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COMMISSION DIRECTIVE 96/2/EC
of 16 January 1996
amending Directive 90/388/EEC with regard to mobile and personal communications

(OJ L 20, 26.1.1996, p. 59)

Corrected by:

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COMMISSION DIRECTIVE 96/2/EC

of 16 January 1996

amending Directive 90/388/EEC with regard to mobile and personal communications

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Whereas:

(1) In its communication on the consultation on the Green Paper on mobile and personal communications of 23 November 1994, the Commission set out the major actions required for the future regulatory environment necessary to exploit the potential of this means of communication. It emphasized the need for the abolition, as soon as possible, of all remaining exclusive and special rights in the sector through full application of Community on competition rules and with the amendment of Commission Directive 90/388/EEC of 28 June 1990 competition in the markets for telecommunications services [1], as last amended by Directive 95/51/EC [2], where required. Moreover, the communication considered removing restrictions on the free choice of underlying facilities used by mobile network operators for the operation and development of their networks for those activities which are allowed by the licences or authorizations. Such a step was seen as essential in order to overcome current distortions of fair competition and, in particular, to allow such operators control over their cost base.

(2) The Council Resolution of 29 June 1995 on the further development of mobile and personal communications in the European Union [3] gave general support to the actions required, as set out in the Commission's communication of 23 November 1994, and considered as one of the major goals the abolition of exclusive or special rights in this area.

(3) The European Parliament, in its Resolution of 14 December 1995 concerning the draft Commission Directive amending Directive 90/388/EEC with regard to mobile and personal communications [4], welcomed this Directive in both its principles and its objectives.

(4) Several Member States have already opened up certain mobile communications services to competition and introduced licensing schemes for such services. Nevertheless, the number of licences granted is still restricted in many Member States on the basis of discretion or, in the case of operators competing with telecommunications organizations subject to technical restrictions such as a ban on using infrastructure other than those provided by the telecommunications organization. Many Member States, for example, have still not granted licences for DCS 1800 mobile telephony.

In addition, some Member States have maintained exclusive rights for the provision of certain mobile and personal communications services granted to the national telecommunications organization.

(5) Directive 90/388/EEC provides for the abolition of special or exclusive rights granted by Member States in respect of the pro-

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[1] OJ No L 192, 24. 7. 1990, p. 10.
[2] OJ No L 256, 26. 10. 1995, p. 49.
[3] OJ No C 188, 22. 7. 1995, p. 3.
[4] Resolution A4-0306/95.

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vision of telecommunications services. However, the Directive does not as yet apply to mobile services.

(6) Where the number of undertakings authorized to provide mobile and personal communications services is limited by Member States through the existence of special rights and *a fortiori* exclusive rights, these constitute restrictions which would be incompatible with Article 90 in conjunction with Article 59 of the Treaty whenever such limitation is not justified under specific Treaty provisions or the essential requirements, since these rights prevent other undertakings from supplying the services concerned, to and from other Member States. In the case of mobile and personal communication networks and services, the applicable essential requirements encompass the effective use of the frequency spectrum and the avoidance of harmful interference between radio-based, space-based or terrestrial technical systems. Consequently, provided that the equipment used to offer the services also satisfies these essential requirements, the current special rights and *a fortiori* exclusive rights on the provision of mobile services are not justified and therefore should be treated in the same way as the other telecommunications services already covered by Directive 90/388/EEC. The scope of application of that Directive should accordingly be extended so as to include mobile and personal communications services.

(7) When opening the markets for mobile and personal communications to competition Member States should give preference to the use of Pan-European standards in the area, such as GSM, DCS 1800, DECT and ERMES, in order to allow development and transborder provision of mobile and personal communications services.

(8) Certain Member States have currently granted licences for digital mobile radio-based services making use of frequencies in the 1 700 to 1 900 Mhz band, according to the DCS 1800 standard. The Commission communication of 23 November 1994 established that DCS 1800 is to be seen as part of the GSM system family. The other Member States have not authorized such services even where frequencies are available in this band, thereby preventing the cross-border provision of such services. This is also incompatible with Article 90 in conjunction with Article 59. To remedy this situation, Member States which have not yet established a procedure for granting such licences should do so within a reasonable time-frame. In this context, due account should be taken of the requirement to promote investments by new entrants in these areas. Member States should be able to refrain from granting a licence to existing operators, for example to operators of GSM systems already present on their territory, if it can be shown that this would eliminate effective competition in particular by the extension of a dominant position. In particular, where a Member State grants or has already granted DCS 1800 licences, the granting of new or supplementary licences for existing GSM or DCS 1800 operators may take place only under conditions ensuring effective competition.

(9) Digital European cordless telecommunications (DECT) services are also an essential element for the development towards personal communications. DECT provides an alternative to the current local loop access to the public switched telephone network. On 3 June 1991, the Council, by Directive 91/287/EEC, designated coordinated frequency bands for the introduction of DECT into the Community [1] to be implemented not later than 31 December 1991. Certain Member States are, however, preventing the use of these frequencies for such services by refusing to grant licences to companies which intend to start offering DECT services. Where telecommunications organizations were granted exclusive rights for the establishment of the public switched telephone net-

[1] OJ No L 144, 8. 6. 1991, p. 45.

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work, the effect of such refusals is to strengthen their dominant position and also to delay the emergence of personal communications services and therefore restricts technical progress at the expense of the users contrary to Article 90 of the Treaty in conjunction with point (b) of Article 86. To remedy this situation Member States which have not yet established a procedure for granting such licences should also do so within a reasonable time-frame.

(10) Even where licences were granted to competing mobile operators, Member States have in certain cases granted to one of them, in a discretionary manner, special legal advantages which were not granted to others. In such a situation, these advantages may be counterbalanced by special obligations and do not, necessarily, preclude the latter from entering and competing in the market. The compatibility of these advantages with the Treaty must therefore be assessed on a case-by-case basis taking into account their impact on the effective freedom of other entities to provide, in an efficient manner, the same telecommunications service and their possible justifications regarding the activity concerned.

(11) The exclusive rights that currently exist in the mobile communications field were generally granted to organizations which already enjoyed a dominant position in creating the terrestrial networks, or to one of their subsidiaries. In such a situation, these rights have the effect of extending the dominant position enjoyed by those organizations and therefore strengthening that position, which, according to the case-law of the Court of Justice, constitutes an abuse of a dominant position contrary to Article 86 of the Treaty. The exclusive rights granted in the mobile and personal communications field are consequently incompatible with Article 90 read in conjunction with Article 86. These exclusive rights should consequently be abolished.

(12) Moreover, as regards new mobile services, given the difficulty of ensuring that telecommunications organizations in those Member States with less developed networks which would qualify for a transitional time period for the abolition of the exclusive rights for the establishment and use of infrastructures required for a given mobile service, would not use this position to extend it to the market of the relevant mobile service, the Member States should, in order to prevent abuses of dominant positions contrary to the Treaty, abstain from granting such telecommunications organization, or any associated organization, a licence for this mobile service. Where telecommunications organization, do not or no longer enjoy exclusive rights for the establishment and the provision of the public network infrastructure, they should, however, not *a priori* be excluded from such licensing procedures.

(13) Exclusive rights not only limit access to the market, but they also have the effect of restricting or preventing, to the disadvantage of users, the use of mobile and personal communications on offer, thereby holding back technical progress in this area. The telecommunications organizations have, in particular, maintained higher tariffs for mobile radiophony in comparison with fixed voice telephony which hinders competition at the expense of their main source of revenues.

Where investment decisions are taken by undertakings in areas where they enjoy exclusive rights, these undertakings are in a position whereby they can decide to give priority to fixed network technologies, whereas new entrants may exploit mobile and personal technology even to compete with fixed services, in particular as regards the local loop. Thus, the exclusive rights imply that there is a restriction on the development of mobile and personal communications and this is incompatible with Article 90, read in conjunction with Article 86.

(14) In order to establish the conditions under which mobile and personal communications systems are to be provided, Member States may introduce licensing or declaration procedures to ensure com-

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pliance with the applicable essential requirements and public service specifications in the form of trade regulations, subject to the proportionality principle. Public service specifications in the form of trade regulations relate to conditions of permanence, availability, and quality of the service. Such conditions may include the obligation to give service providers access to airtime on terms at least as favourable as those available to a service provision business owned by, or with ownership links to, a mobile network. This framework is without prejudice to the harmonization of the framework for licensing in the Community.

The number of licences may be limited only in the case of scarcity of the frequency resources. Conversely, licensing is not justified when a mere declaration procedure would suffice to attain the relevant objective.

As regards airtime resale and other mere provision of services by independent service providers or directly by mobile network operators on already authorized mobile systems, none of the applicable essential requirements would justify the introduction or maintenance of licensing procedures, given that such services do not consist of the provision of telecommunications services or the operation of a mobile communications network, but of the retail of authorized services, the provision of which is likely to be subject to conditions ensuring compliance with essential requirements or public service specifications in the form of trade regulations.

They could therefore, besides the application of national fair trade rules concerning all similar retail activities, only be subject to a requirement of a declaration of their activities to the National Regulatory Authority of the Member States where they choose to operate. Mobile network operators could on the other hand refuse to allow service providers to distribute their services, in particular where these service providers did not adhere to a code of conduct for service providers in conformity with the competition rules of the Treaty, as far as such code exists.

(15) In the context of mobile and personal communications systems radiofrequencies are a crucial bottleneck resource. The allocation of radiofrequencies for mobile and personal communications system by Member States according to criteria other than those which are objective, transparent and non-discriminatory constitutes a restriction incompatible with Article 90 in conjunction with Article 59 of the Treaty to the extent that operators from other Member States are disadvantaged in these allocation procedures. The development of effective competition in the telecommunications sector may be an objective justification to refuse the allocation of frequencies to operators already dominant in the geographical market.

Member States should ensure that the procedure for allocation of radiofrequencies is based on objective criteria and without discriminatory effects. In this context Member States should, with regard to future designation of frequencies for specific communications services, publish the frequency plans as well as the procedures to be followed by operators to obtain frequencies within the designated frequency bands. Current frequency allocation should be reviewed by the Member States at regular intervals. In cases where the number of licences was limited on the basis of spectrum scarcity, Member States should also review whether advances in technology would allow spectrum to be made available for additional licences. Possible fees for the use of frequencies should be proportional and levied according to the number of channels effectively granted.

(16) Most Member States currently oblige mobile operators to use the leased line capacity of telecommunications organizations for both internal network connections and for the routing of long distance portions of calls. As the charges for leased line rental represent a substantial proportion of the mobile operator's cost base, this