

INTRODUCTION TO THE LEGAL ASPECTS OF PROFESSIONAL TELEMATICS CONTRACTS

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For the purposes of this paper, the term "professional telematics contract" means all the contractual or associated structures which may be established at the different stages of the development or implementation of operations relating to one or several professional telematics services.

There are a number of approaches to elucidating and organizing the multi-faceted legal problems arising from the development and implementation of professional telematics contracts.

The following approaches are suggested:

- a first approach describes the subject of telematics contracts: what is the content of the services offered and what is the corresponding contract "typology"?
- a second approach focuses on the legal qualification of telematics operations,
- a third approach emphasizes the special features of the structure and supply of telematics services and the specific agreements binding authors;
- a fourth approach uses the implementation and execution characteristics of professional telematics services to deduce the legal issues at stake.

1. FIRST APPROACH: THE SUBJECT

By telematics we mean all the services offered using teleinformatics techniques.

By teleinformatics we mean all the techniques involving both informatics and telecommunications:

- informatics means all the techniques, methods and tools used for processing information; its main feature is its ability to process a large volume of data at very high speed;
- telecommunications means all the procedures for the long-distance transmission of information, irrespective of the medium (radio-relay systems, technical lines, cables, fibre-optics, etc.).

There are a number of criteria which enable the diverse nature of telematics services to be appreciated.

1.1 The first is technical: a distinction is drawn between distributed and interactive services, based essentially on the fact that interactive service necessarily involves user identification by teletransmission before the operation can start.

1.2 The second relates to type of use of the service, a distinction being drawn between "general public" or "open" services and professional telematics services for professional use only.

1.3 The third emphasizes the service function, i.e., management, communication or documentation.

With regard to "management" telematics, while the computer's traditional role in the enterprise is to facilitate and speed up management operations (accounting, stock management, billing), these capacities are further enhanced through the introduction of telematics providing access to additional facilities (programmes, computers) without any need for the procurement of additional computer hardware.

In contrast with management telematics, communication telematics is intended for non-specialists (secretaries, sales representatives, executives, etc.). Accordingly, as in the case of telematics for the general public, the service must be user-friendly. Three new telematics communication services are worth noting in this connection. Electronic message services enable users to exchange messages via terminals: the user stores in his computer a message to one or more other users, who consult it by calling the service. This service may be restricted to a few users through the use of passwords. Telematics also offers a number of remote means of holding meetings (teleconference, videoconference, videotransmission) and reproducing documents (telewriting).

Finally, telematics documentation services provide enterprises with on-line access, using a password, to a volume of relevant information in the form of references, extracts, summaries or entire texts.

Alongside the commercial data banks, there are in-house data banks (staff file, product and order lists, etc.).

By analyzing the purpose of the various telematics services, it is possible to draw up a first classification of contracts according to subject, e.g., teleprocessing contracts, database access contracts and electronic mail contracts.

It should be noted that the borderlines between these services are not always very clear. For instance, electronic mail services like EUNET offer NEWS services on various topics and auxiliary services closely resembling database access information services; information services may be supplemented by teleprocessing services associating expert assistance in decision-making with the information communicated. Finally, the professional telebanking services offered to enterprises combine electronic mail, teleprocessing and database access services.

Simple utilisateur à titre privé voire entrepreneur, il souhaitera que des systèmes de responsabilité sans faute et de partage des risques soient mis en oeuvre, notamment avec l'appui de la Communauté internationale.

On évoquera à titre d'exemple la volonté des utilisateurs de services télématiques bancaires d'attribuer à la banque du donneur d'ordre la responsabilité pour l'ensemble du réseau, un système interbancaire de partage de responsabilité entre banques participantes au réseau étant mis en place pour la répartition des risques propres au réseau (cf. à cet égard, les règles développées par SWIFT).

En matière de banque de données, certains préconisent également un système de partage de responsabilité mettant à charge du serveur l'ensemble des obligations relatives au service de mise à disposition (cf. supra, point 2) (confidentialité des interrogations, disponibilité de la base de données, qualité et convivialité des langages d'interrogations) et à charge du producteur, les obligations relatives au produit informatique.

Conclusion.

Il est évident que c'est dans le cadre des contrats proposés aux utilisateurs de ces services que leurs promoteurs chercheront à établir les règles propres à chacun des points ci-dessus développés. Ainsi, trouvera-t-on, dans tous les contrats télématiques, des règles relatives à la signature et à la preuve des opérations, particulièrement dans les contrats de télétraitement et d'accès à des bases de données, des clauses de confidentialité et de restriction d'utilisation.

La protection réalisée dans le cadre de ces contrats individuels peut s'avérer insuffisante. Des réglementations dites de "hard law" s'avèrent parfois nécessaires mais, lorsqu'elles sont nationales, risquent de constituer une restriction aux flux transfrontières contraire à la création d'un marché commun. On songe dès maintenant en particulier aux cahiers des charges imposés par la loi aux serveurs qui offrent des services dans le cadre des expériences télématiques grand public.

Mais c'est surtout aux réglementations de soft law établies par les milieux professionnels eux-mêmes que l'on vise. Des associations sectorielles parfois intersectorielles nationales ou internationales visent à prévenir les craintes tant des utilisateurs que des "offreurs" pour définir des "Codes of Conduct", "Codes of Practice" ou "règles déontologiques". On cite les recommandations faites par l'American Libraries Association en matière de confidentialité, les Codes of Practice établis par EUSIDIC en matière de "Downloading" ou de "Electronic Mail", le Codice di Compartamento de l'ANFOV italien et le "Code of Conduct" établi par la "Videntex Industries Association" dans le cadre de l'expérience Prestel. Tout récemment, la CCI a émis un projet de "Règles de conduite uniformes pour l'échange de données commerciales par télétransmission. Ces codes de conduite, auxquels les contrats se réfèrent, prétendent fixer des normes de comportement, des règles de l'art et deviennent ainsi des standards professionnels, condition de la participation à un groupement professionnel. Dans quelle mesure ne réalisent-ils pas des ententes entre entreprises, contraires aux règles de la concurrence (cf. déjà point 3).

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2. SECOND APPROACH: THE LEGAL QUALIFICATION OF OPERATIONS

Two considerations: the first relates to the role of the telematics service in the establishment or implementation of the contract. The following types of contract are to be distinguished:

- contracts concluded through teleinformatics but implemented outside the system (example: teleshopping services);
- contracts concluded and implemented through teleinformatics, such as teletransaction services (travel bookings by remote means, etc.). These contracts are more dematerialized than any others, for neither their conclusion nor their implementation takes place outside the system;
- finally, particularly in the case of professional telematics services, a telematics service is provided as part of a framework agreement under which individual operations constitute a mode of implementation and may at the same time also be agreements in their own right. Thus, under a telebanking agreement drawn up for the general purpose of regulating risk-sharing between the bank and the customer as well as the charges and conditions for using the service, each electronic transfer of funds is a legal act in its own right.

The second consideration relates to qualification of the contract itself with reference to the telematics service to which it relates: should the data circulation which is the subject of such contracts be regarded as a commodity or a service?

Some authors reflect on the legal nature of the actual concept of data or information in order to decide this question. Is information a commodity or a service? This approach does not seem to us to be very sound. The telematics operation is intended either to make available a preconstituted information product using teleinformatics techniques (examples: information databases and teleprocessing operations permitting the remote use of software) or to provide a means of transport for information using teleinformatics techniques (example: electronic mail).

In our view, therefore, a distinction should be drawn between the operation which consists in constituting a product, an information commodity, the database or software which might be a "commodity" within the meaning of the Treaty of Rome and can be leased out, transferred, etc., and the operation which consists in making something available and which characterizes the telematics operation.

Thus, we consider that a database access contract or a teleprocessing contract for the remote use of software or computer capacity can be qualified as a lease contract, i.e., the temporary provision of a product with specific properties (for example, a data bank is characterized by features such as update frequency, comprehensiveness, command language, etc.).

It is true that, under the legislation applied in most countries, localization has implied issuance of the object leased, i.e., exclusive entry into possession, but is this element really essential to the lease agreement or was it simply understood to be so at a time when it was not conceivable for a commodity to be used at a distance and by more than one person simultaneously? We believe that the qualification of a lease agreement as implying the precarious use of a preconstituted commodity should be adopted and that users should benefit from the legal consequences of this qualification: lessor's obligations regarding upkeep and maintenance, hidden defects warranty, etc.

This qualification does not rule out the

possibility of considering the operation of providing or leasing something as a "service" in terms of GATT or the Treaty of Rome. A transfer of information is not the same as a transfer of goods, since information is not a commodity in its own right but forms part of a service offering access to a product.

To paraphrase the Debaue decision on teledistribution, there is no reason to treat messages transmitted by means of telecommunication any differently. This means that the provision of information via telecommunications is indeed a service within the meaning of the Treaty of Rome.

The same EEC jurisprudence on teledistribution, in particular the CODITEL judgement, enables us to go a step further: if transmission between the originator and the end user involves different telecommunication techniques, such as wave broadcasting, satellite retransmission, cable networks and telephone networks, and more than one operator within the meaning of the Treaty of Rome, the whole of the transmission constitutes a single service.

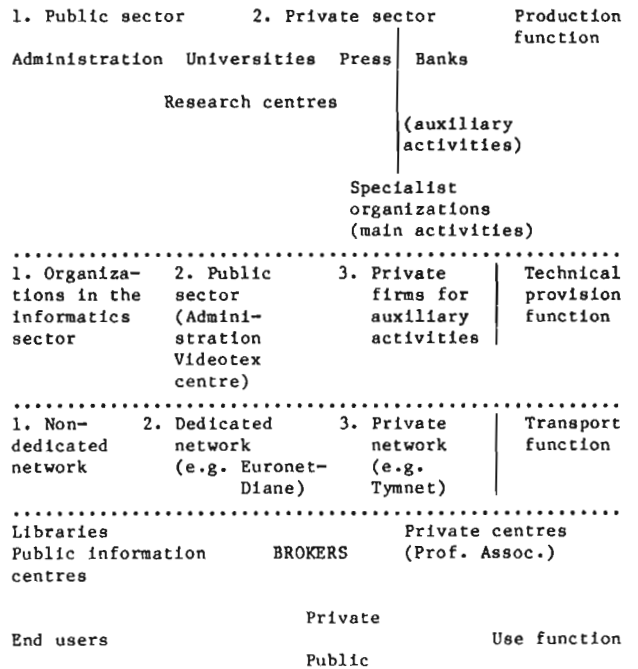
In those circumstances, only one of the transmission elements needs to be in another EEC country for Article 59 and the clause on the liberalization of services to be applicable. It is out of the question to assess the applicability of the Treaty of Rome rules to each element in the chain and, for example, to conclude that there is no transnational element simply because the last of the operators and the user are in the same country.

3. THIRD APPROACH: THE PROTAGONISTS - STRUCTURE AND SUPPLY

The development, communication and implementation of a telematic service involves a large number of protagonists enjoying different types of privileged status.

A. ... a large number of protagonists

The most obvious case is doubtlessly that of the information services. During a recent study we suggested that the following diagram might be used to identify the nature of the organizations involved in four of the main functions, namely, the production, technical provision, transport and use of a database.



Analysis of the fifth function, i.e., database marketing, seemed to suggest that different contractual arrangements could be made for implementing the functions concerned.

The large number of protagonists suggests two things:

- organizing the distribution of information products in particular may give rise to a number of problems. In order to secure the highest possible return on investment, the producer and/or main host service may introduce ad hoc clauses either to compartmentalize the market and restrict database access to a geographically limited number of customers, or to oblige distributors to offer a diversified product range at fixed prices and to guarantee a minimum grade of service, or again to make the distributor divulge the name of his customers and the detailed content of their interrogations in order to adjust the quality and content of the information product accordingly, or, finally, to prohibit the distributor from offering competitors' products. The establishment of such "selective" distribution networks needs to be analyzed from the standpoint of their compatibility with competition law;
- the second suggestion has to do with the difficulty encountered by the user in identifying which of the assorted protagonists is responsible when the service does not run smoothly. This point will be taken up in section 4 below.

B. ... having public or private status

The coexistence of public and private operators is a reality and there can be no doubt that, to an increasing extent, the public sector is competing with the private sector in some of its functions, while at the same time the private sector is taking over certain functions which used to be public sector monopolies.

Two examples will suffice to bear out this statement: database communication by the public sector (statistical database) and the provision of value-added information transport systems by private companies such as SWIFT and TYMNET.

The conditions and limits of the role played by the public authorities in the provision of telematics services requires analysis, whether or not a monopoly is involved.

Action by the State as either a protagonist or a subsidizer of some telecommunication service activities can restrict or distort competition. Government regulation of services may affect the liberty to provide such services or induce anti-competitive behaviour.

C. ... having concluded privileged horizontal agreements

The characteristics of the telematics operation (cf. section 4 below) make it necessary for a large number of agreements to be concluded between operators involved in the same stage of the production or distribution of goods or services. Two reasons may be quoted to justify such agreements:

The need to define common transmission standards and to offer some, or even all, of the organizations of a given sector communication services (electronic mail, shared database, etc.) explains the growing trend towards the establishment of telematics services which are common to several enterprises and sometimes take the form of separate companies (cooperatives, "ASBL", etc.).

The capital cost of creating such services is another reason for concluding cooperative agreements, which may provide for either research and development cost-sharing or the creation of joint services. They may entail setting up enterprises with a distinct legal status, such as SWIFT, BANCONTACT, etc., in the area of financial electronic services.

Mention may be made of the following:

- in the field of electronic mail services, the "ODETTE" project developed by enterprises in the automobile industry, the "EDIFICE" project developed by electronics enterprises and the EDIS project developed by the chemical industry;
- in the field of financial telematics services, the "SEADOCs" projects aimed at developing standards for the transfer of commercial documents between banks and enterprises;
- in the field of information databases, the establishment of common databases derived from primary databases belonging to different enterprises;
- in the field of electronic signature, the "TELETRUST" project involving banks, research institutes and enterprises in various sectors of the economy.

Finally, having regard to the legal, commercial and financial risks involved in developing these new services, the enterprises concerned have felt the need to pool their efforts and have formed associations (which may compete with one another, such as the EUSIDIC and EURIPA documentation services) which issue recommendations in various forms to their members.

A minute analysis of the phenomenon would be both time-consuming and tedious. We shall therefore confine ourselves to proposing some conclusions having regard to competition law.

It should be noted that technical and administrative standardization does not necessarily affect competition, since it enables a larger number of protagonists to join the systems and provides users with a wider range of services. Furthermore, the large investment required to develop a service argues in favour of concluding agreements on cost-sharing and economies of scale.

The agreements concluded in the framework of these associations must not have either the intention or the effect of favouring the nationals of any country or regulating tariffs for distributors or users. It will be up to the associations themselves to demonstrate that their "codes of conduct" do not come within the purview of the legislation protecting competition. For example, the EUSIDIC "Downloading Code of Practice" clearly seems to be exempt from application of that legislation. It enables customers to develop more profitable forms of database utilization, taking account of the opportunities afforded by microcomputers; in other words, it encourages technical progress.

4. FOURTH APPROACH: THE CHARACTERISTICS OF PROFESSIONAL TELEMATICS SERVICES

We shall discuss several characteristics which have major repercussions on the contractual arrangements made for implementing the services and on some of the main clauses of the contracts themselves.

First of all, the operation itself has the following characteristics: it frequently involves a large number of protagonists (cf. section 3 above); by virtue of one of its components or protagonists, it is frequently

international in nature; it does not take the material form of a physical medium, and it is based on interactive dialogue and instantaneous execution with uncontrollable repercussions for both the host service and the user.

The immaterial and international, interactive, instantaneous character of the operation makes it difficult to locate incidents and, therefore, to apportion responsibility, as well as raising certain doubts in the user's mind which have to be allayed by the protagonists with one voice.

The second characteristic derives from the technology itself, without which the operation cannot take place at all. Computer dialogue calls for compatible equipment and for the standardization of both networks and messages.

We shall discuss in turn:

- the technological conditions for implementing services;
- execution of services;
- proof that the service is being implemented;
- service pathology.

4.1 Service utilization conditions: constraints on the use of equipment

The fact that both the host service and the user need to have compatible equipment means that the user, whether public or private, should be able to dictate the choice of equipment or, more simply, software enabling dialogue - the very object of the interactive service - to take place. Accordingly, some thought needs to be given to the problem of "tied" offers from the standpoint of competition law. The situation in question is one in which the use of a telecommunication service is tied to the purchase or rental of a specific equipment for which the host service also provides maintenance.

Such a practice may often be justified on the grounds of equipment compatibility as mentioned above; it has been followed, in the case of computer equipment, by tying the purchase of certain software packages to that of hardware. American courts, as we know, have severely condemned tied offers in the name of the principle of competition and have upheld the principle of UNBUNDLING.

For a number of reasons, however, the dialogue which takes place in an interactive service is rarely only two-sided. In the first place, the service's very purpose may be to extend the scope of such dialogue either to the general public as a whole or to a clearly identified closed group, i.e., first category, Videotex electronic mail services; second category, the services offered by SWIFT to its members or by an ISC to all the subsidiaries or branches of a given enterprise (accounting consultancy service, stock management service, electronic mail service, etc.). In the second place, the service offered by an enterprise to its customers may be part of the service offered upstream in a group of enterprises. Obviously the electronic funds transfer service offered by a bank to its customers cannot be provided unless automatic interaction is possible with interbank electronic services such as those provided by SWIFT or the national clearing house.

This multi-voice dialogue requirement imposes standardization of both the network-connected equipments (e.g., choice of common operating systems) and, what is even more important, the message structure, so that messages are comprehensible to every member of the network. Here, administrative standardization is the point at issue.

This dual standardization is a prerequisite for the development of telematics services. Technical standardization is discussed on other reports, but I feel I must say a few words about administrative standardization, which is generally carried out by private associations or groupings. Since important issues such as the safety and confidentiality of messages are involved, the same question arises as with the "codes of practice": do these agreements not have the effect of narrowing down competition?

4.2 Service utilization

Unless some control is exercised over the use of the data which the user enterprise derives from its own utilization of the service, there is a danger that the confidential nature of the dialogue will be violated to the detriment of that enterprise and to the benefit of competitors or decision-makers.

In order to dispel such apprehensions, the protection afforded by existing legislation on the subject might be extended to enterprise-related data, or a stricter ethical or self-regulatory code might be drawn up for enterprises offering telematics services.

Similarly, if the host service has no control over the user it may fall victim to a customer's dishonesty in emptying a database, for example, or accessing a teleprocessing service for the benefit of a third party.

While authorizing maximum use of their product according to the possibilities offered by new technologies (e.g., downloading), the promoters of telematics services are keen to make their investment pay in terms of the extra value of these new possibilities to the user (principle of separate billing for each type of use by the customer). The law on intellectual property should be recast to ensure effective protection of the host's investment (e.g., recognition of the right of destination, definition of the derived or translated work, etc.).

4.3 Proof that service operations have actually been carried out

In view of the operation's immaterial and evanescent character the user has grounds to fear that he may not be able to prove that the service has been poorly performed or that the rules have been broken (e.g., in advertising).

The question of proving that telematics service operations have been concluded or executed (cf. section 2 above) seems to be one that will have to be settled without imposing regulations so strict as to hinder technical progress.

Following the recommendation by the Council of Europe, it would seem that the best solution might consist in developing preventive measures which would force enterprises offering such services to make the necessary technical and organizational arrangements to guarantee a priori that operations will be performed and recorded reliably, fully and safely, leaving it to the specialists concerned to define the content of those arrangements in terms of technological developments (for instance, cryptography might be made compulsory for certain high-risk telematics services such as bank services).

4.4 Liability: service pathology

The characteristics described above give both the user and the host good reason to feel uneasy. The user of such a service may find it difficult to locate an incident and hence to establish the liability of one of the many protagonists involved in carrying out the operation (cf. section 4), particularly if the context is international.

The user, whether a private individual or an enterprise, will want liability without fault and risk-sharing arrangements to be made, with the support of the international community.

For example, users of telematics banking services want the bank of the party issuing the order to assume liability for the network as a whole, the related risks being shared under interbank shared-liability arrangements concluded between the banks participating in the network (in this connection, cf. the SWIFT rules).

With regard to data banks, it has also been suggested that a shared-liability system should be devised under which the host would be responsible for all obligations relating to the facility itself (cf. section 2 above) (confidential nature of interrogations, database availability, quality and user-friendliness of interrogation languages) and the producer for those relating to the information product.

Conclusion

Clearly, it is when they draw up contracts for users that the promoters of these services will endeavour to lay down the ground rules for each of the items described above. For instance, all telematics contracts will contain clauses relating to signature and operational evidence, while teleprocessing and database access contracts will contain clauses relating to confidentiality and restricted use.

The protection afforded under individual contracts may prove to be inadequate. "Hard law" provisions may be necessary but, if part of domestic legislation, may restrict cross-border flows and inhibit the creation of a common market. The specifications imposed by law on hosts offering services as part of experiments on telematics for the general public are a case in point.

The dominant role will no doubt be played by "soft law" regulations established by the professionals themselves. National or international sectoral and intersectoral associations are endeavouring to reassure both users and hosts by drawing up codes of conduct, codes of practice or ethical codes. Mention may be made of the confidentiality recommendations issued by the American Libraries Association, the codes of practice drawn up by EUSIDIC on downloading and electronic mail, the code of conduct drawn up by the Italian organization ANFOV and that produced by the Videotex Industries Association as part of the Prestel experiment. The ICC has very recently issued draft uniform rules of conduct for the exchange of commercial data by teletransmission. These codes of conduct, to which the contracts refer, claim to set standards of behaviour and lay down the rules of the game, thus becoming professional standards to be met as a precondition for participation in a professional grouping. The question is: to what extent do they constitute inter-enterprise agreements which are contrary to competition law (cf. section 3 above)?

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