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COMMISSION DIRECTIVE

of 28 June 1990

on competition in the markets for telecommunications services

(90/388/EEC)

(OJ L 192, 24.7.1990, p. 10)

Amended by:

		Official Journal		
		No	page	date
►**M1**	Commission Directive 94/46/EC of 13 October 1994	L 268	15	19.10.1994
►**M2**	Commission Directive 95/51/EC of 18 October 1995	L 256	49	26.10.1995
►**M3**	Commission Directive 96/2/EC of 16 January 1996	L 20	59	26.1.1996
►**M4**	Commission Directive 96/19/EC of 13 March 1996	L 74	13	22.3.1996
►**M5**	Commission Directive 1999/64/EC of 23 June 1999	L 175	39	10.7.1999

Corrected by:

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

►**C2** Corrigendum, OJ L 66, 16.3.1996, p. 36 (96/2/EC)

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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COMMISSION DIRECTIVE

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on competition in the markets for telecommunications services

(90/388/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Whereas:

(1) The improvement of telecommunications in the Community is an essential condition for the harmonious development of economic activities and a competitive market in the Community, from the point of view of both service providers and users. The Commission has therefore adopted a programme, set out in its Green Paper on the development of the common market for telecommunications services and equipment and in its communication on the implementation of the Green Paper by 1992, for progressively introducing competition into the telecommunications market. The programme does not concern mobile telephony and paging services, and mass communication services such as radio for television. The Council, in its resolution of 30 June 1988 [1], expressed broad support for the objectives of this programme, and in particular the progressive creation of an open Community market for telecommunications services. The last decades have seen considerable technological advances in the telecommunications sector. These allow an increasingly varied range of services to be provided, notably data transmission services, and also make it technically and economically possible for competition to take place between different service providers.

(2) In all the Member States the provision and operation of telecommunications networks and the provision of related services are generally vested in one or more telecommunications organizations holding exclusive or special rights. Such rights are characterized by the discretionary powers which the State exercises, in various degrees with regard to access to the market for telecommunications services.

(3) The organizations entrusted with the provision and operation of the telecommunications network are undertakings within the meaning of Article 90 (1) of the Treaty because they carry on an organized business activity, namely the provision of telecommunications services. They are either public untertakings or private enterprises to which the State has granted exclusive or special rights.

(4) Several Member States, while ensuring the performance of public service tasks, have already revised the system of exclusive or special rights that used to exist in the telecommunications sector in their country. In all cases, the system of exclusive or special rights has been maintained in respect of the provision and operation of the network. In some Member States, it has been maintained for all telecommunications services, while in others such rights cover only certain services. All Member States have either themselves imposed or allowed their telecommunications administrations to impose restrictions on the free provision of telecommunications services.

(5) The granting of special or exclusive rights to one or more undertakings to operate the network derives from the discretionary power of the State. The granting by a Member State of such rights inevitably restricts the provision of such services by other undertakings to or from other Member States.

[1] OJ No C 257, 4. 10. 1988, p. 1.

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(6) In practice, restrictions on the provision of telecommunications services within the meaning of Article 59 to or from other Member States consist mainly in the prohibition on connecting leased lines by means of concentrators, multiplexers and other equipment to the switched telephone network, in imposing access charges for the connection that are out of proportion to the service provided, in prohibiting the routing of signals to or from third parties by means of leased lines or applying volume sensitive tariffs without economic justification or refusing to give service providers access to the network. The effect of the usage restrictions and the excessive charges in relation to net cost is to hinder the provision to or from other Member States of such telecommunications services as:

— services designed to improve telecommunications functions, e.g. conversion of the protocol, code, format or speed,

— information services providing access to data bases,

— remote data-processing services,

— message storing and forwarding services, e.g. electronic mail,

— transaction services, e.g. financial transactions, electronic commercial data transfer, teleshopping and telereservations,

— teleaction services, e.g. telemetry and remote monitoring.

(7) Articles 55, 56 and 66 of the Treaty allow exceptions on non-economic grounds to the freedom to provide services. The restrictions permitted are those connected, even occasionally, with the exercise of official authority, and those connected with public policy, public security or public health. Since these are exceptions, they must be interpreted restrictively. None of the telecommunications services is connected with the exercise of official authority involving the right to use undue powers compared with the ordinary law, privileges of public power or a power of coercion over the public. The supply of telecommunication services cannot in itself threaten public policy and cannot affect public health.

(8) The Court of Justice caselaw also recognizes restrictions on the freedom to provide services if they fulfil essential requirements in the general interest and are applied without discrimination and in proportion to the objective. Consumer protection does not make it necessary to restrict freedom to provide telecommunications services since this objective can also be attained through free competition. Nor can the protection of intellectual property be invoked in this connection. The only essential requirements derogating from Article 59 which could justify restrictions on the use of the public network are the maintenance of the integrity of the network, security of network operations and in justified cases, interoperability and data protection. The restrictions imposed, however, must be adapted to the objectives pursued by these legitimate requirements. Member States will have to make such restrictions known to the public and notify them to the Commission to enable it to assess their proportionality.

(9) In this context, the security of network operations means ensuring the availability of the public network in case of emergency. The technical integrity of the public network means ensuring its normal operation and the interconnection of public networks in the Community on the basis of common technical specifications. The concept of interoperability of services means complying with such technical specifications introduced to increase the provision of services and the choice available to users. Data protection means measures taken to warrant the confidentiality of communications and the protection of personal data.

(10) Apart from the essential requirements which can be included as conditions in the licensing or declaration procedures, Member States can include conditions regarding public-service requirements which constitute objective, non-discriminatory and transparent trade regulations regarding the conditions of permanence, availability and quality of the service.

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(11) When a Member State has entrusted a telecommunications organization with the task of providing packet or circuit switched data services for the public in general and when this service may be obstructed because of competition by private providers, the Commission can allow the Member State to impose additional conditions for the provision of such a service, with respect also to geographical coverage. In assessing these measures, the Commission in the context of the achievement of the fundamental objectives of the Treaty referred to in Article 2 thereof, including that of strengthening the Community's economic and social cohesion as referred to in Article 130a, will also take into account the situation of those Member States in which the network for the provision of the packet or circuit switched services is not yet sufficiently developed and which could justify the deferment for these Member States until 1 January 1996 of the date for prohibition on the simple resale of leased line capacity.

(12) Article 59 of the Treaty requires the abolition of any other restriction on the freedom of nationals of Member States who are established in a Community country to provide services to persons in other Member States. The maintenance or introduction of any exclusive or special right which does not correspond to the abovementioned criteria is therefore a breach of Article 90 in conjunction with Article 59.

(13) Article 86 of the Treaty prohibits as incompatible with the common market any conduct by one or more undertakings that involves an abuse of a dominant position within the common market or a substantial part of it. Telecommunications organizations are also undertakings for the purposes of this Article because they carry out economic activities, in particular the service they provide by making telecommunications networks and services available to users. This provision of the network constitutes a separate services market as it is not interchangeable with other services. On each national market the competitive environment in which the network and the telecommunications services are provided is homogeneous enough for the Commission to be able to evaluate the power held by the organizations providing the services on these territories. The territories of the Member States constitute distinct geographical markets. This is essentially due to the existing difference between the rules governing conditions of access and technical operation, relating to the provision of the network and of such services. Furthermore, each Member State market forms a substantial part of the common market.

(14) In each national market the telecommunications organizations hold individually or collectively a dominant position for the creation and the exploitation of the network because they are the only ones with networks in each Member State covering the whole territory of those States and because their governments granted them the exclusive right to provide this network either alone or in conjunction with other organizations.

(15) Where a State grants special or exclusive rights to provide telecommunications services to organizations which already have a dominant position in creating and operating the network, the effect of such rights is to strengthen the dominant position by extending it to services.

(16) Moreover, the special or exclusive rights granted to telecommunications organizations by the State to provide certain telecommunications services mean such organizations:

(a) prevent or restrict access to the market for these telecommunications services by their competitors, thus limiting consumer choice, which is liable to restrict technological progress to the detriment of consumers;

(b) compel network users to use the services subject to exclusive rights, and thus make the conclusion of network utilization

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contracts dependent on acceptance of supplementary services having no connection with the subject of such contracts.

Each of these types of conduct represents a specific abuse of a dominant position which is likely to have an appreciable effect on trade between Member States, as all the services in question could in principle be supplied by providers from other Member States. The structure of competition within the common market is substantially changed by them. At all events, the special or exclusive rights for these services give rise to a situation which is contrary to the objective in Article 3 (f) of the Treaty, which provides for the institution of a system ensuring that competition in the common market is not distorted, and requires *a fortiori* that competition must not be eliminated. Member States have an obligation under Article 5 of the Treaty to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty, including that of Article 3 (f).

17) The exclusive rights to telecommunications services granted to public undertakings or undertakings to which Member States have granted special or exclusive rights for the provision of the network are incompatible with Article 90 (1) in conjunction with Article 86.

(18) Article 90 (2) of the Treaty allows derogation from the application of Articles 59 and 86 of the Treaty where such application would obstruct the performance, in law or in fact, of the particular task assigned to the telecommunications organizations. This task consists in the provision and exploitation of a universal network, i.e. one having general geographical coverage, and being provided to any service provider or user upon request within a reasonable period of time. The financial resources for the development of the network still derive mainly from the operation of the telephone service. Consequently, the opening-up of voice telephony to competition could threaten the financial stability of the telecommunications organizations. The voice telephony service, whether provided from the present telephone network or forming part of the ISDN service, is currently also the most important means of notifying and calling up emergency services in charge of public safety.

(19) The provision of leased lines forms an essential part of the telecommunications organizations' tasks. There is at present, in almost all Member States, a substantial difference between charges for use of the data transmission service on the switched network and for use of leased lines. Balancing those tariffs without delay could jeopardize this task. Equilibrium in such charges must be achieved gradually between now and 31 December 1992. In the meantime it must be possible to require private operators not to offer to the public a service consisting merely of the resale of leased line capacity, i.e. including only such processing, switching of data, storing, or protocol conversion as is necessary for transmission in real time. The Member States may therefore establish a declaration system through which private operators would undertake not to engage in simple resale. However, no other requirement may be imposed on such operators to ensure compliance with this measure.

(20) These restrictions do not affect the development of trade to such an extent as would be contrary to the interests of the Community. Under these circumstances, these restrictions are compatible with Article 90 (2) of the Treaty. This may also be the case as regards the measures adopted by Member States to ensure that the activities of private service providers do not obstruct the public switched-data service.

(21) The rules of the Treaty, including those on competition, apply to telex services; however, the use of this service is gradually declining throughout the Community owing to the emergence of competing means of telecommunication such as telefax. The abolition of current restrictions on the use of the switched telephone network and leased lines will allow telex messages to