DIRECTIVE 97/51/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 6 October 1997

amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

Acting in accordance with the procedure laid down in Article 189b of the Treaty [3], in the light of the joint text approved by the Conciliation Committee on 28 May 1997,

(1) Whereas Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision [4] (ONP) concerns the harmonization of conditions for open and efficient access to and use of public telecommunications networks and, where applicable, services; whereas, in accordance with that Directive, the Council adopted Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines [5];

(2) Whereas the Council resolution of 22 July 1993 on the review of the situation in the telecommunications sector and the need for further development in that market [6], combined with the Council resolution of 22 December 1994 on the principles and timetable for the liberalization of telecommunications infrastructures [7], call for the liberalization of telecommunications services and infrastructures by 1 January 1998 (with transitional periods for certain Member States); whereas this is supported by the European Parliament resolution of 20 April 1993 on the Commission's 1992 review of the situation in the telecommunications sector [8], and the European Parliament resolution of 19 May 1995 on the Green Paper on the liberalization of telecommunications infrastructures and cable television networks (Part II) [9];

(3) Whereas the Council resolution of 22 July 1993 considered as a major goal for the Community's telecommunications policy the application throughout the Community and, where necessary, the adaptation, in the light of further liberalization, of open network provision principles in respect of the entities covered and of such issues as universal service, interconnection and access charges as well as the consequent questions connected with licensing conditions; whereas the Council resolution of 18 September 1995 on the implementation of the future regulatory framework for telecommunications [10] called on the Commission, in accordance with the timetable set out in the Council resolutions of 22 July 1993 and 22 December 1994, to present to the European Parliament and the Council before 1 January 1996 all legislative provisions intended to establish the European regulatory framework for telecommunications accompanying the full liberalization of this sector, in particular concerning the adaptation of open network provision measures to the future competitive environment;

(4) Whereas the European Parliament resolution of 6 May 1994 on the Commission communication accompanied by the proposal for a Council resolution on universal service principles in the telecommunications sector [11] emphasizes the central importance of universal service principles; whereas the Council resolution of 7 February 1994 on universal service principles in the telecommunications sector [12] provides a basic definition of universal service and calls upon the Member States to establish and maintain an appropriate regulatory framework in order to ensure universal service throughout their territories; whereas, as was recognized by the Council in that resolution, the concept of universal service

[1] OJ C 62, 1. 3. 1996, p. 3 and OJ C 291, 4. 10. 1996, p. 18.
[2] OJ C 204, 15. 7. 1996, p. 14.
[3] Opinion of the European Parliament of 22 May 1996 (OJ C 166, 10. 6. 1996, p. 87), Council common position of 12 September 1996 (OJ C 315, 24. 10. 1996, p. 41) and Decision of the European Parliament of 11 December 1996 (OJ C 20, 20. 1. 1997, p. 55). Decision of the European Parliament of 16 July 1997. Council Decision of 22 July 1997.
[4] OJ L 192, 24. 7. 1990, p. 1.
[5] OJ L 165, 19. 6. 1992, p. 27. Directive as amended by Commission Decision 94/439/EC (OJ L 181, 15. 7. 1994, p. 40).
[6] OJ C 213, 6. 8. 1993, p. 1.
[7] OJ C 379, 31. 12. 1994, p. 4.
[8] OJ C 150, 31. 5. 1993, p. 39.
[9] OJ C 151, 19. 6. 1995, p. 479.
[10] OJ C 258, 3. 10. 1995, p. 1.
[11] OJ C 205, 25. 7. 1994, p. 551.
[12] OJ C 48, 16. 2. 1994, p. 1.

must evolve to keep pace with advances in technology, market development and changes in user demand; whereas universal service in telecommunications will have a role to play in strengthening social and economic cohesion, in particular in remote, peripheral, landlocked and rural areas and islands of the Community; whereas, where justified, the net cost of universal service obligations may be shared by market players in accordance with Community law;

(5) Whereas the basic principles concerning access to and the use of public telecommunications networks and services, set out within the open network provision framework, must be adapted to ensure Europe-wide services in a liberalized environment, in order to benefit users and organizations providing public telecommunications networks and/or services; whereas a voluntary approach based on common technical standards and specifications, with consultations undertaken where necessary to satisfy user needs, is appropriate in a liberalized environment; whereas, nevertheless, the provision of universal service and the availability of a minimum set of services must be guaranteed to all users in the Community in accordance with the Community measures applicable; whereas a general framework for interconnection to public telecommunications networks and public telecommunications services is needed in order to provide end-to-end interoperability of services for Community users;

(6) Whereas open network provision conditions must not restrict the use of or access to public telecommunications networks or publicly available telecommunications services except on grounds of essential requirements or the exercise of special and exclusive rights retained by Member States in accordance with Community law;

(7) Whereas the provisions of this Directive do not prevent a Member State from taking measures justified on grounds set out in Articles 36 and 56 of the Treaty, and in particular on grounds of public security, public policy and public morality;

(8) Wheras a *modus vivendi*[1] between the European Parliament, the Council and the Commission concerning the implementing measures for acts adopted in accordance with the procedure laid down in Article 189b of the Treaty was concluded on 20 December 1994;

(9) Whereas in accordance with the principle of the separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory authority or authorities with a view to ensuring the impartiality of their decisions, and ensure that the national regulatory authority or authorities of each Member State will play a keyrole in the implementation of the regulatory framework set out in relevant Community legislation; whereas this requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States, or to the principle of neutrality with regard to the rules in Member States governing the system of property ownership in accordance with Article 222 of the Treaty; whereas the national regulatory authorities should be in possession of all the resources necessary, in terms of staffing, expertise, and financial means, for the performance of their function;

(10) Whereas numbering and the more general concepts of addressing and naming play an important role; whereas adherence to a harmonized approach for numbering/addressing and, where applicable, naming will contribute to Europe-wide end-to-end communications for users and the interoperability of services; whereas in addition to numbering it may be appropriate to apply the principles of objectivity, transparency, non-discrimination and proportionality in the allocation of names and addresses; whereas Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets [2] provides for adequate numbers to be available for all telecommunications services, and for numbers to be allocated in an objective, transparent, non-discriminatory and proportionate manner;

(11) Whereas in order to guarantee the provision of leased lines throughout the Community, Member States should ensure that at every point in their territories users have access to a minimum set of leased lines from at least one organization; whereas organizations with obligations to provide leased lines should be designated by Member States; whereas Member States must notify the Commission of the organizations subject to this Directive, the leased line types within the minimum set which they are required to provide, and the geographical area in which this requirement applies; whereas, within a specific geographical area, all the leased line types provided by a notified organization are subject to the general provisions of this Directive;

(12) Whereas the market power of an organization depends on a number of factors, including its share of the relevant product or service market in the relevant geographical market, its turnover relative to the size of the market, its ability to influence market conditions, its control of the means of access to

[1] OJ C 102, 4. 4. 1996, p. 1.

[2] OJ L 74, 22. 3. 1996, p. 13.

end-users, its access to financial resources and its experience in providing products and services in the market; whereas determining which organizations have significant market power should be a function of national regulatory authorities, taking into account the situation on the relevant market;

(13) Whereas the concept of leased-lines services will evolve with new technologial advances and market demand, allowing users more flexible use of the leased-line bandwidth;

(14) Whereas, in order to achieve more efficient communications within the Community, it is important that Member States encourage the provision of an additional harmonized set of higher-order leased lines, taking into account market demand and progress with standardization;

(15) Whereas until an effective competitive environment is achieved, there is a need for the regulatory supervision of tariffs for leased lines with a view to ensuring cost orientation and transparency in accordance with the principle of proportionality; whereas it is appropriate to allow the requirements for cost orientation and transparency in specific markets to be set aside where no organization has significant market power or where effective competition ensures that tariffs for leased lines are reasonable;

(16) Whereas common technical regulations (CTRs) adopted under Council Directive 91/263/EEC of 29 April 1991 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity [1], and Council Directive 93/97/EEC of 29 October 1993 supplementing Directive 91/263/EEC in respect of satellite earth station equipment [2] define the conditions for the connection of terminal equipment to leased lines;

(17) Whereas certain amendments to existing open network provision measures are appropriate in order to ensure their consistency with new technical developments and with other regulatory measures that will form part of the overall regulatory framework for telecommunications;

(18) Whereas all the areas identified in Annex I to Directive 90/387/EEC as possible areas for the application of open network provision conditions have been addressed in analysis reports subject to public consultation, in accordance with the procedure laid down in Article 4 of that Directive; whereas all the priority measures identified in Annex III thereto have been adopted;

(19) Whereas in order to enable the Commission to carry out the monitoring task assigned to it by the Treaty, changes in national regulatory authority or authorities and the organizations affected must be swiftly communicated to the Commission;

(20) Whereas, in accordance with the principles of subsidiarity and proportionality as stated in Article 3b of the Treaty, the objective of adapting Directives 90/387/EEC and 92/44/EEC to a competitive environment in telecommunications cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community;

(21) Whereas the functioning of Directives 90/387/EEC and 92/44/EEC shoud be reviewed no later than 31 December 1999; whereas that review should take account of the increasing effectivness of competition in telecommunications markets;

(22) Whereas, when bringing forward proposals for any further measures in pursuit of the aims of this Directive, consideration should be given to a single consolidated text incorporating all relevant European Parliament and Council Directives implementing the ONP provisions so as to improve the transparency of Community legislation;

(23) Whereas pursuant to Articles 52 and 59 of the Treaty, the regulatory regime in the field of telecommunications should be compatible and consistent with the principles of freedom of establishment and freedom to provide services and should take into account the need to facilitate the introduction of new services as well as the widespread application of technological improvements,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendment of Directive 90/387/EEC

Directive 90/387/EEC is hereby amended as follows:

1. Article 1 shall be amended as follows:

(a) paragraph 2 shall be replaced by the following:

'2. The purpose of the conditions prescribed in paragraph 1 shall be to facilitate the provision of public telecommunications networks and/or public telecommunications services, within and between Member States, and in particular the

[1] OJ L 128, 23. 5. 1991, p. 1. Directive as last amended by Directive 93/68/EEC (OJ L 220, 30. 8. 1993, p. 1).
[2] OJ L 290, 24. 11. 1993, p. 1.

provision of services by companies, firms or natural persons established in a Member State other than that of the company, firm or natural person for whom the services are intended.';

(b) the following paragraph shall be added:

'3. Open network provision conditions shall aim at:

— ensuring the availability of a minimum set of services,

— securing access and interconnection to public telecommunications networks and public telecommunications services,

— encouraging the provision of harmonized telecommunications services to the benefit of users, in particular by identifying and promoting by voluntary means harmonized technical interfaces for open and efficient access and interconnection, and associated standards and/or specifications and

— guaranteeing the provision of universal service in telecommunications, taking account of any future evolution,

throughout the Community.'

2. Article 2 shall be replaced by the following:

'Article 2

For the purposes of this Directive:

1. 'users' shall mean individuals, including consumers, or organizations using or requesting publicly available telecommunications services;

2. 'telecommunications network' shall mean transmission systems and, where applicable, switching equipment and other resources which permit the conveyance of signals between defined termination points by wire, by radio, by optical or by other electromagnetic means;

'public telecommunications network' shall mean a telecommunications network used, wholly or in part, for the provision of publicly available telecommunications services;

3. 'telecommunications services' shall mean services the provision of which consists wholly or partly in the transmission and routing of signals on telecommunications networks, with the exception of radio and television broadcasting;

4. 'universal service' shall mean a defined minimum set of services of specified quality which is available to all users regardless of their geographical location and, in the light of specific national conditions, at an affordable price;

5. 'network termination point' shall mean the physical point at which a user is provided with access to a public telecommunications network. The locations of network termination points shall be defined by the national regulatory authority and shall represent a boundary, for regulatory purposes, of the public telecommunications network;

6. 'essential requirements' shall mean the non-economic reasons in the public interest which may cause a Member State to impose conditions on the establishment and/or operation of telecommunications networks or the provision of telecommunications services. Those reasons shall be the security of network operations, the maintenance of network integrity and, where justified, the interoperability of services, data protection, the protection of the environment and town and country planning objectives as well as the effective use of the frequency spectrum and the avoidance of harmful interference between radio-based telecommunications systems and other space-based or terrestrial technical systems. Data protection may include protection of personal data, the confidentiality of information transmitted or stored and the protection of privacy;

7. 'interconnection' shall mean the physical and logical linking of telecommunications networks used by the same or a different organization in order to allow the users of one organization to communicate with users of the same or another organization or to access services provided by another organizations. Services may be provided by the parties involved or other parties who have access to the network;

8. 'open network provision conditions' shall mean the conditions, harmonized in accordance with this Directive, which govern open and efficient access to public telecommunications networks and, where applicable, public telecommunications services and the efficient use of those networks and services.

Without prejudice to their application on a case-by-case basis, open network provision conditions may include harmonized conditions with regard to:

— technical interfaces, including the definition and implementation of network termination points, where required,

— usage conditions,

— tariff principles and

— access to frequencies and numbers/addresses/names, where required in accordance with the reference framework of the Annex;

9. "technical specifications", "standards" and "terminal equipment" shall have the same meanings as in Article 1 of Directive 91/263/EEC (*).

(*) OJ L 128, 23. 5. 1991, p. 1.';

3. Article 3 shall be amended as follows:

(a) paragraphs 2 and 3 shall be replaced by the following:

'2. Open network provision conditions shall not restrict access to public telecommunications networks or public telecommunications services, except on grounds of essential requirements within the framework of Community law. In addition, the conditions generally applicable to the connection of terminal equipment to the network shall apply.

3. Open network provision conditions may not allow for any additional restrictions on the use of the public telecommunications networks and/or public telecommunications services, except those which are compatible with Community law.';

(b) paragraph 4 shall be deleted;

(c) paragraph 5 shall be replaced by the following:

'5. Without prejudice to the specific Directives adopted in the field of open network provision and in so far as the application of the essential requirements referred to in paragraph 2 may cause Member States to limit access to public telecommunications networks or services, the rules for uniform application of the essential requirements, in particular concerning the interoperability of services and the protection of data, shall be determined, where appropriate, by the Commission, in accordance with the procedure laid down in Article 10.';

4. Article 4 shall be deleted;

5. Article 5 shall be replaced by the following:

'Article 5

1. References to standards and/or specifications drawn up as a basis for harmonized technical interfaces and/or service features for open network provision shall be published in the *Official Journal of the European Communities* as suitable for the requirement of open and efficient access, interconnection and interoperability in order to encourage the provision of harmonized telecommunications services to the benefit of users throughout the Community.

Where necessary, the Commission may, in consultation with the committee referred to in Article 9, request standards to be drawn up by European standardization bodies.

2. Member States shall encourage the use of the standards and/or specifications to which reference is made in the *Official Journal of the European Communities*, in accordance with paragraph 1, for the provision of technical interfaces and/or network functions.

As long as such standards and/or specifications are not adopted, Member States shall encourage:

— standards and/or specifications adopted by European standardization bodies such as the European Telecommunications Standards Institute (ETSI) or the joint European standards institution, the European Committee for Standardization (CEN)/ European Committee for Electrotechnical Standardization (Cenelec),

or, in the absence of such standards and/or specifications,

— international standards or recommendations adopted by the International Telecommunications Union (ITU), the International Organization for Standardization (ISO) or the International Electrotechnical Committee (IEC),

or, in the absence of such standards and/or specifications,

— national standards and/or specifications.

3. If the implementation of the standards and/or specifications referred to in paragraph 1 appears to be inadequate to ensure the interoperability of transfrontier services in one or more Member States, the implementation of such standards and/or specifications may be made compulsory under the procedure laid down in Article 10, to the extent strictly necessary to ensure such interoperability and to improve freedom of choice for users, subject to Articles 85 and 86 of the Treaty.

Before the implementation of the standards and/or specifications is made compulsory in accordance with the first subparagraph, the Commission shall, by publishing a notice to that effect in the *Official Journal of the European Communities*, invite public comment by all parties concerned.

4. Where a Member State or the Commission considers that the harmonized standards and/or specifications referred to in paragraph 1 do not correspond to the objective of open and efficient access, interconnection and interoperability, in particular the basic principles and the essential requirements referred to in Article 3, it shall be decided whether or not it is necessary to withdraw references to those standards and/or specifications from the *Official Journal of the European Communities* in accordance with the procedure laid down in Article 10.

5. The Commission shall inform the Member States of any such decision and publish information on the withdrawal of those standards and/or specifications in the *Official Journal of the European Communities*.';

6. the following Article shall be inserted:

'Article 5a

1. Where the tasks assigned to the national regulatory authority in Community legislation are undertaken by more than one body, Member States shall ensure that the tasks to be undertaken by each body are made public.