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

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 90 (3) thereof,

Whereas:

(1) According to Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services [1], as last amended by Directive 96/2/EC [2], telecommunications services, with the exception of voice telephony to the general public and those services specifically excluded from the scope of that Directive, must be open to competition. These services were the telex service, mobile communications and radio and television broadcasting to the public. Satellite communications were included in the scope of the Directive through Commission Directive 94/46/EC [3]. Cable television networks were included in the scope of the Directive through Commission Directive 95/51/EC [4], and mobile and personal communications were included in the scope of the Directive through Directive 96/2/EC. Under Directive 90/388/EEC, Member States must take the measures necessary to ensure that any operator is entitled to supply such services.

(2) Subsequent to the public consultation organized by the Commission in 1992 on the situation in the telecommunications sector (the 1992 Review), the Council, in its resolution of 22 July 1993 [5], unanimously called for the liberalization of all public voice telephony services by 1 January 1998, subject to additional transitional periods of up to five years to allow Member States with less developed networks, i.e. Spain, Ireland, Greece and Portugal, to achieve the necessary adjustments, in particular tariff adjustments. Moreover, very small networks should, according to the Council also be granted an adjustment period of up to two years where so justified. The Council subsequently unanimously recognized, in its resolution of 22 December 1994 [6], that the provision of telecommunications infrastructure should also be liberalized by 1 January 1998, subject to the same transitional periods as agreed for the liberalization of voice telephony. Furthermore, in its resolution of 18 September 1995 [7], the Council established basic guidelines for the future regulatory environment.

(3) Directive 90/388/EEC establishes that the granting of special or exclusive rights to telecommunications services to telecommunications organizations is in breach of Article 90 of the Treaty, in conjunction with Article 59 of the Treaty, since they limit the provision of cross-border services. As far as telecommunications services and networks are concerned such special rights were defined in that Directive.

According to Directive 90/388/EEC exclusive rights granted for the provision of telecommunications services are also incompatible with Article 90 (1) of the Treaty, in conjunction with Article 86 of the Treaty, where they are granted to telecommunications organizations which also enjoy exclusive or special rights for the establishment and the provision of telecommunications networks since their grant amounts to the reinforcement or the extension of a dominant position or necessarily leads to other abuses of such position.

(4) In 1990, the Commission, however, granted a temporary exception under Article 90 (2) in respect of exclusive and special rights for the provision of voice telephony, since the financial resources for the development of the network still derived mainly from the operation of the telephony service and the opening-up of that service could, at that time, threaten the financial stability of the telecommunications organizations and obstruct the performance of the task of general economic interest assigned to them, consisting in the provision and exploitation of a universal network, i.e. one having general geographic coverage, and that connection to it is being provided to any service provider or user upon request within a reasonable period of time.

Moreover, at the time of the adoption of Directive 90/388/EEC, all telecommunications organizations were also in the course of digitalizing their network to increase the range of services which could be

(1) OJ No L 192, 24. 7. 1990, p. 10.
(2) OJ No L 20, 26. 1. 1996, p. 59.
(3) OJ No L 268, 19. 10. 1994, p. 15.
(4) OJ No L 256, 26. 10. 1995, p. 49.
(5) OJ No C 213, 6. 8. 1993, p. 1.
(6) OJ No C 379, 31. 12. 1994, p. 4.
(7) OJ No C 258, 3. 10. 1995, p. 1.

provided to the final customers. Today, coverage and digitalization are already achieved in a number of Member States. Taking into account the progress in radio frequency applications and the on-going heavy investment programmes, optic fibre-coverage and network penetration are expected to improve significantly in the other Member States in the coming years.

In 1990, concerns were also expressed against immediate introduction of competition in voice telephony while price structures of the telecommunications organizations were substantially out of line with costs, because competing operators could target highly profitable services such as international telephony and gain market share merely on the basis of existing substantially distorted tariff structures. In the meantime efforts have been made to balance differences in pricing and cost structures in preparation for liberalization. The European Parliament and the Council have in the meantime recognized that there are less restrictive means than the granting of special or exclusive rights to ensure this task of general economic interest.

(5) For these reasons, and in accordance with the Council resolutions of 22 July 1993 and of 22 December 1994, the continuation of the exception granted with respect of voice telephony is no longer justified. The exception granted by Directive 90/388/EEC should be ended and the Directive, including the definitions used, amended accordingly. In order to allow telecommunications organizations to complete their preparation for competition and in particular to pursue the necessary rebalancing of tariffs, Member States may continue the current special and exclusive rights regarding the provision of voice telephony until 1 January 1998. Member States with less developed networks or with very small networks must be eligible for a temporary exception where this is warranted by the need to carry out structural adjustments and strictly only to the extent necessary for those adjustments. Such Member States should be granted, upon request, an additional transitional period respectively of up to five and of up to two years, provided it is necessary to complete the necessary structural adjustments. The Member States which may request such an exception are Spain, Ireland, Greece and Portugal with regard to less developed networks and Luxembourg with regard to very small networks. The possibility of such transitional periods has also been called for in the Council resolutions of 22 July 1993 and of 22 December 1994.

(6) The abolition of exclusive and special rights as regards the provision of voice telephony will in particular allow the current telecommunications organizations from one Member State to directly provide their service in other Member States as from 1 January 1998. These organizations currently possess the skills and the experience required to enter into the markets opened to competition. However, in almost all Member States, they will compete with the national telecommunications organizations which are granted the exclusive or special right to provide not only voice telephony but also to establish and provide the underlying infrastructure, including the acquisition of indefeasible rights of use in international circuits. The flexibility and the economies of scope which this allows will prevent this dominant position being challenged in the normal course of competition once the liberalization of voice telephony takes place. This will make it possible for the telecommunications organizations to maintain their dominant position on their home markets unless the new entrants in the voice telephony market were entitled to the same rights and obligations. In particular, if new entrants are not granted free choice as regards the underlying infrastructure to provide their services in competition with the dominant operator, this restriction would *de facto* prevent them from entering the market for voice telephony, including for the provision of cross-border services. The maintenance of special rights limiting the number of undertakings authorized to establish and provide infrastructure would therefore limit the freedom to provide services contrary to Article 59 of the Treaty. The fact that the restriction on establishing own infrastructure would apparently apply in the Member State concerned without distinction to all companies providing voice telephony other than the national telecommunications organizations would not be sufficient to remove the preferential treatment of the latter from the scope of Article 59 of the Treaty. Given the fact that it is likely that most new entrants will originate from other Member States such a measure would in practice affect foreign companies to a larger extent than national undertakings. On the other hand, while no justification for these restrictions appears to exist, less restrictive means such as licensing procedures would in any event be available to ensure general interests of a non-economic nature.

(7) In addition, the abolition of exclusive and special rights on the provision of voice telephony would have little or no effect, if new entrants would be obliged to use the public telecommunications

network of the incumbent telecommunications organizations, with whom they compete in the voice telephony market. Reserving to one undertaking which markets telecommunications services the task of supplying the indispensable raw material, i.e. the transmission capacity, to all its competitors would be tantamount to conferring upon it the power to determine at will where and when services can be offered by its competitors, at what cost, and to monitor their clients and the traffic generated by its competitors, placing that undertaking in a position where it would be induced to abuse its dominant position. Directive 90/388/EEC did not explicitly address the establishment and provision of telecommunications networks, as it granted a temporary exception under Article 90 (2) of the Treaty in respect of exclusive and special rights for the by far most important service in economic terms provided over telecommunications networks, i.e. voice telephony. However, the Directive provided for an overall review by the Commission of the situation in the whole telecommunications sector in 1992.

It is true that Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines, amended by Commission Decision 94/439/EC [1], harmonizes the basic principles regarding the provision of leased lines, but it only harmonizes the conditions of access and use of leased lines. The aim of that Directive is not to remedy the conflict of interest of the telecommunications organizations as infrastructure and service providers. It does not impose a structural separation between the telecommunications organizations as providers of leased lines and as service providers. Complaints illustrate that even in Member States which have implemented that Directive, telecommunications organizations still use their control of the access conditions to the network at the expense of their competitors in the services market. Complaints show that telecommunications organizations still apply excessive tariffs and that they use information acquired as infrastructure providers regarding the services planned by their competitors, to target clients in the services market. Directive 92/44/EEC only provides for the principle of cost-orientation and does not prevent telecommunications organizations to use the information acquired as capacity provider as regards subscribers' usage patterns, necessary to target specific groups of users, and on price elasticities of demand in each service market segment and region of the country. The current regulatory framework does not resolve the conflict of interest mentioned above. The most appropriate remedy to this conflict of interest is therefore to allow service providers to use own or third party telecommunications infrastructure to provide their services to the final customers instead of the infrastructure of their main competitor. In its resolution of 22 December 1994 the Council also approved the principle that infrastructure provision should be liberalized.

Member States should therefore abolish the current exclusive rights on the provision and use of infrastructure which infringe Article 90 (1) of the Treaty, in combination with Articles 59 and 86 of the Treaty, and allow voice telephony providers to use own and/or any alternative infrastructure of their choice.

(8) Directive 90/388/EEC states that the rules of the Treaty, including those on competition, apply to telex services. At the same time it establishes that the granting of special or exclusive rights for telecommunications services to telecommunications organizations is in breach of Article 90 (1) of the Treaty, in conjunction with Article 59 of the Treaty, since they limit the provision of cross-border services. However, it was considered in the Directive that an individual approach was appropriate, as a rapid decline of the service was expected. It the meantime it has become clear that the telex service will continue to coexist with new services like facsimile in the forseeable future, given that the telex network is still the only standardized network with worldwide coverage and providing legal proof in Court. It is therefore no longer justified to maintain the initial approach.

(9) As regards the access of new competitors to the telecommunications markets, only mandatory requirements can justify restrictions to the fundamental freedoms provided for in the Treaty. These restrictions should be limited to what is necessary to achieve the objective of a non-economic nature pursued. Member States may therefore only introduce licensing or declaration procedures where it is indispensable to ensure compliance with the applicable essential requirements and, with regard to the provision of voice telephony and the underlying infrastructure, introduce requirements in the form of trade regulations where it is necessary in order to ensure, in accordance with Article 90 (2) of the Treaty, the performance in a competitive environment of the particular tasks of public service assigned to the relevant undertakings in the telecommunications field and/or to ensure a contribution to the financing of universal service. Other public service requirements can be included by Member States in certain categories of licences, in line with the principle of proportionality and in conformity with Articles 56 and 66 of the Treaty.

[1] OJ No L 165, 19. 6. 1992, p. 27.

The provisions of Directive 90/388/EEC are therefore not to prejudice the applicability of provisions laid down by law, regulation or administrative action providing for the protection of public security and in particular the lawful interception of communications.

In the framework of the adoption of authorization requirements under Directive 90/388/EEC, it appeared that certain Member States were imposing obligations on new entrants which where not in proportion with the aims of general interest pursued. To avoid such measures being used to prevent the dominant position of the telecommunications organizations being challenged by competition once the liberalization of voice telephony takes place, thus making it possible for the telecommunications organizations to maintain their dominant position in the voice telephony and public telecommunications networks markets and thereby strengthening the dominant position of the incumbent operator, it is necessary that Member States should notify any licensing or declaration requirements to the Commission, before they are introduced, to enable the latter to assess their compatibility with the Treaty and in particular the proportionality of the obligations imposed.

(10) According to the principle of proportionality, the number of licences may only be limited where this is unavoidable to ensure compliance with essential requirements concerning the use of scarce resources. As the Commission stated in its communication on the consultation on the Green Paper on the liberalization of telecommunications infrastructure and cable television networks, the sole reason in this respect should be the existence of physical limitations, imposed by the lack of necessary frequency spectrum.

As regards the provision of voice telephony, public fixed telecommunications networks and other telecommunications networks involving the use of radio frequencies, the essential requirements would justify the introduction or maintenance of an individual licensing procedure. In all other cases, a general authorization or a declaration procedure suffices to ensure compliance with the essential requirements. Licensing is not justified when a mere declaration procedure would suffice to attain the relevant objective.

As regards the provision of packet- or circuit-switched data services, Directive 90/388/EEC allowed the Member States under Article 90 (2) of the Treaty to adopt specific sets of public service specifications in the form of trade regulations with a view to preserving the relevant public service requirements. The Commission has in the course of 1994 assessed the effects of the measures adopted under this provision. The results of this review were made public in its Communication on the status and the implementation of Directive 90/388/EEC. On the basis of that review, which also took account of the experience in most Member States where the relevant public service objectives were achieved without the implementation of such schemes, there is no justification to continue this specific regime and the current schemes should be abolished accordingly. However, Member States may replace these schemes by a declaration or a general authorization procedure.

(11) Newly authorized voice telephony providers will be able to compete effectively with the current telecommunications organizations only if they are granted adequate numbers to allocate to their customers. Moreover, where numbers are allocated by the current telecommunications organizations, the latter will be induced to reserve the best numbers for themselves and to give their competitors insufficient numbers or numbers which are commercially less attractive, for example, because of their length. By maintaining such power in the hands of their telecommunications organizations Member States would therefore induce the former to abuse their power on the market for voice telephony and infringe Article 90 of the Treaty, in conjunction with Article 86 of the Treaty.

Consequently, the establishment and administration of the national numbering plan should be entrusted to a body independent from the telecommunications organization, and a procedure for the allocation of numbers should, where required, be drafted, which is based on objective criteria, is transparent and without discriminatory effects. Where a subscriber changes service providers, telecommunications organizations should communicate, in the way and to the extent required by Article 86 of the Treaty, the information on his new number for a sufficient period of time to parties seeking to contact him under his old number. Subscribers changing service providers should also have the possibility of keeping their numbers in return for a reasonable contribution to the cost of transferring the numbers.

(12) As Member States are obliged by this Directive to withdraw special and exclusive rights for the provision and operation of fixed public telecommunications networks, the obligation set out in Directive 90/388/EEC to take the necessary measures to ensure objective, non-discriminatory and published access conditions should be adapted accordingly.

(13) Subject to reasonable compensation, the right of new providers of voice telephony to interconnect

their service for call completion purposes with the existing public telecommunications network at the necessary interconnection points, including access to customer databases necessary for the provision of directory information, is of crucial importance in the initial period after the abolition of the special and exclusive rights regarding voice telephony and telecommunications infrastructure provision. Interconnection should in principle be a matter for negotiation between the parties, subject to the application of the competition rules addressed to undertakings. Given the imbalance in negotiating power of new entrants compared with the telecommunications organizations whose monopoly position results from their special and exclusive rights, it is likely that, as long as a harmonized regulatory framework has not been established by the European Parliament and the Council, interconnection would be delayed by disputes as to terms and conditions to be applied. Such delays would jeopardize the market entry of new entrants and hence prevent the abolition of special and exclusive rights to become effective. The failure by Member States to adopt the necessary safeguards to prevent such a situation would lead to a continuation *de facto* of the current special and exclusive rights, which as set out above are considered to be incompatible with Article 90 (1) of the Treaty, in conjunction with Articles 59 and 86 of the Treaty.

In order to allow for effective market entry and to prevent the *de facto* continuation of special and exclusive rights contrary to Article 90 (1) of the Treaty, in conjunction with Articles 59 and 86 of the Treaty, Member States should ensure that, during the time period necessary for such entry by competitors, telecommunications organizations publish standard terms and conditions for interconnection to the voice telephony networks which they offer to the public, including interconnect price lists and access points, no later than six months before the actual date of liberalization of voice telephony and telecommunications transmission capacity. Such standard offers should be non-discriminatory and sufficiently unbundled to allow the new entrants to purchase only those elements of the interconnection offer they actually need. Furthermore, they may not discriminate on the basis of the origin of the calls and/or the networks.

(14) Moreover in order to allow the monitoring of interconnection obligations under competition law, the cost accounting system implemented with regard to the provision of voice telephony and public telecommunications networks should, during the time period necessary to allow for effective market entry, clearly identify the cost elements relevant for pricing interconnection offerings and, in particular for each element of the interconnection offered, identify the basis for that cost element, in order to ensure in particular that this pricing includes only elements which are relevant, namely the initial connection charge, conveyance charges, the share of the costs incurred in providing equal access and number-portability and of ensuring essential requirements and, where applicable, supplementary charges aimed to share the net cost of universal service, and provisionally, imbalances in voice telephony tariffs. Such cost accounting should also make it possible to identify when a telecommunications organization charges its major users less than providers of voice telephony networks.

The absence of a quick, cheap and effective procedure to solve interconnection disputes, and one which would prevent the telecommunications organizations causing delays or using their financial resources to increase the cost of available remedies under applicable national law or Community law, would make it possible for the telecommunications organizations to maintain their dominant position. Member States should therefore establish a specific recourse procedure for interconnection disputes.

(15) The obligation to publish standard charges and interconnection conditions is without prejudice to the requirement on undertakings in a dominant position, under Article 86 of the Treaty, to negotiate special or tailor-made agreements for a particular combination or use of unbundled public switched telephony network components and/or the granting of discounts for particular service providers or large users where these are justified and non-discriminatory. Any interconnection discounts should be justified on an objective basis and be transparent.

(16) The requirement to publish standard interconnection conditions is also without prejudice to the obligation of dominant undertakings under Article 86 of the Treaty to allow interconnected operators on whose network a call originates to remain responsible for setting the tariff for the customer between the calling and the called party and for routing its clients' traffic up to the interconnection point of its choice.

(17) A number of Member States are currently still maintaining exclusive rights with regard to the establishment and provision of telephone directory and enquiry services. These exclusive rights are generally granted either to organizations which are