall not be such that it enables the originator of the message to send it more cheaply than if he had sent it by means of a telex call made by him directly to the person for whom the message was ultimately intended'.

- (12) The above provisions were reiterated under the heading 'Restriction on assignment of telex service and use of telex installation', in Paragraph 70 (2) of the Post Office Telecommunication Scheme 1976 (Scheme T1/1976), which was in operation from 1 June 1976 to 20 January 1978.

- (13) Concerning paragraph 43 (2) (b) (iii) of Scheme T7/1975, subsequently renumbered 70 (2) (b) (iii) in Scheme T1/1976, BT found it administratively impossible to monitor the situation to ensure that, for any telex traffic between third countries, message-forwarding agencies did not undercut the charges of other Administrations.

(c) *Message-forwarding agencies*

- (14) Taking advantage of telecommunication tariffs which are lower, especially in relations with North America, from the UK than from some countries in mainland Europe (e.g. because of differences in tariff policies, such as lower rentals and higher call charges, and in the real costs), and of currency fluctuations which at some times made these UK tariffs still more attractive, a number of communications bureaux operating in the UK have in the last decade entered the business of retransmitting messages originating and for delivery outside the UK. There are approximately 100 message-forwarding agencies in the UK, 11 of which were believed to be engaged in the business of relaying traffic between third countries at the time of publishing Scheme T1/1978 (16 below). These message-forwarding agencies

- (i) offer to receive messages by telex from persons or other telex forwarding agencies in one foreign country and send the messages on by telex to persons or other telex forwarding agencies in other countries. This service may be particularly useful when the same message (such as a detailed specification of goods for which tenders are invited) is required to be sent to a large number of foreign destinations; or

(ii) receive their customers' messages in data form by means of the public telephone system from computers abroad (mainly from the United States) and send them onwards to other countries as data to be received at their destination in visual form, either as printed out messages or as pictures on a visual display unit.

(d) *CCITT Recommendation F 60, Section 3.5*

- (15) In October 1976 the CCITT passed Recommendation F 60 on Telex Operating Methods, whose Section 3.5 entitled 'Restriction on the use of a telex station' contains the following:

'Administrations and recognized private operating agencies should refuse to make the telex service available to a telegraph forwarding agency which is known to be organized for the purpose of sending or receiving telegrams for retransmission by telegraphy with a view to evading the full charges due for the complete route'. 'Administrations shall refuse to provide international telex service to a customer whose activity would be regarded as an infringement of the functions of an Administration in providing a public telecommunication service'.

(e) *Scheme T1/1978*

- (16) In direct or indirect implementation of CCITT Recommendation F 60, Section 3.5, BT in Post Office Telecommunication Scheme (Scheme T1/1978) which came into operation on 21 January 1978, amended Scheme T1/1976 as follows (excerpts):

'44 (2) (a) unless the Post Office otherwise consents in writing, a (*telephone*) subscriber who is engaged in the business of sending and receiving messages on behalf of other persons by means of his telephone installation and/or allowing other persons to use his telephone installation for the purpose of sending and receiving messages on their own behalf shall not so use or allow his telephone installation to be so used for the purpose of sending to or receiving from a place outside the United Kingdom and the Isle of Man any message intended for ultimate reception in visual form'.

'70 (2) (b) any (*telex*) message which originates outside the United Kingdom and the Isle of Man shall not be sent onwards to

a destination outside the United Kingdom and the Isle of Man;

(c) any message which originates outside the United Kingdom and the Isle of Man shall not be sent onwards to a destination within the United Kingdom and the Isle of Man unless it is received as a telex call made directly to the subscriber's installation by the originator of the message. (...);

(d) any message which originates in the United Kingdom or the Isle of Man shall not be sent onwards to a destination outside the United Kingdom and the Isle of Man unless it is sent as a telex call made from the subscriber's installation directly to the person for whom the message is ultimately intended by the originator of the message'.

- (17) In August 1978 BT sent a standard letter to all communications bureau operators in the United Kingdom calling their attention to the above amendments and explaining that they mean, in effect, that private agency operators are prohibited from providing international services for their customers whereby:

— messages in data form are sent or received internationally by telephone and then converted into telecommunication messages for reception in telex, facsimile, written or other visual form,

— telex messages are forwarded in transit between places outside the United Kingdom and the Isle of Man,

— telex messages are sent or received via other message-forwarding agencies.

- (18) BT also explained in this standard letter that 'Indeed, it is because we have managed to keep our international telex charges so low — much lower than in other countries — that it is attractive for other countries to send their telex messages through agencies in this country. (...). The activities of agencies which attract telex messages from other countries to transmit them from the United Kingdom to a third country, cause a serious loss of revenue to other countries and break the international agreements on which world cooperation in telecommunications is founded. They thus put at risk the arrangements we have been able to negotiate with other countries, and so endanger the low tariffs we at present charge to our own customers in the United Kingdom'.

(19) BT has written a further letter to those agencies believed to be forwarding traffic between telex subscribers in third countries. A written assurance was requested, stating that they understood and would comply with the new provisions. Nine of the 12 recipients gave such an assurance.

(20) BT has stated to the Commission that it had been under pressure from certain other national telecommunication authorities to prevent retransmission of telex messages between third countries by the UK message-forwarding agencies and that it had introduced the restrictions in order to, in its view, meet its international obligations to other administrations.

(21) Paragraph 11 (1) of Scheme T1/1976 provides that if a subscriber 'fails to observe or perform any of the provisions of the Scheme, or any obligation on his part arising thereunder, the Post Office may (without prejudice to any other right or remedy):

(a) without notice, temporarily disconnect any installation or any part of an installation;

(b) summarily cease to provide telecommunication service after giving notice of its intention to terminate service provided under the Scheme.'

BT maintains that it has the right to disconnect the facilities of those agencies which persist in ignoring the Scheme restrictions but it has not sought to enforce the restrictions by taking any such action.

(22) On 22 June 1979, Telespeed Services Limited, one of the UK message-forwarding agencies concerned by the restrictions introduced by BT on 21 January 1978, lodged an application under Article 3 of Regulation No 17 requesting the Commission to find that Articles 85 (1) or 86 of the EEC Treaty had been infringed and to require BT to bring such infringement to an end. The complainant submits that the actual effect of the BT restriction is to prohibit retransmission by a UK telex operator of messages originating outside the UK to destinations outside the UK even where there is no question of lower rates being charged or available. To the best of the complainant's knowledge its charges are the same as or higher than those ruling in the countries of its customers within the EEC.

(23) In November 1981, BT revoked and replaced all previous schemes by the Telecommunication

Scheme 1981. The provisions of paragraphs 44 (2) (a) and 70 (2) (b) of Scheme T1/1978 were carried into the 1981 Scheme and re-numbered paragraphs 51 (2) (a) and 82 (2) (a) respectively.

(24) On 22 October 1982, BT wrote to the Commission as follows: 'it is now accepted that, in the context of this case, the CCITT Recommendation directly conflicts with Articles 85 (1) and 86 of the Treaty of Rome. Consequently, British Telecommunications has unilaterally decided to withdraw the particular restrictions at issue and will amend the Telecommunication Scheme accordingly and advise other administrations and UK message-forwarding agencies of this decision'.

II. LEGAL ASSESSMENT

A. Applicability of Article 86 of the EEC Treaty

Article 86 of the EEC Treaty prohibits as incompatible with the common market any abuse by one or more undertakings of a dominant position within the common market, or in a substantial part of it, in so far as such abuse may affect trade between Member States.

(a) *Undertaking in a dominant position*

(25) The United Kingdom Post Office and British Telecommunications are public corporations and economic entities carrying on activities of an economic nature. As such they are undertakings within the meaning of Article 86 of the EEC Treaty.

(26) British Telecommunications has a statutory monopoly, under the Telecommunications Act 1981, for the running of telecommunication systems throughout the United Kingdom and the Isle of Man. British Telecommunications therefore holds a dominant position in the United Kingdom, which constitutes a substantial part of the common market, for the provision of telex and telephone systems.

(27) Under the Telecommunications Act 1981 British Telecommunications became the legal successor of the United Kingdom Post Office in respect of the statutory monopoly for the running of telecommunication systems throughout the United Kingdom and of all rights and liabilities thereunder. British Telecommunications is therefore the successor to the United Kingdom Post Office for the purposes of this proceeding.

(b) *Abuse*

(28) Restrictions imposed by an undertaking in a dominant position, even under a power conferred on it by authority, may constitute an abuse of such a dominant position.

(29) Restrictions on the provision on behalf of third parties of telephone and telex services and on the use of telephone and telex installations in the United Kingdom are laid down by BT in 'Schemes' made under Section 28 of the Post Office Act 1969 and Section 21 of the Telecommunications Act 1981 respectively. Under Schemes T7/1975 and T1/1976, subscribers were free to use their installations for the purpose of sending or receiving messages on behalf of third parties.

(30) Until 20 January 1978, however, paragraph 43 (2) (b) (iii) of Scheme T7/1975 and paragraph 70 (2) (b) (iii) of Scheme T1/1976 provided that where a subscriber relayed a telex message both originating and for delivery outside the United Kingdom, the amount he charged should not be such as to enable the originator of the message to send it more cheaply than if he had sent it directly. In so far as it applied to the retransmission of telex messages originating in another EEC Member State for delivery to any country outside the United Kingdom, or originating in any country outside the United Kingdom for delivery to another EEC Member State, this provision was an abuse under Article 86 EEC as it :

(i) limited message-forwarding agencies' activities to the prejudice of customers located in other EEC Member States ;

(ii) applied dissimilar conditions to equivalent transactions with message-forwarding agencies by imposing a condition for the continuation of services that, of all telex messages submitted to BT, those for onward transmission outside the United Kingdom must either originate in the United Kingdom or be charged for by the agencies at a price that ensured that they were not cheaper for the sender than if he had sent them directly. This placed the agencies at a competitive disadvantage *vis-à-vis* the national telecommunication authorities and

agencies in other Member States not subject to such restrictions ; and

(iii) made the use of telephone and telex installations subject to the acceptance by message-forwarding agencies of an obligation to charge prices that had no connection with the type and quality of the telecommunication services provided by them but rather arose out of BT's desire to protect the revenues of other national telecommunication authorities.

It may be noted, however, that the above provision of Schemes T7/1975 and T1/1976 were never enforced (13 above) and were finally deleted on 11 January 1978 with effect on 20 January 1978.

(31) Scheme T1/1978, amending the principal Scheme T1/1976, came into operation on 21 January 1978. The new provisions of paragraphs 44 (2) (a) and 70 (2) (b), which were later carried into the 1981 Scheme as paragraphs 51 (2) (a) and 82 (2) (a) respectively, in effect prohibit message-forwarding agencies in the United Kingdom from retransmitting to destinations outside the United Kingdom

(i) messages intended for ultimate reception in visual form (such as telex, facsimile, printout or picture on a visual display unit) and received in data form via the telephone system from computers abroad ; and

(ii) telex messages originating outside the United Kingdom.

(32) In so far as they apply to telephone and telex messages originating in another EEC Member State for delivery to any country outside the United Kingdom or originating in any country outside the United Kingdom for delivery to another EEC Member State, such prohibitions are an abuse under Article 86 of the EEC Treaty as they :

(i) limit the activities of United Kingdom telephone and telex subscribers acting as message-forwarding agencies to the prejudice of customers in other EEC Member States ; and

(ii) make the use of telephone and telex installations subject to obligations which have no connection with the assignment of telephone or telex services.

(33) BT contends that it would not be an infringement of Article 86 of the EEC Treaty if BT were to prohibit telex forwarding agencies altogether in order to reserve to itself, in accordance with its monopoly, the sole right of providing international services. Therefore, there can be no justification for holding that the lesser restrictions which it has imposed on the activities of such agencies is an abuse of a dominant position. The Commission doubts that this contention is correct since the scope of BT's monopoly in the relevant legislation is the exclusive privilege of running telecommunication systems not the offering of services making use of such systems. However, even assuming that the contention is correct then BT must exercise the powers granted to it under the statutory monopoly in accordance with the EEC rules on competition (see paragraph 41 *et seq.*).

(34) With regard to paragraph 32 (i) above, the new restriction laid down in paragraph 44 (2) (a) of Scheme T1/1978, which prohibits UK message-forwarding agencies from using their telephone lines for relaying telex and other visual messages between countries outside the United Kingdom, is an abuse under Article 86 (b) of the EEC Treaty as it both limits the development of a new market and the use of new technology to the prejudice of relay operators and their customers who are thus prevented from making more efficient use of existing telecommunication systems. The fact that in so doing the message-forwarding agencies are simply exploiting the tariff differentials existing between telex and telephone services provided by the telecommunication authorities is irrelevant. Even if this were to result in fewer telex messages, thereby providing savings in costs to the users, this would not put the entire international telex system at risk. The maintenance of obsolete systems through measures taken by an undertaking in a dominant position is an abuse under Article 86 (b) of the EEC Treaty in that it limits technical development to the prejudice of consumers.

(35) With regard to paragraph 32 (ii) above, the new restriction laid down in paragraph 70 (2) (b) of Scheme T1/1978 is an abuse under Article 86 of the EEC Treaty as it makes the provision and continued provision of telecommunication services subject to the acceptance of an obligation not to deal with certain equivalent telex traffic according to its origin. It is in no way technically necessary nor in commercial usage

to treat such traffic differently and as such it has no connection with the provision of telecommunication services. Rather, the obligation again arose out of BT's desire to protect the revenues of other national telecommunication authorities.

(36) BT's contention that the logical consequence of such a view would be that it would not be free to restrict the use which customers could make of its telecommunication systems can be seen to be unfounded. Any such restrictions imposed by BT in the form of supplementary obligations should fall outside the terms of Article 86 and in this case they have been shown not to do so. As to BT's contention that they do not have to tolerate competition in services which its monopoly was intended to cover, see paragraph 33 above.

(c) *Effect on interstate trade*

(37) The prohibitions imposed by BT on message-forwarding agencies in the United Kingdom against the forwarding of messages originating from or for delivery outside the United Kingdom may affect trade between Member States in so far as the countries of destination or origin of such messages are Member States of the European Community.

(38) Although the prohibitions relate to the use of telecommunication installations within the United Kingdom, they directly affect the provision of services by message-forwarding agencies in the United Kingdom to third parties located in other Member States, as such services may be provided only in direct relations (i.e. not those in transit) between the United Kingdom and other Member States and no longer in relations between Member States other than the United Kingdom or between those Member States and countries outside the European Community.

(39) Thus, there is a clear restriction on trade between Member States as the prohibition restricts message-forwarding agencies, in carrying on their business, from providing certain services for customers situated in other Member States. The Commission was informed by the complainant that of the 13 000 to 14 000 messages it received from abroad annually between 1976 and 1979 for onward transmission to destinations abroad 85 % originated from EEC countries and 85 % were destined for EEC countries.

- (40) BT considers that it has the right to disconnect those agencies who persist in ignoring the prohibition and this would, of course, have the effect of preventing services of all kinds between Member States being offered by message-forwarding agencies. The complainant has further informed the Commission that it has not sought to develop the provision of these services, for which it saw a considerable potential, as a result of the threat of disconnection by BT. The prohibition has thus also affected the development of such trade between Member States.

B. Applicability of Article 90 (2) of the EEC Treaty

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

- (41) Under the Post Office Act 1969 and the Telecommunications Act 1981, BT has been entrusted with the operation of services of general economic interest, namely the provision of telecommunication systems throughout the United Kingdom. The application of the Treaty rules on competition to BT would not and does not obstruct the performance of its duties in an efficient and economic way. For BT to be exempted from compliance with the rules on competition it is not sufficient that such compliance would make performance of its duties more complicated.
- (42) BT has claimed, but not explained how, it would be obstructed in the performance of its duties. Indeed it would be in BT's interests to allow such traffic. Even if BT were to experience difficulties with other national telecommunication authorities for not preventing message-forwarding agencies in the United Kingdom from undercutting telex tariffs applied in other countries, such a situation would not 'obstruct' the performance of BT's particular task.
- (43) The Commission accepts, in its broadest sense, the view held by BT that international cooperation and the honouring of international commitments are essential features in the

provision of international communications in an efficient and economic way. However, this cooperation should not go so far as to violate the Treaty rules of competition.

- (44) For the reasons set out above the restrictions on the use of telex and telephone facilities and services by BT constitute infringements of Article 86 of the EEC Treaty. BT should therefore be required to terminate any of the restrictions that are still in operation.
- (45) Notwithstanding these infringements, the Commission does not consider that a fine should be imposed on BT in view of the special circumstances of the case and of the matters referred to in paragraph 20 above, and because BT did not enforce the restrictions by disconnecting the facilities of the message-forwarding agencies.

HAS ADOPTED THIS DECISION :

Article 1

The following provisions of the relevant Telecommunication Schemes of the United Kingdom Post Office and British Telecommunications constitute infringements of Article 86 of the Treaty establishing the European Economic Community :

1. Scheme T7/1975, paragraph 43 (2) (b) (iii)
2. Scheme T1/1976, paragraph 70 (2) (b) (iii)
3. Scheme T1/1978, paragraphs 44 (2) (a) and 70 (2) (b)
4. Scheme/1981, paragraphs 51 (2) (a) and 82 (2) (a).

Article 2

British Telecommunications shall within two months of the date of notification of this Decision bring the infringements found in Article 1 to an end in so far as those infringements have not already been brought to an end.

Article 3

This Decision is addressed to British Telecommunications, 2-12 Gresham Street, UK-London EC2V 7AG.

Done at Brussels, 10 December 1982.

For the Commission

Frans ANDRIESEN

Member of the Commission