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COMMISSION DIRECTIVE 95/51/EC

of 18 October 1995

amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services

(OJ L 256, 26.10.1995, p. 49)

Corrected by:

►**C1** Corrigendum, OJ L 308, 29.11.1996, p. 59 (95/51)

NB: This consolidated version contains references to the European unit of account and/or the ecu, which from 1 January 1999 should be understood as references to the euro — Council Regulation (EEC) No 3308/80 (OJ L 345, 20.12.1980, p. 1) and Council Regulation (EC) No 1103/97 (OJ L 162, 19.6.1997, p. 1).

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Whereas:

(1) Under Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services ([1]), as amended by Directive 94/46/EC ([2]), certain telecommunications services were opened to competition, and the Member States were requested to take the measures necessary to ensure that any operator was entitled to supply such services; as far as voice telephony services to the general public are concerned, the Council Resolution of 22 July 1993 ([3]) acknowledges that this exception can be terminated by 1 January 1998, with a transitional period for some Member States; the telex service, mobile communications and radio and television broadcasting to the public were specifically excluded from the scope of the Directive; satellite communications were included in the scope of the Directive through Directive 94/46/EC.

During the public consultation organized by the Commission in 1992 on the situation in the telecommunications sector, following the Communication of the Commission of 21 October 1992, the effectiveness of the measures liberalizing the telecommunications sector and in particular the liberalization of data communications, value added services and the provision of data and voice services to corporate users and closed user groups, was questioned by many service providers and users of such services.

(2) The regulatory restrictions preventing the use of alternative infrastructure for the provision of liberalized services, and in particular the restrictions on the use of cable TV networks, are the main cause of this continuing bottleneck situation. Potential service providers must now rely on transmission capacity — 'leased lines' — provided by the telecommunications organizations, which are often also competitors in the area of liberalized services. To remedy this problem, the European Parliament, in its Resolution of 20 April 1993 ([4]), called upon the Commission to adopt as soon as possible the necessary measures to take full advantage of the potential of the existing infrastructure of cable networks for telecommunications services and to abolish without delay the existing restrictions in the Member States on the use of cable networks for non-reserved services.

(3) Following that resolution the Commission completed two studies on the use of cable TV networks and alternative infrastructures for the delivery of those telecommunications services which have already been opened to competition under Community law: 'The effects of liberalization of satellite infrastructure on the corporate and closed user group market', Analysis, 1994 and 'L'impact de l'autorisation de la fourniture de services de télécommunications libéralisés par les câblo-opérateurs' by Idate, 1994. The basic findings of those studies emphasize the potential role for, amongst other things, cable TV networks, in meeting the concerns raised about the relatively slow pace of innovation and

([1]) OJ No L 192, 24. 7. 1990, p. 10.
([2]) OJ No L 268, 19. 10. 1994, p. 15.
([3]) OJ No C 213, 6. 8. 1993, p. 1.
([4]) OJ No C 150, 31. 5. 1993, p. 39.

▼B

delayed development of liberalized services in the European Community. Opening such networks would help to overcome the problems of high pricing levels and lack of suitable capacity, which are largely due to current exclusive provision of infrastructure in most Member States. The networks operated by authorized cable TV providers indeed offer opportunities for the supply of an increasing number of services, apart from TV broadcasts, if additional investment is forthcoming. The example of the US market shows that new services combining image and telecommunications emerge when certain regulatory barriers are removed.

(4) Some Member States have therefore abolished previous restrictions on the provision of some data services and/or non-reserved telephone services on cable TV networks. One Member State permits voice telephony. Other Member States have, however, maintained severe restrictions on the provision of services other than the distribution of TV broadcasts on those networks.

(5) The current restrictions imposed by Member States on the use of cable TV networks for the provision of services other than the distribution of TV broadcasts aim to prevent the provision of public voice telephony by means of networks other than the public switched telephone network, to protect the main source of revenue of the telecommunications organizations.

Exclusive rights to provide public voice telephony were granted to most of the telecommunications organizations of the Community, to guarantee them the financial resources necessary for the provision and exploitation of a universal network, that is to say, one having general geographical coverage and provided to any service provider or user upon request within a reasonable period of time.

(6) Since those restrictions on the use of cable TV networks are brought about by State measures and seek, in each of the national markets where they exist, to favour telecommunications organizations, which the Member States own or to which they have granted special or exclusive rights, the restrictions must be assessed under Article 90 (1) of the EC Treaty. This Article requires Member States not to enact or maintain in force any measures regarding such undertakings which defeat the object of Treaty provisions, and in particular of the competition rules. It includes a prohibition on maintaining measures regarding telecommunications organizations which result in limiting the free provision of services within the Community or lead to abuses of a dominant position to the detriment of the users of a given service.

(7) The granting of exclusive rights to the telecommunications organizations to provide transmission capacity for the provision of telecommunications services to the public and the consequent regulatory restrictions on the use of cable TV networks for purposes other than the distribution of radio and television broadcasting programmes, in particular, for new services such as interactive television and video on demand as well as multimedia-services in the Community, which otherwise cannot be provided, necessarily limits the freedom to provide such services to or from other Member States. Such regulatory restrictions cannot be justified for public policy reasons or in terms of essential requirements, since the latter, and in particular the essential requirement of interworking networks wherever cable TV networks and telecommunications networks are interconnected, can be guaranteed by less restrictive measures, such as objective, non-discriminatory and transparent declaration or licensing conditions.

(8) The measures granting exclusive rights to the telecommunications organizations for the provision of transmission capacity and the consequent regulatory restrictions on the use of cable TV infrastructure for the provision of other telecommunications services already open to competition are therefore a breach of Article 90, read in conjunction with Article 59 of the Treaty. The

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fact that the restrictions apply without distinction to all companies other than the relevant telecommunications organizations is not sufficient to remove the preferential treatment of the latter from the scope of Article 59 of the Treaty. Indeed it is not necessary for all the companies of a Member State to be favoured in relation to the foreign companies. It is sufficient that the preferential treatment should benefit certain national operators.

(9) Article 86 of the Treaty prohibits as incompatible with the common market any conduct by one or more undertakings holding dominant positions that constitutes an abuse of a dominant position within the common market or a substantial part of it.

(10) In each relevant national market the telecommunications organizations hold a dominant position for the provision of transmission capacity for telecommunications services because they are the only ones with a public telecommunications network covering the whole territory of those States. Another factor in this dominant position concerns the peculiar characteristics of the market and in particular its highly capital-intensive nature. Taking account of the amount of investment needed to duplicate a network, there is a high reliance on use of existing networks. This enhances the structural dominance of the relevant telecommunications organizations and constitutes a potential barrier to entry. Thirdly, as a result of their market share, the telecommunications organizations further benefit from detailed information on telecommunications flows which is not available to new entrants. It includes information on subscribers' usage patterns, necessary to target specific groups of users, and on price elasticities of demand in each market segment and region of the country. Finally, the fact that the relevant telecommunications organizations enjoy exclusive rights for the provision of voice telephony also contributes to their dominance in the neighbouring, but distinct, market for telecommunications capacity.

(11) The mere creation of a dominant position within a given market through the grant of an exclusive right is not, as such, incompatible with Article 86. A Member State is, however, not allowed to maintain a legal monopoly where the relevant undertaking is compelled or induced to abuse its dominant position in a way that is liable to affect trade between Member States.

(12) The prohibition of the use of other infrastructure, and in particular CATV networks, for the provision of telecommunications services has encouraged the telecommunications organizations to charge high prices in comparison with prices in other countries, whereas innovation in European corporate networking and competitive service provision as well as the implementation of applications proposed in the 'Report on Europe and the global information society', are critically dependent on the availability of infrastructure, in particular of leased circuits at decreasing costs. Tariffs for such high-capacity infrastructure are on average 10 times higher in the Community than equivalent capacity over equivalent distances in North America. In the absence of a justification, in the form of (for example) higher costs, these tariffs must be considered abusive within the meaning of point (a) of the second paragraph of Article 86.

Those high prices in the Community are a direct consequence of the restrictions imposed by Member States on the use of infrastructures other than those of the telecommunications organizations, and in particular of those of the cable TV operators, for the provision of telecommunications services. Such high prices cannot only be explained by the underlying costs, given the substantial differences in tariffs between Member States where similar cost structures could be expected.

(13) Moreover, the State measures preventing the CATV operators from offering transmission capacity in competition with the telecommunications organizations for the provision of liberalized services restrict the overall supply of capacity in the market and